

State Actors Beating Children: A Call For Judicial Relief

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INTRODUCTION

He told her to bend over a chair with her buttocks raised. The petite, attractive eighteen-year-old woman refused. The unusually large, strong young man then physically forced her to assume the position, and summoned two assistants to hold her down as she struggled to resist. He swung Ole Thunder mightily, striking her buttocks, leg, and hip with the four-foot long piece of wood. She momentarily broke a hand free and raised it to shield her body from the blows, and he struck her hand with Ole Thunder, causing her to cry out that he had broken her hand. His helpers then pulled her feet up, raising her buttocks off of the floor, and he continued to beat her with Ole Thunder. She was crying the whole time, humiliated and in a great deal of pain. When it was over, her buttocks were bleeding, her hand was too swollen and painful to use, and her face was stained with tears. Jessica Serafin was then ordered to return to her classroom and resume her studies.¹

This sounds like a nightmare, not a scene from a Texas public high school principal's office. One would expect a federal judge to consider with diligence Jessica's claims that her brutal beating violated the Constitution. After all, the judiciary is the self-appointed guardian of constitutional guarantees, a role that carries great responsibility to protect (especially vulnerable) citizens from other branches' overreaching.² But the

* Professor of Law, Texas Southern University, Thurgood Marshall School of Law. The author wishes to thank Ed Baker, Susan H. Bitensky, Al Brophy, Elizabeth Gershoff, George Holden, and Larry Weeden for comments on an earlier draft, and Alma Allen, Nadine Block, Jimmy Dunne, Robert Fathman, Philip Greven, Murray A. Straus, Jordan Riak, and the board members of EPOCH USA and PTAVE for their efforts to ban school paddling and to educate the public about the dangers of child corporal punishment.

¹ Jessica Serafin was a student at the School of Excellence in Education in San Antonio Texas. On June 18, 2004, Jessica arrived on campus, then walked across the street to buy a breakfast taco, and returned to campus and arrived in class on time. A while later, she was summoned to Brett Wilkinson's office, the interim principal for the school. After entering Brett's office, the large (well over six feet) man in his early thirties told Jessica that he intended to paddle her because she had broken a closed-campus school rule by walking off campus to buy breakfast. Jessica refused to accept the punishment, and demanded to leave the school. Brett refused to let her leave his office, and called in Mary Sanchez and Adrian Gutierrez to restrain Jessica. Brett carried out the corporal punishment described. Jessica's mother picked her up from school after the incident and took her to the hospital for emergency treatment. Jessica never returned to the School of Excellence in Education, and her high school graduation was delayed on account of the incident. Plaintiff's First Amended Original Petition at 2, *Serafin v. School of Excellence in Education and Brett Wilkinson*, Case No. SA-05-CA-0062 (W.D. Tex. 2005); Telephone Interview with Dan Hargrove, attorney for Jessica Serafin (Dec. 14, 2005). On June 23, 2008, the Supreme Court declined to hear Jessica's appeal from the Fifth Circuit's affirmation of the district court's dismissal of Jessica's claim that her beating constituted a deprivation of substantive due process. *See Serafin v. School of Excellence in Education*, 252 Fed.Appx. 684, 2007 WL 3226296 (5th Cir. 2007) (unpublished opinion), *cert. den.* 2008 WL 672390, 76 USLW 3673 (2008). *See also*

http://blogs.edweek.org/edweek/school_law/2008/06/supreme_court_declines_appeals.html.

² "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule." *Marbury v. Madison*, 1 U.S. (Cranch) 137, 177 (1803). The Court has repeatedly reiterated its role and "obligation" to protect individual autonomy from state action that cannot be justified sufficiently by legislative goals. *See Planned Parenthood v. Casey*, 505 U.S. 833, 864 (1992). This is particularly true where laws infringe on rights of persons who are politically powerless or

judge yawned and dismissed the case, and on June 23, 2008, the Supreme Court looked the other way, once again.³ This Article addresses the federal courts' failure to recognize that what happened to Jessica is repugnant to the constitutional guarantees of liberty and equal protection of the laws prohibiting assault and battery.

In the early 1970's, federal courts reviewed a variety of constitutional challenges to school corporal punishment.⁴ A number of federal courts briefly considered the issue of whether corporal punishment constitutes a legislative deprivation of substantive due process, but no court ever engaged a meaningful and objective analysis of the nexus between corporal punishment and the state's educational goals in accordance with *Meyer v. Nebraska* and its progeny. The Supreme Court's refusal to review the substantive due process issue in *Ingraham v. Wright*, and the Court's rejection of Eight Amendment and procedural due process protection for students in that case, left lower courts to grapple with the issue of whether and when school corporal punishment violates substantive due process. The *Ingraham v. Wright* Court's reliance on Fourth Amendment jurisprudence as the "relevant analogy" to determine the procedural due process issue encouraged lower federal courts to invoke a police brutality analogy to adjudicate substantive due process claims: an executive deprivation model was adopted, and the legislative deprivation issue was never analyzed.

The intent-based executive deprivation model employed in school corporal punishment cases for the past thirty years was rendered unconstitutional nearly two decades ago, but remains the majority rule. The real issue – the nexus between school corporal punishment and the states' objectives – remains unexamined by the judiciary, despite a wealth of social science research that demonstrates beyond any reasonable doubt that it is an ineffective educational tool that creates unnecessary and very serious risks to children. School corporal punishment continues to be administered routinely in nearly half of the United States despite international declarations that it is a human rights violation, and its nearly universal rejection in the industrialized world.

This Article examines existing school corporal punishment jurisprudence then revisits the dormant legislative deprivation issue. The fundamental nature of the liberty infringement inherent in corporal punishment is revealed by analyzing six elements of liberty created by Supreme Court liberty jurisprudence in the past century, including: history and precedent; current social science data on the efficacy and dangers of corporal punishment; the nature of the painful, personal invasion; and social rejection of corporal punishment, manifested by trends in American law, foreign law, and international law. The elements of liberty mitigate in favor of finding that children's right to avoid corporal punishment is fundamental, warranting strict scrutiny under either the Due Process Clause or the Equal Protection Clause. Regardless, the inefficacy of corporal punishment and prejudice reflected by laws supporting it render it unconstitutional even under less stringent judicial review.

Part I reveals how corporal punishment is used in American schools, and exposes the gross racial disparity in its use. Part II explains existing school corporal punishment jurisprudence. Part III argues that the issue of legislative deprivation has never been analyzed adequately, and the prevailing test to establish an executive deprivation is

otherwise are vulnerable to majoritarian viewpoints reflected in legislation. *See* *United States v. Carolene Products*, 304 U.S. 144, 152, n. 4 (1938).

³ *See supra* note 1; *see infra* Section II.A. Serafin's tort claims were not dismissed.

⁴ *See infra* Section II.A.

unconstitutional. Part IV demonstrates that the nature of corporal punishment's impact on children is profound, dangerous, and enduring, rendering it a very serious liberty violation worthy of heightened judicial review. Part V argues that corporal punishment's inefficacy, coupled with its counterproductive and dangerous consequences for both children and society at large, render it an irrational and arbitrary practice that cannot withstand constitutional scrutiny, and that the prejudice and stereotypes about children reflected in state laws authorizing it also render it unconstitutional.

I. CORPORAL PUNISHMENT IN AMERICAN PUBLIC SCHOOLS

A. PREVALENCE OF SCHOOL PADDLING

Twenty-one United States still authorize corporal punishment, often referred to as "paddling," in public schools for the purpose of disciplining students.⁵ Children subjected to school corporal punishment are generally from less educated, poor regions of the United States in which public support of physical punishment and spanking in the home are prominent.⁶ The use of corporal punishment in American schools has declined drastically over the past twenty years, but hundreds of thousands of students continue to be paddled every year. In 1976, approximately 1,521,896 public students

⁵ These states largely occupy the southeastern portion of the United States, an area in which teachers have reported a lack of training regarding child abuse, and a lack of support by school administration to report child abuse. Maureen C. Kenny, *Teachers' Attitudes And Knowledge Of Child Maltreatment*, 28 CHILD ABUSE & NEGLECT 1311 (2000). For example, only 34% of teachers reported that child abuse was covered in their pre-service training, and 78% of that 34% felt that the training was minimal or inadequate. *Id.* at 1314. In addition, 76% reported that the school administration would not support them if they reported suspected child abuse. *Id.* at 1314. See also, e.g., Gordon B. Bauer, Richard Dubanski, Lois A. Yamauchi, & Kelly Ann M. Honbo, *Corporal Punishment and the Schools*, 22 EDUC. & URB. SOC. 285, 287-288 (1990). Teachers who use corporal punishment were often physically punished as children and "tend to be authoritarian, dogmatic, neurotic, and inexperienced compared to their peers." *Id.* at 288. The following states have banned school paddling in all public schools, either by state regulation, state law rescinding authorization to paddle students, or by resolution by the state board of education or every school board in the state: Alaska, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah (banned by state board of education; see <http://www.rules.utah.gov/publicat/code/r277/r277-608.htm>), Vermont, Virginia, Washington, West Virginia, and Wisconsin. The following states still paddle students in public schools: Alabama (over 5% of students paddled in 2000; hereinafter percentages represent percent of students paddled where the data is available), Arizona, Arkansas (over 9%), Colorado, Florida, Georgia (nearly 2%), Idaho, Indiana, Kansas, Kentucky, Louisiana (more than 2%), Mississippi (nearly 10%), Missouri, New Mexico, North Carolina, Ohio, Oklahoma, (nearly 3%), South Carolina, Tennessee (over 4%), Texas (nearly 2%), and Wyoming. U.S. Department of Education, Office for Civil Rights, 2000 Elementary and Secondary School Civil Rights Compliance Report. Data compiled by the National Coalition to Abolish Corporal Punishment in Schools, Columbus, Ohio, see www.stophitting.com. See also generally Human Rights Watch/ACLU, *A Violent Education: Corporal Punishment of Children in U.S. Public Schools* 42 (August, 2008).

⁶ See Bauer, et al., *supra* note 5 at 292. In general, adults who were physically punished as children are more supportive of child corporal punishment. See Position Paper of the Society for Adolescent Medicine, *Corporal Punishment in Schools*, 32 J. ADOLES. HEALTH 385, 387 (2003).

were paddled according to school reports to the U.S. Department of Education.⁷ By 2006, the number of paddled students dropped to 223,190.⁸ Although on average less than 1% of students in paddling districts are paddled, over 9% of students (45,197 total) were hit in Mississippi during the 2002-3 school year, and 7.5% of students (38,131) were hit during the 2004-2005 school year.⁹ Texas public schools hit the largest total number of students. In the 2002-2003 school year, 57,817 students were paddled in Texas, and in the 2004-2005 school year, 49,197 students were paddled.¹⁰

B. CORPORAL PUNISHMENT VERSUS USE OF FORCE TO SUBDUE

Corporal punishment is defined by the American Academy of Pediatrics as the willful and deliberate infliction of physical pain on the person of another to modify undesirable behavior.¹¹ This definition fails to distinguish between the use of force in exigent circumstances and the decision to inflict pain on students as routine punishment, a distinction that is critical to a proper constitutional analysis, but has been overlooked or conflated in many school corporal punishment cases.¹² For analytic purposes, school

⁷ U.S. Department of Education, Office for Civil Rights, Elementary and Secondary School Civil Rights Compliance Reports for years 1976, 1986, 1990, 2000, 2004 & 2006. The 2006 data is the most recent data available. See also www.stophitting.com for compilation of DOE data. The projected values (number of students hit per year) are based upon a stratified sample of approximately 6000 of the approximate 16,000 school districts in the United States. All DOE data is derived from self-reports submitted by schools to the DOE, which contain the number of students paddled, including race and gender of each student, but do not report the total number of paddling incidents. To the extent that the same students are paddled repeatedly, the projected values underestimate the number of incidents of school corporal punishment. Each school district superintendent must certify the data on school corporal punishment under penalty of law before submitting it to the DOE. However, school districts rely on reporting from each school, and there is no independent routine data verification process, so it is possible that some incidents are not reported, and underreporting could go unnoticed absent a compliance complaint and resulting investigation by the DOE. Telephone Interviews with Mary Shifferi, Program Analyst, Office for Civil Rights, United States Department of Education (July 18, 2007 and July 23 & 24, 2008). Some researchers have found that the Office of Civil Rights data severely underestimates the extent of school corporal punishment, and that the true numbers may be twice as high as reported. See Bauer et al., *supra* note 5 at 287; Position Paper for the Society of Adolescent Medicine, *supra* note 6 at 386 (citations omitted); Irwin A. Hyman, Eliminating corporal punishment in schools: Moving from advocacy research to policy implementation. Paper presented to the 96th Annual Convention of the American Psychological Association, Atlanta, Georgia (August, 1988).

⁸ U.S. Department of Education, Office for Civil Rights, 2002-2003 Elementary and Secondary School Civil Rights Compliance Report, 2004 and 2006 Civil Rights Data Collection – Projected Values for the Nation. By 1986, the figure had dropped to 1,099,731; by 1990, it was 613,514; by 2000, it was 342,038; and by 2004, it was 272,028. *Id.* See also www.stophitting.com.

⁹ United States Department of Education, Office for Civil Rights, 2004 and 2006 Civil Rights Data Collection, Projected Values for the State of Mississippi.

¹⁰ *Id.* These large number constitute a prevalence rate of only 1.4% and 1.1% respectively, because Texas has a large number of public school students.

¹¹ Comm. on Psychosocial Aspects of Child and Family Health, Am. Acad. of Pediatrics, *Guidance for Effective Discipline*, 101 PEDIATRICS 723 (1998). See also *Ingraham v. Wright*, 525 F.2d 909, 916 (5th Cir. 1976); *Ellis v. Cleveland Municipal School District*, 455 F.3d 690, 694 (6th Cir. 2006) (“Corporal punishment is defined as the act of inflicting or causing to be inflicted bodily pain as a penalty for the commission or omission of an act.”)

¹² If a school official is attempting to apprehend or subdue a student with physical force, as opposed to punish a student, the official use of force should not be considered corporal punishment. See, e.g., *London v. Directors of the DeWitt Public Schools*, 194 F.3d 873 (8th Cir. 1999). Some courts seem confused about the distinction between using force to prevent harm to

corporal punishment should be defined as the routine infliction of physical pain subsequent to misconduct, in the absence of a contemporaneous need to use force to subdue a student or to protect persons or property, for the purpose of punishing the student's behavior after an opportunity to deliberate about the appropriate punishment. Anytime physical force is used in a manner or for reasons that do not fit this definition, the state action should not be analyzed as corporal punishment,¹³ but should be analyzed consistent with criminal and tort privileges, Fourth Amendment "seizure" analysis, or other executive "excessive force" analysis.¹⁴

This Article focuses exclusively on corporal punishment as defined herein. Paddling a student for a prior fight with another student and for making rude comments to a principal,¹⁵ for using "abusive language" to a school bus driver,¹⁶ for continuing to play dodge ball after being instructed to stop,¹⁷ for disrupting class,¹⁸ for failing to turn in a homework assignment,¹⁹ or for humming in the boys' bathroom²⁰ typify school corporal punishment. Similarly, slapping a student for breaking an egg while attempting a technology class experiment,²¹ striking boys in the testicles for disciplinary reasons,²²

persons or property and corporal punishment. For example, in *Wise v. Pea Ridge School Dist.*, 675 F. Supp 1524, 1531 (1987), *aff'd*, 855 F.2d 560 (8th Cir. 1988), the court stated that "some steps had to be taken to *prevent* the boys from inflicting harm on each other." (Emphasis added). However, the boys had already sat out the remainder of the class in which they misbehaved, and the coach paddled them sometime later. The court correctly deemed the paddlings "corporal punishment" but incorrectly stated that it was necessary to prevent harm. Some states that have outlawed corporal punishment recognize school officials' need to use physical force on students as necessary to protect persons or property, which is not considered corporal punishment. *See, e.g.*, Mont. Code Ann. Sec. 20-4-302(4)(1991); N.J. Stat. Ann. Sec. 18A:6-1 (West 1989); N.D. Cent. Code Sec. 15-47-47 (1989); Vt. Stat. Ann. Tit. 16, sec. 1161a (Supp. 1988); Wis. Stat. Ann. Sec. 118.31 (West Supp. 1988).

¹³ *See, e.g.*, *Widdoes v. Detroit Public Schools*, 242 Mich.App. 403, 619 N.W.2d 12 (2000) (teacher's use of force in grabbing student was not corporal punishment); *Doria v. Stulting*, 888 S.W.2d 563 (Tex.App. Corpus Christi 1994) (physically escorting student to principal's office did not constitute corporal punishment). *See also*, William H. Danne, Jr., *Prison Conditions As Amounting to Cruel and Unusual Punishment*, 51 A.L.R.3d 111, Sec. 6[a] (1973) (explaining distinction between use of force to control a prisoner or to protect persons and "corporal punishment," which is a "strictly punitive rather than arguably preventive" use of force, inflicted deliberately in the absence of a contemporaneous need for use of force). *See also, e.g.*, *O'Brien v. Olson*, 32 Cal.App.2d 449 (1941) (distinguishing corporal punishment from preventive use of force). Similarly, if an educator's use of force arises from malice toward the student, as opposed to disciplinary motive, it is not corporal punishment. *See, e.g.*, *Webb v. McCullough*, 828 F.2d 1151, 1158 (6th Cir. 1987) (school official's violence perpetrated against a student was not corporal punishment because there was no evidence in the record that the blows were disciplinary, but rather, appeared to arise out of malice).

¹⁴ *See infra* Section III.B.

¹⁵ *Garcia v. Miera*, 817 F.2d 650, 652-653 (10th Cir. 1987) (student held upside down by a teacher while the principal paddled the student so hard that student suffered deep bruises and a 2 inch cut that bled through student's clothes, resulting in permanent scar; student had gotten into a fight with another student and told the principal that her father had stated that the principal should "shape up"); *Saylor v. Board of Education of Harlan County*, 118 F.3d 507, 508 (6th Cir. 1997).

¹⁶ *Woodard v. Los Fresnos Independent School District*, 732 F.2d 1243, 1244-5 (5th Cir. 1984).

¹⁷ *Wise v. Pea Ridge School District*, 855 F. 2d 560, 562 (8th Cir. 1988).

¹⁸ *Ingraham v. Wright*, 525 F.2d 909, 911 (5th Cir. 1976).

¹⁹ *Darden v. Watkins*, 1988 WL 40083 (6th Cr. Apr. 28 1988).

²⁰ *Archev v. Hyche*, 1991 WL 100586 (6th Cir. June 11, 1991).

²¹ *Smith v. Half Hollow Hills Central School District*, 298 F.3d 168, 170 (2nd Cir. 2002).

piercing a student's arm with a straight pin as punishment,²³ "kicking the shit" out of a student for throwing a dodge ball towards the coach in response to the coach's request to hand over the ball,²⁴ knocking a student's eye out of its socket during the student's fight with another student,²⁵ placing a student in a choke hold, resulting in the student's loss of consciousness and resultant broken nose and teeth,²⁶ slamming a student to the floor and dragging the student to the principal's office for being disruptive in class,²⁷ and forcing painful, excessive exercise for talking to another student during roll call²⁸ resulting in death²⁹ may constitute corporal punishment,³⁰ but a factual determination regarding the need for use of force and the intent of the school official is necessary before constitutional analysis is possible.

C. PURPOSE AND METHOD OF SCHOOL PADDLING

Physical punishment in public schools has been justified as "reasonably necessary for the proper education and discipline of the child."³¹ Typically, corporal punishment is administered by a principal, teacher, coach, or other by striking students on the buttocks

²² Mott v. Endicott Sch. Dist. No. 308, 695 P.2d 1010, 1011-1013 (Wash.Ct.App. 1985), *rev'd*, 105 Wash.2d 199, 713 P.2d 98 (1986) (reversing appellate court's decision to reinstate teacher).

²³ Brooks v. School Bd., 569 F.Supp. 1534, 1535 (E.D.Va. 1983).

²⁴ Johnson v. Newburgh Enlarged Sch. Dist., 239 F.3d 246, 249 (2nd Cir. 2001) (coach dragged student across the floor, choked him, and slammed his head against the bleachers four times, *inter alia*, and stopped beating up the student only after another student threatened to intervene.)

²⁵ Neal v. Fulton County Board of Education, 229 F.3d 1069, 1071 (11th Cir. 2000).

²⁶ Metzger v. Osbeck, 841 F.2d 518, 519-520 (3rd Cir. 1988).

²⁷ Campbell v. McAlister, 162 F. 3d 94 (5th Cir. 1998).

²⁸ Moore v. Willis Independent School District, 233 F.3d 871, 873 (5th Cir. 2000).

²⁹ Waechter v. School Dist. No. 14-030, 773 F. Supp. 1005, 1007 (W.D. Mich. 1991) (special education student with congenital heart condition died after being ordered to sprint 350 yards (a "gut run") for talking in line; school officials knew of the child's medical condition, and knew that his doctor had ordered no forced exertion).

³⁰ See also, *e.g.*, Position Paper of the Society for Adolescent Medicine, *supra* note at 385 (school corporal punishment has included shaking, choking, forcing painful body postures for extended periods (such as by confining students in closed spaces), electric shocks, and prevention of urination or defecation).

³¹ Ingraham v. Wright, 430 U.S. 651, 657, 670 (1977). See also Baker v. Owen, 395 F.Supp. 294, 297 (1975) (corporal punishment used for the purpose of "correcting" students and "maintaining order" and control of the school environment.) The RESTATEMENT (SECOND) OF TORTS sets forth a privilege for a teacher to hit students if the teacher "reasonably believes [paddling] to be necessary for proper control, training, or education." RESTATEMENT (SECOND) OF TORTS, Sec. 147 (2) (1965) (herein after RESTATEMENT). The RESTATEMENT also sets forth considerations for corporal punishment in school, including the seriousness of the offense, the attitude and past behavior of the child, the nature and severity of the punishment, the age and strength of the child, and the availability of less severe but equally effective means of discipline. *Id.* at Sec. 150, Comments (c) – (e). Originally, the school authority's use of corporal punishment was derived from the parent's privilege based on the doctrine of *in loco parentis*. However, the justification is now an aspect of compulsory education laws, to maintain group discipline. Goldstein, *The Scope And Source Of School Board Authority To Regulate Student Conduct And Status: A Nonconstitutional Analysis*, 117 U. PA. L. REV. 373, 384 (1969); Ingraham v. Wright, 430 U.S. 651, 662 (1977). See also Position Paper for the Society of Adolescent Medicine, *supra* note 6 at 387 (advocates of school corporal punishment claim that it teaches students respect for authority, good social skills, and improved moral character, arguments rejected by the Society based on scientific research).

with a wooden paddle from one to twenty times.³² The paddles used by elementary schools are often about half as tall as the students being struck by the paddles.³³ Large bruises – several inches wide and several inches long – are common, as are large blood blisters resulting from severe blows to the legs, buttocks, or chest.³⁴

D. RACIAL DISPARITY IN ADMINISTRATION OF SCHOOL CORPORAL PUNISHMENT

There is a gross racial disparity in public school corporal punishment: black students are far more likely to get whacked. Although black students comprise approximately 16 percent of American public school students, they comprise between 34 and 39 percent of the students reportedly receiving corporal punishment at school.³⁵ In southern states, the disparity is greater. For example, in Georgia in 2006, blacks comprised 39.76% of the student population, yet 59.89% of the students paddled were black; whites comprised 48.30% of the student population and received only 37.68% of the school paddlings.³⁶ In South Carolina, blacks comprised 40.95% of the student population in 2006, but received a whopping 73.17% of school paddlings.³⁷ Similar racial discrepancies existed in Mississippi and Texas in 2006.³⁸ The 2004 data for Tennessee shows that, although blacks made up less than one-fourth of the student body, they

³² See *Ingraham v. Wright*, 430 U.S. at 656 (“The authorized punishment consisted of paddling the recalcitrant student on the buttocks with a flat wooden paddle measuring less than two feet long, three to four inches wide, and about one-half inch thick. The normal punishment was limited to one to five “licks” or blows with the paddle. . . .”) Up to five licks were allowed for elementary students, while seven licks were allowed for junior and high school students, but the record revealed that students were sometimes whacked between 20 and 50 times. *Id.* at 657, 688.

³³ *Id.* The Pickens County Board of Education in western Alabama provides that paddles can be 24’ long, 3’ wide, and ½’ thick and that physical punishment administered by such paddles “shall not include more than three (3) licks administered to the buttocks.” The Pickens County Board of Education Board Policy Manual p 258, available at <http://www.pickens.k12.al.us/Other%20Resources/Policy%20Manual.doc>. Given that elementary school children average 45 to 55 inches tall, a 24 inch long paddle can be half as tall as the child being hit with it. Centers for Disease Control, National Center for Health Statistics, CDC Growth Charts: United States (2000), available at <http://www.cdc.gov/nchs/about/major/nhanes/growthcharts/charts.htm>.

³⁴ For a view of representative photos of injuries caused by school paddling, see, www.nospank.net/violan.htm. See also, e.g., *Ingraham v. Wright*, 430 U.S. at 657 & nn. 9-10. See also Position Paper of the Society for Adolescent Medicine, *supra* note 6 at 389 (at least 10,000 to 20,000 students needed medical treatment as a result of school corporal punishment during the 1986-1987 school year for injuries such as whiplash, extensive hematomas, and “life-threatening fat hemorrhage”) (citations omitted).

³⁵ For example, in 1990, black students comprised 16% of the student population yet received 34% of the school paddlings; in 2004, they comprised 16.88% of the student population yet received 38.46% of the school paddlings; in 2006, blacks comprised about 17% of the student population, yet received about 36% of the paddings. Department of Education, Office for Civil Rights, 1990 Elementary and Secondary School Civil Rights Survey, Adjusted National Estimated Data (1993) and 2004 & 2006 Civil Rights Data Collection Projected Values for the Nation.

³⁶ Department of Education, Office for Civil Rights, 2006 Civil Rights Data Collection, Projected Values for the State of Georgia.

³⁷ Whites comprised 52.96% of students, and received 24.49% of paddlings. Department of Education, Office for Civil Rights, 2006 Civil Rights Data Collection, Projected Values for the State of North Carolina.

³⁸ Department of Education, Office for Civil Rights, 2006 Civil Rights Data Collection, Projected Values for the States of Mississippi and Texas.

received more than half (52%) of the paddlings, whereas whites comprised 71% of the student body and received only 46% of paddlings.³⁹ Blacks are thus hit up to three times more frequently than whites in districts that paddle.⁴⁰ This recent data is consistent with historical data on the racial disparity of school corporal punishment between black and white students in southern states.⁴¹ For example, in 1993, there were approximately three times as many white students as black students nationwide, yet the number of black students padded was very close to the number of white students padded.⁴² Males students are hit much more often than female students in general, but black females are hit disproportionately compared with white females.⁴³ One study found that black males are 16 times more likely to be padded than white females.⁴⁴

³⁹ Remarkably, the reported figures showed substantial racial equalization for Tennessee in 2006. Department of Education, Office for Civil Rights, 2004 & 2006 Civil Rights Data Collection, Projected Values for the State of Tennessee (in 2006, blacks constituted 24.02% of the student population and 21.17% of students padded were black; whites constituted 70.11% of the student population and 77.31% of students padded were white).

⁴⁰ See Elizabeth T. Gershoff & Susan H. Bitensky, *The Case Against Corporal Punishment of Children – Converging Evidence From Social Science Research And International Human Rights Law And Implications For United States Public Policy*, 13 PSYCH. PUB. POL. & THE LAW 231, 247 (2008) (citations omitted) (black children are 2.5 times more likely to be hit in public schools than Hispanics or whites, based on 2004-2005 data from the U.S. Department of Education, Office For Civil Rights).

⁴¹ For example, in 1992:

Texas – 22% of students were black, but blacks received 28% of paddlings;
 South Carolina – 42% of students were black, but blacks received 65% of paddlings; Tennessee – 23% of students were black, but blacks received 39% of paddlings;
 North Carolina – 28% of students were blacks, but blacks received 47% of paddlings; Mississippi – 48% of students were black, but blacks received 57% of paddlings; Louisiana – 44% of students were black, but blacks received 61% of paddlings;
 Florida – 24% of students were black, but blacks received 36% of paddlings;
 Georgia – 39% of students were black, but blacks received 55% of paddlings. Dept. of Education, Office for Civil Rights, 1992 Elementary and Secondary School Civil Rights Compliance Report, Projected Values for the States of Texas, South Carolina, Tennessee, North Carolina, Mississippi, Louisiana, Florida, Georgia.

⁴² The total number of black students was about 5.3 million, compared to over 15 million white students. Total number of black students padded was 127,103; the total number of white students padded was 137,621. Department of Education, Office for Civil Rights, 1992 Elementary and Secondary School Civil Rights Compliance Report, Reported and Projected Enrollment Data for the Nation (Final File) (p. 3 of 16).

⁴³ For example, in 1992 in South Carolina, of 11,660 students padded, 1374 were black females but only 421 were white females, despite the fact that white females comprised 27% of the school population and black females comprised only 21% of the school population. Thus, white females received 4% of paddlings, but black females received 12% of school paddlings. Black males constituted 21% of the student body and received 53% of paddlings, and white males constituted 26% of the student body and received 30% of school paddlings. Department of Education, Office for Civil Rights, 1992 Elementary and Secondary School Civil Rights Compliance Report, Projected values for State of South Carolina. Similarly, in Tennessee in 2004, white females comprised 34% of the student body and received less than 7% of the paddlings, whereas black females comprised less than 12% of the student body and received nearly 15% of the paddlings. During this same year in Tennessee, white males comprised 36.54% of the student body and received 37.64% of the paddlings, but black males comprised only 12.37% of the student body, yet received 37.31% of the paddlings. *Id.*

⁴⁴ See James F. Gregory, *The Crime of Punishment: Racial and Gender Disparities in the Use of Corporal Punishment in United States Public Schools*, 64 J. NEGRO EDUC. 454 (Autumn 1995) (concluding that discriminatory use of corporal punishment results in disparate drop-out rates among black males).

The available research has found that black children are not misbehaving more frequently than other students, but rather, are being struck more often regardless of the severity or chronicity of their alleged misbehavior.⁴⁵ The disparate treatment of black students probably results from conscious or unconscious bias against blacks, considering that social science research demonstrates that most people have cognitive bias against black males in particular, consistent with implicit associations between black males and violence, rendering them vulnerable to others' hostile attributions and punitive attitudes.⁴⁶

II. EXISTING JURISPRUDENCE: EXECUTIVE DEPRIVATION OF SUBSTANTIVE DUE PROCESS ANALYSIS ADOPTED

A. EARLY FEDERAL COURT REVIEW OF CHALLENGES TO SCHOOL CORPORAL PUNISHMENT: INGRAHAM V. WRIGHT

Early federal court treatment of the constitutional issues presented by school corporal punishment was controversial and schizophrenic. In *Ingraham v. Wright*,⁴⁷ Florida public students received severe beatings at Drew Junior High representative of the school's pattern of cruel and severe student beatings, often with little or no proof of misconduct.⁴⁸ A Florida district court dismissed Eighth and Fourteenth Amendment challenges⁴⁹ to the school's corporal punishment practices, but a three-judge panel of the Fifth Circuit reversed, finding that severe beatings could violate the Eighth Amendment, and may violate due process as well.⁵⁰ Considering the age of the

⁴⁵ See S. Shaw & J. Braden, *Race & Gender Bias in the Administration of Corporal Punishment*, 19 SCHOOL PSYCH. REV. 379 (1990).

⁴⁶ See, e.g., Justin Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L. J. 345 (2007); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Deana A. Pollard, *Unconscious Bias And Self-Critical Analysis: The Case For A Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH. L. REV. 913 (1999); Linda Hamilton Krieger, *The Content of our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

⁴⁷ 498 F. 2d 248 (5th Cir. 1974), *rev'd*, 525 F.2d 9097 (5th Cir. 1975) (en banc), *aff'd*, 430 U.S. 651 (1977). A few published federal district court cases predate *Ingraham*, but *Ingraham* is widely considered the seminal school corporal punishment case, in part because the Supreme Court ultimately issued a detailed opinion on the merits. See, e.g., *Ware v. Estes*, 328 F. Supp. 657 (N.D. Tex. 1971), *aff'd* 458 F2d 1360 (5th Cir. 1972); *Glaser v. Marietta*, 351 F. Supp. 555 (W.D. Pa. 1972).

⁴⁸ 498 F.2d at 255-259. The beatings violated the school district's own policy regarding corporal punishment, as excessive licks were imposed. *Id.* Lemmie Deliford, the assistant principal in charge of administration, carried brass knuckles around the school with him, and Solomon Barnes, an assistant to the principal, carried a paddle when he walked around the school. *Id.* at 257. Reginald Bloom was beaten with 50 licks of the paddle by Deliford on one occasion, and James Ingraham was beaten with 20 licks by Principal Willie Wright while Barnes and Deliford held him down, because he was "slow in leaving the stage of the auditorium when asked to do so by a teacher." *Id.* at 255-258. The injuries to Ingraham required medical care, including a week of home rest, pain pills, laxatives, sleeping pills, and ice packs. Another boy's hand was broken when a school official hit him on the hand. *Id.* at 256-258. See also *Ingraham v. Wright*, 430 U.S. at 653-657 (describing injuries).

⁴⁹ The plaintiffs raised procedural due process and substantive due process claims; the latter were based on the students' and parents' liberty rights.

⁵⁰ 498 F.2d. 248 (1974). The opinion was written by Judge Rives, joined by Judge Wisdom. Judge Morgan dissented.

students, the nature of the alleged misconduct, the severity of the beatings, the risks of physical and “substantial and lasting” psychological injuries, and the availability of alternate disciplinary measures, the court determined that the beatings were constitutionally “excessive,” and therefore established prima facie Eighth Amendment violations.⁵¹ The court also concluded that some procedural due process was required to comport with “fundamental fairness,” such as an opportunity to respond to charges of misconduct, to call witnesses, and to respond to the school’s witnesses.⁵²

Regarding the students’ substantive due process claims, the court acknowledged professional authority opposing corporal punishment based on its inefficacy and risks to children, but was unwilling to find that mild or moderate corporal punishment was unrelated to achieving any legitimate educational purpose.⁵³ The court did not consider whether the students’ liberty rights were “fundamental” based on existing precedent,⁵⁴ but simply adopted rational basis review⁵⁵ for both the students’ liberty claims and the parents’ right to control their children’s upbringing. Based on the controversy regarding corporal punishment’s efficacy,⁵⁶ the court remanded the legislative deprivation claim for fact-finding.⁵⁷ The executive deprivation claim was sustained based on the “shocking disparity” between the students’ offenses and the punishment imposed.⁵⁸ The government challenged the Fifth Circuit panel’s opinion and sought en banc reconsideration, which was granted.

Before the Fifth Circuit considered *Ingraham v. Wright* en banc, a North Carolina District Court heard *Baker v. Owen*,⁵⁹ a case in which a child and his mother challenged a teacher’s corporal punishment of the child over the mother’s objection on grounds that the punishment violated the mother’s parental right to control her child’s upbringing, procedural due process, and the Eighth Amendment. The court found that the parental right was not “fundamental,”⁶⁰ and that corporal punishment furthered the legitimate state end of correcting pupils and maintaining school order based primarily on the fact of its historical use.⁶¹ The court took note of the fact that corporal

⁵¹ *Id.* at 263-265. The court found that corporal punishment does not violate the Eighth Amendment per se, but the evidence showed that the corporal punishment at issue in *Ingraham* was often severe, likely to cause serious physical harm and psychological harm, and could cause paddled students to become more aggressive and suffer other socially undesirable consequences. *Id.* at 260-264.

⁵² *Id.* at 267-268.

⁵³ *Id.* at 269.

⁵⁴ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973).

⁵⁵ The court stated that for corporal punishment to be declared unconstitutional, it must bear “no reasonable relation to some purpose within the competency of the state in its educational function.” 498 F.2d at 270, quoting *Ware v. Estes*, 328 F. Supp. at 658-659.

⁵⁶ The weight of professional authority condemned corporal punishment at the time of this case, but the government produced some conflicting evidence in cross-examining the plaintiff’s expert witness, and other cases had also found conflicting evidence regarding the efficacy of corporal punishment. *Id.* at 268-269. See also *Ware v. Estes*, 328 F. Supp. at 659; *Glaser v. Marietta*, 351 F. Supp. at 557.

⁵⁷ *Id.* at 270. The court indicated that the school bore the burden of proving the efficacy of corporal punishment. *Id.* This burden appears to have been reversed in the Fifth Circuit en banc opinion. See *infra* note 70.

⁵⁸ 498 F.2d at 269.

⁵⁹ 395 F.Supp. 294 (1975), *aff’d*, 423 U.S. 907 (1975).

⁶⁰ *Baker v. Owen*, 395 F. Supp. at 299.

⁶¹ “Mrs. Baker’s opposition to corporal punishment . . . bucks a settled tradition of countenancing such punishment when reasonable.” *Id.* at 300. See also Bauer et al., *supra* note 5

punishment is “discouraged by the weight of professional opinion,” and that other options are available to correct students and maintain order,⁶² but deferred to school officials’ “professional judgment” without investigating the nexus between corporal punishment and the state’s educational objectives.⁶³

Regarding procedural due process, the *Baker v. Owen* court found a liberty interest in “personal security,” noting the demise of the husband’s privilege of physical chastisement of his wife, and that society had become intolerant of flogging sailors and physically punishing prisoners.⁶⁴ The court agreed with *Ingraham v. Wright* that procedural due process required an opportunity for the student to be heard, the presence of a second school official during corporal punishment, and a written explanation of the reasons for the punishment upon parental request.⁶⁵ The Supreme Court summarily affirmed *Baker v. Owen*.⁶⁶

The following year, the Fifth Circuit issued its ten-to-five en banc⁶⁷ decision in *Ingraham v. Wright*, which reversed the three judge panel’s prior two-to-one decision and affirmed the district court’s dismissal of the students’ and parents’ constitutional claims.⁶⁸ First, the court found that the Eighth Amendment applies only to punishment imposed for crimes.⁶⁹ Second, the court summarily dismissed the legislative deprivation claims: “the evidence has not shown that corporal punishment in concept . . . is arbitrary, capricious or wholly unrelated to the legitimate state purpose of determining educational policy,”⁷⁰ considering that “paddling recalcitrant children has long been an accepted method of promoting good behavior and instilling notions of responsibility and decorum into the mischievous heads of school children.”⁷¹ Regarding executive deprivation, the Court stated that it would be a “misuse of our judicial power to determine, for example, whether a teacher has acted arbitrarily in paddling a particular child . . . or whether . . . five licks would have been a more appropriate

at 294 (“Clearly, cultural traditions have been more influential than research findings in determining public policy.”)

⁶² *Id.* at 300-301.

⁶³ *Id.* at 300-301 (“opinion on the merits of the rod is far from unanimous.”) The mother argued that her parental right to control her child’s upbringing was fundamental, so strict scrutiny should apply, but the court applied rational basis review in reliance on *Meyer v. Nebraska* and its progeny. *Id.* at 298-301.

⁶⁴ *Id.* at 301-302. *See also infra* notes 316-317 & accompanying text.

⁶⁵ *Id.* at 302-303. The court did not decide whether the Eighth Amendment protects students from school corporal punishment, finding that the beating at hand was not severe enough to be labeled “cruel and unusual” in any event. *Id.* at 303.

⁶⁶ 423 U.S. 907 (1975).

⁶⁷ Fifteen judges participated in the en banc hearing. Judge Wisdom, who joined Judge Rives to form the majority vote on the three judge panel, took no part in the en banc decision. 525 F.2d. at 910. Five judges dissented from the en banc opinion. *Id.* at 920-927.

⁶⁸ 525 F. 2d 909.

⁶⁹ *Id.* at 914.

⁷⁰ *Id.* at 916. The Court’s language appears to shift the burden of proof onto the plaintiffs. *See supra* note 57. The court found that maintenance of discipline and order is a “proper subject” for state and school board regulation, and that disciplinary measures were necessary so that students who desired to learn would not be deprived of their right to an education by more disruptive members of their class. *Id.* at 916-917.

⁷¹ *Id.* at 917.

punishment than ten licks.”⁷² The court noted that excessive corporal punishment could warrant civil or criminal liability under state law.⁷³

Finally, in considering the procedural due process claim, the court found that corporal punishment has “value,” and “utility” without reference to any supporting evidence, and that procedural safeguards would “dilute” its utility.⁷⁴ In distinguishing *Goss v. Lopez*,⁷⁵ in which the Supreme Court held two years prior that students’ liberty interest in reputation mandated procedural due process before school suspension or expulsion, the court simply stated that corporal punishment was “commonplace and trivial in the lives of most children,” and therefore cannot damage reputation or constitute a “grievous loss” sufficient to warrant procedural safeguards.⁷⁶

The Supreme Court granted certiorari on the issues of cruel and unusual punishment and procedural due process, but declined to consider the substantive due process claims,⁷⁷ and affirmed the Fifth Circuit’s en banc opinion in a five-to-four decision.⁷⁸ In determining the Eighth Amendment issue, the Court relied on the “tradition” of school corporal punishment, which dates back to the colonial period, and found that, although professional and public opinion is “sharply divided,” it could “discern no trend toward its elimination,” since only two states had outlawed school paddling at that time.⁷⁹ Principally, the Court found that the Eighth Amendment applies only to persons convicted of crimes,⁸⁰ and that schoolchildren do not need Eighth Amendment protection because of the “openness of the public school and its supervision by the community,” which afford “significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner.”⁸¹

The Court determined that children’s liberty was at stake by focusing on the nature of the infringement, that is, the physical restraint and “appreciable physical pain” involved in corporal punishment.⁸² However, since corporal punishment is “rooted in history,”

⁷² *Id.* at 917.

⁷³ *Id.* at 917.

⁷⁴ *Id.* at 919.

⁷⁵ 419 U.S. 565 (1975).

⁷⁶ *Id.* at 919. The opinion drew a sharp dissent from Judge Rives : “The precedent to be set by the en banc majority is that school children have no federal constitutional rights which protect them from cruel and severe beatings administered under color of state law, without any kind of hearing, for the slightest offense or for no offense whatsoever.”*Id.* at 927 (Rives, J., dissenting).

⁷⁷ Ironically, and possibly based on the Fifth Circuit’s dictum that a civil or criminal action could lie against a teacher who *excessively* punishes a child, the issue of a legislative deprivation of substantive due process was not squarely presented to the Supreme Court. The issue presented was: “Is the infliction of *severe* corporal punishment upon public school students arbitrary, capricious and unrelated to achieving any legitimate educational purpose and therefore violative of the Due Process Clause of the Fourteenth Amendment?” *Ingraham v. Wright*, 430 U.S. at 659, n.12. (emphasis added). By qualifying corporal punishment by the word “severe,” the petitioners probably unknowingly confused the issue of *excessive* punishment/executive deprivation with *any* corporal punishment/legislative deprivation. See *infra* Section III.

⁷⁸ Justice White wrote a lengthy dissenting opinion, which was joined by Justices Brennan, Marshall, and Stevens. *Id.* at 683 (White, J., dissenting). Justice Stevens also wrote a dissenting opinion. *Id.* at 701 (Stevens, J., dissenting).

⁷⁹ *Id.* at 660-661. The two states were Massachusetts and New Jersey. *Id.* at 663.

⁸⁰ *Id.* at 664-671.

⁸¹ *Id.* at 670-671.

⁸² *Id.* at 674.

the children's liberty interest was limited,⁸³ rendering state law remedies sufficient to satisfy procedural due process: "there can be no deprivation of substantive rights as long as disciplinary corporal punishment is within the limits of the common-law privilege."⁸⁴

The Court deemed Fourth Amendment excessive force analysis, in which a police officer's conduct is reviewed for reasonableness only after the fact, the "relevant analogy."⁸⁵ The Court concluded that the "cost" of procedural safeguards prior to paddling a schoolchild outweighed any benefit, in part because the risk of a substantive rights deprivation at school "can only be regarded as minimal."⁸⁶ The Court therefore affirmed the district court's and Fifth Circuit's en banc decisions, contrary to its summary affirmation of *Baker v. Owen*.

B. HALL V. TAWNEY & ITS PROGENY

After the Supreme Court terminated Eighth Amendment and procedural due process challenges to school corporal punishment and declined to address the substantive due process issue in *Ingraham v. Wright*, lower federal courts were left to decide whether and under what circumstances school corporal punishment constitutes a deprivation of substantive due process. *Hall v. Tawney*⁸⁷ is the leading case, and set the standard that most other federal courts followed. In *Hall v. Tawney*, the court determined that excessive corporal punishment could violate a student's substantive due process rights.⁸⁸ The court assumed, without analysis, that school corporal punishment is not a legislative deprivation of substantive due process,⁸⁹ and therefore adopted an executive deprivation standard based on Fourth Amendment case law.

But rather than adopt the reasonableness standard suggested by the Supreme Court in *Ingraham v. Wright*,⁹⁰ the court relied on *Johnson v. Glick*⁹¹ to create a much more

⁸³ "Because it is rooted in history, the child's liberty interest in avoiding corporal punishment while in the care of public school authorities is subject to historical limitations." *Id.* at 675.

⁸⁴ *Id.* at 676. This is dictum, since the Court explicitly declined to consider the substantive due process issue: "We have no occasion . . . to decide *whether or under what circumstances* corporal punishment of a public school child may give rise to an independent federal cause of action to vindicate substantive rights under the Due Process Clause." 430 U.S. at 679, n. 47 (emphasis added). See also *infra* notes 96-97 & accompanying text.

⁸⁵ "There is no more reason to depart from tradition and require advance procedural safeguards for intrusions on personal security to which the Fourth Amendment does not apply." *Id.* at 680.

⁸⁶ *Id.* at 682.

⁸⁷ 621 F.2d 607 (4th Cir. 1980).

⁸⁸ *Id.* at 611.

⁸⁹ The court started with the proposition that "disciplinary corporal punishment does not per se violate the public school child's substantive due process rights." *Id.* at 611. The court stated that the Supreme Court in *Ingraham* "implicitly" held that "the protectible liberty interest there recognized admits of some corporal punishment, which in turn is based upon a recognition that corporal punishment as such is reasonably related to a legitimate state interest in maintaining order in the schools. . . ." *Id.* at 612. This is inaccurate: the Court denied certiorari on the substantive due process issue. Counsel for the plaintiff erred in "conceding" the legislative deprivation issue. *Id.* at 612. See also Jerry R. Parkinson, *Federal Court Treatment of Corporal Punishment In Public Schools: Jurisprudence That Is Literally Shocking To the Conscience*, 39 S.D. L. REV. 276, 286-287 (1994) (arguing that lower courts' interpretation of the Supreme Court's holding in *Ingraham* has been "intellectually dishonest").

⁹⁰ See *Ingraham v. Wright*, 430 U.S. at 679-680.

⁹¹ 481 F.2d 1028 (2nd Cir. 1973), *overruled*, *Graham v. Connor*, 490 U.S. 386 (1989).

stringent “shocks the conscience” standard requiring “severe” injury and proof that the school official acted with “malice or sadism.”⁹² In 1989, the Supreme Court abrogated *Johnson v. Glick* in favor of a reasonableness standard in Fourth Amendment cases.⁹³ Most other circuits followed *Hall v. Tawney*’s analytical paradigm in school corporal punishment cases,⁹⁴ with a couple of circuits adopting a similar multi-factor test grounded in police brutality cases,⁹⁵ and the Fifth Circuit refusing to review cases alleging executive deprivations, and holding that and no legislative deprivation claim exists if adequate state law remedies exist⁹⁶ – a position contrary to Supreme Court precedent.⁹⁷

⁹² “As in the cognate police brutality cases, the substantive due process inquiry in school corporal punishment cases must be whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.” *Id.* at 613, citing *Johnson v. Glick*, 481 F.2d at 1033. The court also relied on *Rochin v. California*, 342 U.S. 165 (1952) and *Jenkins v. Averett*, 424 F.2d 1228 (4th Cir. 1970). *Id.* at 613.

⁹³ *Graham v. Connor*, 490 U.S. 386. See *infra* Section II.B.

⁹⁴ See, e.g., *Webb v. McCullough*, 828 F.2d 1151, 1158 (6th Cir. 1987); *Lillard v. Shelby County Board of Education*, 76 F.3d 716 (6th Cir. 1996); *Saylor v. Board of Education*, 118 F.3d 507 (6th Cir. 1997), *cert. den.*, 522 U.S. 1029 (1997); *Garcia v. Miera*, 817 F.2d 650, 655 (10th Cir. 1987); *Gottlieb v. Laurel Highlands School District*, 272 F.3d 168, 172 (3rd Cir. 2001); *Johnson v. Newburgh Enlarged School District*, 239 F.3d 246 (2nd Cir. 2001); *Neal v. Fulton County Board of Education*, 229 F.3d 1069, 1075 (11th Cir. 2000) (“We agree [with *Hall v. Tawney*] and join the vast majority of Circuits in confirming that excessive corporal punishment . . . may be actionable under the Due Process Clause when it is tantamount to arbitrary, egregious, and conscience-shocking behavior”); *Thrasher v. General Cas. Co. of Wisconsin*, 732 F. Supp 966, 970 (W.D. Wisc. 1990) (noting that Seventh Circuit has not adopted a test, and following *Tawney* and its progeny).

⁹⁵ *Wise v. Pea Ridge School District*, 855 F.2d 560, 564 (8th Cir. 1988) (adopting a four-factor variation of the *Hall* standard, based on police brutality cases). As in *Hall v. Tawney*, the Eighth Circuit assumed, without analysis, that corporal punishment did not per se violate substantive due process. See also *Metzger v. Osbeck*, 841 F.2d 518, 520 (3rd Cir. 1988) (employing a four-factor variation of *Tawney*’s standard, relying on *Glick* analysis). The Ninth Circuit appears to have adopted a standard consistent with “excessive force” analysis in *P.B. v. Koch*, 96 F.3d 1298, 1302-1304 (9th Cir. 1996), relying on *Sinaloa Lake Owners Ass’n v. City of Simi Valley*, 882 F.2d 1398, 1408-1409 (9th Cir. 1989), *cert den.*, 494 U.S. 1016 (1990), *overruled in part by Armendariz v. Penman*, 75 F.3d 1311, 1319 (9th Cir. 1996). See also *Parkinson, supra* note 89 at 285-302 (reviewing standards circuit courts have adopted for substantive due process challenges to school corporal punishment in the wake of *Ingraham v. Wright*); David T. Jones, *Retooling Federal Court Analysis Of Students’ Substantive Due Process Challenges To Corporal Punishment In Light Of County Of Sacramento v. Lewis*, 75 TEMP. L. REV. 891, 893-904 (2002).

⁹⁶ “If the state affords the student adequate post-punishment remedies to deter unjustified or excessive punishment and to redress that which may nevertheless occur, the student receives all the process that is constitutionally due.” *Cunningham v. Beavers*, 859 F.2d 269, 272 (5th Cir. 1988), citing *Woodard v. Los Fresnos Independent School District*, 732 F.2d 1243, 1245 (5th Cir. 1984). See also *Fee v. Herndon*, 900 F.2d 804 (5th Cir. 1990); *Moore v. Willis Independent Sch. Dist.*, 233 F.3d 781 (5th Cir. 2000). See, also, *Jones, supra* note 95 at 898-900.

⁹⁷ See *Zinerman v. Burch*, 494 U.S. 113 (1990) (limiting application of *Parrat v. Taylor*, 451 U.S. 527 (1981) to procedural due process claims). See also ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES* 553-557 (2006); *Hall v. Tawney*, 621 F.2d at 612, citing *Monroe v. Pape*, 365 U.S. 167, 183 (1961); Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 872 (2003) (“the idea that a state postdeprivation process can somehow prevent a substantive due process violation . . . would do more than impose a limitation on the doctrine presenting a challenge to its legitimacy. . . . it also would dramatically challenge the post-Civil

III. PROBLEMS WITH EXISTING SCHOOL CORPORAL PUNISHMENT JURISPRUDENCE

A. LEGISLATIVE DEPRIVATION CHALLENGES

The Supreme Court has never addressed the issue of whether school corporal punishment constitutes a legislative deprivation of substantive due process under the authority of *Meyer v. Nebraska* and its progeny. Although a few federal courts found that corporal punishment does not constitute a legislative deprivation of substantive due process, no court has conducted a meaningful investigation of the nexus between corporal punishment and the state's objectives by reference to the available scientific and professional evidence, although the Fifth Circuit panel had remanded that controversial issue for factual development in *Ingraham v. Wright* before its order was nullified by the court's en banc opinion.⁹⁸ The Supreme Court's decision in *Ingraham v. Wright* exacerbated the poor analysis and apparent confusion regarding substantive due process jurisprudence by offering substantive due process dictum in its procedural due process analysis.⁹⁹ The *Hall v. Tawney* court declared three years later that the Supreme Court had "implicitly" held that school corporal punishment is not a legislative deprivation of substantive due process, thereby avoiding a means-to-ends analysis in accordance with *Meyer v. Nebraska* and its progeny.¹⁰⁰

On June 23, 2008, the Supreme Court denied certiorari in *Serafin v. School of Excellence in Education*, a case that challenged existing Fifth Circuit substantive due process jurisprudence.¹⁰¹ Since the Court denied review, the Fifth Circuit's precedent remains controlling in the states in which the greatest number of students are paddled, despite being contrary to Supreme Court precedent.¹⁰² The legislative deprivation issue has been avoided by federal courts for three decades now, during which over ten million American children have been beaten in public schools.¹⁰³ The controversy surrounding the efficacy of corporal punishment in the 1970's and public support for corporal punishment at that time render federal courts' reluctance to entertain the issue at that time somewhat understandable.¹⁰⁴ However, there is currently no credible professional support for school corporal punishment.¹⁰⁵ The inefficacy and risks posed

War conception of the role of the Federal Constitution and the federal courts in protecting individual rights from state infringement.") The Fifth Circuit presides over states with school districts that hit the largest number of students, including Texas, which hits the greatest number of students, and Mississippi, which hits the highest percentage of students. *See also supra* Section I.A. *See also* Parkinson, *supra* note 89 at 297-298 & n. 181; *infra* Section III.B.

⁹⁸ *See supra* notes 56-57 & accompanying text.

⁹⁹ The Court stated that substantive due process could not be violated where the state's execution of corporal punishment does not exceed common law privileges. *Id.* at 676.

¹⁰⁰ *Id.* at 611-612.

¹⁰¹ 2008 WL 672390. *See supra* note 1. The Fifth Circuit refused to reconsider its substantive due process analysis in school paddling cases: "As a matter of law, punishment is not arbitrary so long as the state affords local remedies . . ." 252 Fed.Appx. at 685.

¹⁰² *See supra* Section I.A.

¹⁰³ *See supra* notes 7-8 & accompanying text. Ten million is a very conservative estimate.

¹⁰⁴ However, even by the early 1970's, the prevailing professional opinion was that school corporal punishment is counterproductive and inadvisable, rendering the courts' decisions to avoid the issue more likely a function of societal attitudes and political influences, as opposed to conflicting professional opinion. *See supra* notes 56-57. *See, also, e.g.*, R. AMSTERDAM, CONSTRUCTIVE CLASSROOM DISCIPLINE & PRACTICE 82 (1957); N. CUTTS & N. MOSELEY, TEACHING THE DISORDERLY PUPIL 34 (1957); J. HOWARD, CHILDREN IN TROUBLE 239 (1970).

¹⁰⁵ *See infra* Section IV.B.

by corporal punishment have been clearly established since the 1970's, and this contemporary knowledge obligates federal courts to reconsider the legislative deprivation issue as part of their "constitutional duty" to interpret and safeguard constitutional rights.¹⁰⁶

B. EXECUTIVE DEPRIVATION CHALLENGES.

The *Hall v. Tawney* court's reliance on *Johnson v. Glick* to create a test for school paddling cases is troublesome. The prisoner's claim in *Johnson v. Glick* was analyzed under substantive due process specifically because the alleged abuse of force was deemed *not* punishment,¹⁰⁷ but rather a spontaneous need for use of force, rendering "Monday morning quarterback[ing]"¹⁰⁸ inappropriate, and warranting greater deference to official action by way of a more stringent burden to prove official misconduct.¹⁰⁹ Yet, the *Hall v. Tawney* court adopted this stringent test to prove excessive force relative to routine punishment of children. Under the reasoning of *Johnson v. Glick*, the *Hall v. Tawney* court should have adopted a test consistent with Eighth Amendment jurisprudence governing "punishment." Or, the court could have adopted a reasonableness test, as suggested by the Supreme Court in *Ingraham v. Wright*.¹¹⁰ Instead, the court chose the most stringent "shocks the conscience" test that was employed sporadically in excessive force cases from 1952¹¹¹ until 1989, when the Court

¹⁰⁶ See *infra* Section IV.B. for a summary of contemporary social science regarding child corporal punishment. "In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of this Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty." *Planned Parenthood v. Casey*, 505 U.S. at 864. The Court stated that social advances required the Court to overrule *Lochner v. New York* and *Plessy v. Ferguson* in *West Coast Hotel v. Parrish* and *Brown v. Board of Education*, respectively. *Id.* at 861-864. A judicial declaration that school paddling is unconstitutional could initiate "top down" changes, i.e., attitudes and practices that "cascade down to principals, teachers, and parents." Bauer et al, *supra* note 5 at 295. See also Cass R. Sunstein, *On The Expressive Function Of Law*, 144 U. PA. L. REV. 2021, 2035 (1996) (discussing "norm cascades" that can occur as a result of publicizing risks of undesirable social behavior).

¹⁰⁷ *Johnson v. Glick*, 481 F.2d 1028. Since the prisoner had not yet been found "liable to 'punishment' of any sort," Judge Friendly found that the Eighth Amendment, which applies only after conviction and sentencing, was not applicable to the alleged misconduct. *Id.* at 1032. Judge Friendly relied on *Rochin v. California*, 342 U.S. 165 (1952) and did not address whether the prison guard's conduct constituted an unreasonable search or seizure. See *id.* at 1032-1033. See also *Graham v. Connor*, 490 U.S. 386 (discussing Judge Friendly's analysis in *Johnson v. Glick*). The *Hall v. Tawney* Court's reliance on criminal cases is also troubling considering that *no* corporal punishment is never constitutional when perpetrated against criminal suspects or even convicts. See *infra* notes 296-297.

¹⁰⁸ See *Samuel v. Busnuck*, 423 F.Supp. 99, 101 (D.C.Md. 1976).

¹⁰⁹ The court explained that "punishment" connotes deliberate action, whereas the abuse alleged in this case resulted from spontaneous use of force to "maintain" order. *Johnson v. Glick*, 481 F.2d at 1032-1033.

¹¹⁰ 430 U.S. at 680.

¹¹¹ The Court in *Rochin v. California*, 342 U.S. 165 (1952), reversed a criminal conviction for possession of morphine because the government's method of obtaining the "chief evidence" – unlawfully breaking and entering into the suspect's bedroom, then hauling him off to a hospital in handcuffs to pump his stomach against his will to obtain morphine capsules the police saw him ingest upon breaking and entering – "shocked the conscience" of the Court and violated substantive due process and "the community's sense of fair play and decency." *Id.* at 174. See *County of Sacramento v. Lewis*, 523 U.S. 833, 850, n. 9 (1998). The Court had previously adopted a "shocks the conscience" standard in other contexts. See, e.g., *Jencks v. Quidnick Co.*, 135 U.S. 457, 459 (1890). The "shocks the conscience" standard was also being advocated for

made clear that Fourth Amendment claims must be analyzed under the more lenient “reasonableness” test.¹¹²

The Supreme Court’s decision in *County of Sacramento v. Lewis*¹¹³ made clear that *Hall v. Tawney*’s “malice or sadism” intent requirement is unconstitutionally stringent in corporal punishment cases. In the context of a high speed police chase resulting in the accidental death of a suspect, the Court held that the definition of “arbitrary” or “conscience shocking” executive action to support a substantive due process violation depends on the circumstances surrounding the official action.¹¹⁴ In sudden, urgent circumstances where officials are “forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving,” proof of intent to harm is constitutionally required.¹¹⁵ To the contrary, in the ordinary custodial setting, deliberate indifference (i.e., “gross negligence or recklessness”) establishes a substantive due process violation: “When such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking.”¹¹⁶

School corporal punishment is inflicted on students routinely in custodial settings in the absence of exigent circumstances.¹¹⁷ *County of Sacramento v. Lewis* established that deliberate indifference is the proper level of culpability, not intent to harm. And yet, most federal courts continue to apply the *Hall v. Tawney* test post-*County of Sacramento v. Lewis*.¹¹⁸

8th amendment violations at the time *Rochin* was decided. See, e.g., *U.S. v. Rosenberg*, 195 F.2d 583, 608 & n. 34 (2nd Cir. 1952).

¹¹² In *Graham v. Connor*, the Court abrogated *Johnson v. Glick*, and clarified that courts must first consider whether excessive force claims implicate a specific constitutional right – such as the Fourth or Eighth Amendments – governed by specific constitutional standards before they may employ the “shocks the conscience” standard grounded in a “generic ‘right’ to be free from excessive force. . . .” *Id.* at 393-395. Today, both *Rochin v. California* and *Johnson v. Glick* would be analyzed as Fourth Amendment violations. See also *Albright v. Oliver*, 510 U.S. 266, 273 (1994); *County of Sacramento v. Lewis*, 523 U.S. at 850, n. 9.

¹¹³ 523 U.S. 833 (1998).

¹¹⁴ *Id.* at 845-7.

¹¹⁵ *Id.* at 853, quoting *Graham v. Connor*, 490 U.S. at 397. The Court set forth three levels of culpability: negligence; deliberate indifference, which is something between negligence and intentional conduct, such as recklessness or gross negligence; and intent to cause harm. *Id.* at 849. Negligence can never support a due process claim, lest the Fourteenth Amendment become a “font of tort law.” *Id.* at 848, quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976).

¹¹⁶ *Id.* at 853. See also *id.* at 849, 851-854. “As the very term ‘deliberate indifference’ implies, the standard is sensibly employed only when actual deliberation is practical.” *Id.* at 851. See also *id.* at 852, n. 12: “The combination of a patient’s involuntary commitment and his total dependence on his custodians obliges the government to take thought and make reasonable provision for the patient’s welfare.” See also Brad K. Thoenen, *Stretching The Fourteenth Amendment And Substantive Due Process: Another “Close Call” For 42 U.S.C. Sec. 1983*, 71 MO. L. REV. 529 (2006).

¹¹⁷ See *supra* Section I.B.

¹¹⁸ Six years after *County of Sacramento v. Lewis*, the Fourth Circuit reaffirmed *Hall v. Tawney* in *Meeker v. Edmundson*, 415 F.3d 317, 320-321 (4th Cir. 2005). Note, however, that in *Meeker*, the court referred to intent to harm as a “factor” to consider, although *Tawney* implied that it is an essential element: “the substantive due process inquiry in school corporal punishment cases must be whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism . . . that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.” *Hall v. Tawney*, 621 F.2d at 613 (emphasis added). See also *Neal v. Fulton*, 299 F.2d 1069, 1074-1075 (11th Cir. 2000) (citing *County of Sacramento v. Lewis*, but adopting an intent standard greater than deliberate

IV. CHILDREN HAVE A FUNDAMENTAL LIBERTY RIGHT TO AVOID SCHOOL CORPORAL PUNISHMENT

Federal courts are obligated to interpret the Constitution and uphold it against government abuses.¹¹⁹ Considering that nearly half of the states have failed to modify their corporal punishment policies in light of contemporary scientific knowledge about its inefficacy and risks, it is incumbent upon federal courts to review these states' policies for constitutional validity, particularly considering the vulnerability and powerlessness of children.¹²⁰

The Supreme Court has never articulated a consistent test for what constitutes a "fundamental" liberty right. However, over the past century, the Court has provided substantial guidance on what factors should be considered when characterizing the nature and breadth of liberty rights and the proper level of judicial scrutiny. These factors, or "elements of liberty"¹²¹ are identified in the following subsections.

A. HISTORY AND TRADITION

The Court has often initiated its liberty analysis by looking to "history and tradition" to determine whether a claimed liberty right is "fundamental." History and tradition has been defined to include civil liberties that are "rooted in the traditions and conscience of our people,"¹²² but also includes "objective" criteria such as legal precedent and recorded history.¹²³ "History and tradition" thus includes the Court's own precedent,¹²⁴ English common law,¹²⁵ the Framers' intent,¹²⁶ the laws of the United States,¹²⁷ foreign

indifference, relying on *Tawney, inter alia*); *Ellis v. Cleveland Municipal Sch. Dist.*, 455 F.3d 690, 700 (6th Cir. 2006) (plaintiff "must prove that the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of power literally shocking to the conscience") (emphasis added; citing *Tawney, inter alia*); *Gottlieb v. Laurel Highlands Sch. Dist.*, 272 F.3d 168, 173 (3rd Cir. 2001) (listing "malice or sadism" as an element to establish a substantive due process claim grounded in school corporal punishment, stating, "Hall v. Tawney now provides the most commonly cited test for claims of excessive force in public schools.") *See also* *Brown v. Ramsey*, 121 F.Supp 911 (E.D. Va. 2000) (malice or sadism is a proof "element" in school corporal punishment cases, citing *Tawney*); *W.E.T. v. Mitchell*, 2007 WL 2712924 (M.D.N.C. 2007) (assuming plaintiff must allege malice or sadism to support substantive due process claim based on *Tawney* analysis); *Thomas v. Board of Education*, 467 F.Supp.2d 483, 487-489 (W.D.Pa. 2006).

¹¹⁹ *See supra* note 2. *See also, e.g.*, Deana Pollard-Sacks, *Elements of Liberty*, 61 S.M.U. L. REV. (forthcoming Oct. 2008) (manuscript at 4-6, on file with the author) (discussing "judicial activism" and the Court's repeated statements this it is obligated to scrutinize state action objectively to assure state conformity with constitutional guarantees).

¹²⁰ *See, U.S. v. Carolene Products*, 304 U.S. at 152, n. 4.

¹²¹ For a more thorough analysis of the Court's history in defining and analyzing liberty, *see generally* Pollard-Sacks, *supra* note 119.

¹²² *See, e.g., Griswold v. Connecticut*, 381 U.S. at 487 (Goldberg, J., concurring), *quoting* *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 105 (1934).

¹²³ *See Duncan v. Louisiana*, 391 U.S. 145,161, (1968) where the Court stated that "the existing laws and practices of the Nation" constitute "objective criteria," referring to the fact that 49 of 50 states do not require jury trials for some crimes. *See also Rochin v. California*, 342 U.S. at 171 (history includes maxims and rules of traditional decisions).

¹²⁴ *See, e.g., Lawrence v. Texas*, 539 U.S. at 564-568.

¹²⁵ *See, e.g., Benton v. Maryland*, 395 U.S. 784, 795-795 (1969).

¹²⁶ *See, e.g., Malloy v. Hogan*, 378 U.S. 1, 5 (1964).

law,¹²⁸ and political philosophy.¹²⁹ American tradition also includes *breaking* tradition.¹³⁰ History and tradition is therefore a “starting point” in liberty analysis, but does not conclude the due process inquiry.¹³¹

School corporal punishment is a part of this country’s longstanding history, as was slavery, overt race discrimination, and discrimination against homosexuals, the mentally retarded, and women until the Court determined that such discrimination did not comport with the contemporary meaning of liberty. The fact that a practice has historical roots is therefore not particularly compelling. A few years ago, the Court declared that the laws and traditions of *recent* history – the past half century – are the most relevant to liberty analysis,¹³² and recent history overwhelmingly supports banning school paddling.¹³³ In addition, the right of personal security constitutes an “historic liberty interest,”¹³⁴ so history on this issue is not entirely favorable to the practice of corporal punishment. Finally, several other elements of liberty analysis have emerged from Supreme Court precedent that are critical to understanding the nature of corporal punishment’s impact on children, discussed herein below.

B. LEGISLATIVE FACTS: “REASONED JUDGMENT” BASED ON SCIENTIFIC AND SOCIAL FACTS, AND PROFESSIONAL OPINION

The Court has repeatedly expressed its commitment to “reasoned judgment”¹³⁵ and a rational and objective methodology both in defining liberty and in determining the mandates of due process.¹³⁶ Reviewing scientific or other relevant facts as part of the liberty analysis furthers the Court’s obligation to check legislative action based on a “disinterested inquiry pursued in the spirit of science,”¹³⁷ particularly where the “facts have so changed, or come to be seen so differently, as to have robbed the [existing law] of significant application or justification.”¹³⁸ Therefore, the Court has historically

¹²⁷ See *infra* Section IV.E.

¹²⁸ See *infra* Section IV.F.

¹²⁹ See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905); *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

¹³⁰ As stated by Justice Harlan, history and tradition involves “having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke.” *Poe v. Ullman*, 367 U.S. at 542 (Harlan, J., dissenting).

¹³¹ “[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.” *County of Sacramento v. Lewis*, 523 U.S. at 857 (Kennedy, J., concurring).

¹³² *Lawrence v. Texas*, 539 U.S. at 571-572.

¹³³ See *infra* Section IV.E & F.

¹³⁴ *Ingraham v. Wright*, 430 U.S. at 673.

¹³⁵ See *Planned Parenthood v. Casey* 505 U.S. at 849.

¹³⁶ See, e.g., *Poe v. Ullman*, 367 U.S. at 542 “[D]ue process follows the advancing standards of a free society as to what is deemed *reasonable and right*. . . [i]t is to be applied . . . to *facts and circumstances as they arise*. . . .” (Harlan, J., dissenting) (emphasis added); *Planned Parenthood v. Casey*, 505 U.S. at 854. See also *Winston v. Lee*, 470 U.S. at 760-763 (Court stated objective factors to consider in characterizing the liberty infringement and deciding whether due process was violated, including health risks and other medical evidence).

¹³⁷ *Rochin v. California*, 342 U.S. at 172.

¹³⁸ *Planned Parenthood v. Casey*, 505 U.S. at 854-855. See also *Lawrence v. Texas*, 539 U.S. at 578-579: “[T]hose who drew and ratified the Due Process Clauses . . . knew times can blind us to certain truths and later generations can see that laws once thought necessary and property in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”

relied upon medical facts, social facts, and professional opinion to interpret liberty.¹³⁹

For example, the Court upheld the Filled Milk Act of 1923 based on an “extensive investigation” including congressional hearings in which “eminent scientists and health experts testified” regarding the injurious effects of filled milk on public health.¹⁴⁰ The Court has relied on medical evidence to determine the degree of liberty infringement based on the level of health risk and pain to decide whether the state’s interest in procuring criminal evidence justified invasion of a suspect’s body.¹⁴¹ Similarly, in the abortion cases, the Court has relied extensively on available relevant medical facts, such as fetal development and viability,¹⁴² advances in neonatal medicine,¹⁴³ and medical risks created by particular abortion procedures,¹⁴⁴ relying on opinions of experts in obstetrics and prenatal medicine, such as the AMA.¹⁴⁵ These “legislative facts,”¹⁴⁶ though controversial,¹⁴⁷ are a critical part of sound constitutional analysis because they are the best objective evidence of the efficacy of state action and its impact on individual freedom and social welfare, and help to avoid interpreting liberty based on the “predilections of those who happen to be Members of [the] Court.”¹⁴⁸

¹³⁹ As early as 1905, the Court in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), upheld mandatory smallpox vaccine against a due process challenge because, although the challenger offered proof of possible injurious effects of vaccine, including possible death, the Court found that the majority of medical professionals believed in the efficacy of the vaccine, which supported the state law. *Id.* at 34-36. The Court also stated that it would be an improper invasion of the individual’s rights if the vaccine had “no real or substantial relation to [the state’s] objectives of health, safety, or morals.” *Id.* at 31.

¹⁴⁰ *United States v. Carolene Products*, 304 U.S. 144, 148-149 (1938). The Court summarized the congressional reports, finding that filled milk lacks important vitamins that whole milk contains. *Id.* at 149, n. 2. The Court found: “There is now extensive literature indicating wide recognition by scientists and dieticians of the great importance to the public health of butter fat and whole milk as the prime source of vitamins, which are essential growth producing and disease preventing elements in the diet.” *Id.* at 150, n. 3 (relying on various academic articles and books).

¹⁴¹ See *Schmerber v. California*, 384 U.S. 757, 769-772 (1966); *Winston v. Lee*, 470 U.S. 753, 763-765 (1985).

¹⁴² In *Roe v. Wade*, the Court set legal standards concerning the right to obtain an abortion convergent with the trimesters of pregnancy. 410 U.S. at 141-147. The Court also found that imminent psychological harm and emotional distress may result from forced motherhood, although it did not cite social science data in making this finding. *Id.* at 153.

¹⁴³ See *Planned Parenthood v. Casey*, 505 U.S. 833. The *Casey* Court’s rejection of *Roe v. Wade*’s trimester paradigm was based in part on advances in prenatal and neonatal care post *Roe v. Wade*. The Court heard the testimony of numerous experts regarding the emotional and social impact on women if they were to be required to give their spouses notice prior to an abortion, including the A.M.A. *Id.* at 887-895.

¹⁴⁴ *Stenberg v. Carhart*, 530 U.S. at 924-929. The *Stenberg* Court deferred to medical experts’ testimony regarding increased risks to women created by Nebraska’s partial birth abortion law in striking down the law.

¹⁴⁵ See *Roe v. Wade*, 410 U.S. at 144-147.

¹⁴⁶ See Kenneth L. Karst, *Legislative Facts In Constitutional Litigation*, 1960 SUP. CT. REV. 75.

¹⁴⁷ See, e.g., Ann Woolhandler, *Rethinking The Judicial Reception Of Legislative Facts*, 41 VAND. L. REV. 111 (1988); Rachael N. Pine, *Speculation And Reality: The Role Of Facts In Judicial Protection Of Fundamental Rights*, 136 U. PA. L. REV. 655 (1987); Suzanne B. Goldbar, *Constitutional Tipping Points: Civil Rights, Social Change, And Fact-Based Adjudication*, 106 COLUM. L. REV. 1955 (2006). See also Allison Morse, *Good Science, Bad Law: A “Multiple Balancing” Approach To Adjudication*, 46 S.D.L. REV. 410 (2000-2001) (arguing that the Court should consider natural and social science, to fulfill its mission to protect fundamental rights).

¹⁴⁸ *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1973).

Over the past forty years, the vast majority of psychology and pediatric studies analyzing the efficacy of corporal punishment have concluded that corporal punishment is not ultimately efficacious and can cause serious harm to children and to society at large.¹⁴⁹ The available scientific evidence converges to indicate that corporal punishment is ineffective in the long-term, and counterproductive to the state's goals of maximizing students' cognitive and academic potential, and teaching children non-violence, appropriate social behavior, and self-discipline. In addition, corporal punishment is associated and believed to cause a variety of emotional and psychological injuries resulting in depression and substance abuse, among other problems. School corporal punishment is thus uniformly rejected by professional health care organizations and professional educational associations, including The American Academy of Pediatrics, the American Medical Association, the American Psychiatric Association, The American Psychology Association, and The National Education Association.¹⁵⁰ A summary of the research follows.

1. Corporal Punishment Is Counterproductive To Internalization of Social Values And Social Skills

Corporal punishment is counterproductive to the educational objective of socializing children to become self-disciplined, productive members of society, because it does not

¹⁴⁹ See generally Am. Acad. of Pediatrics, *Consensus Statements*, 98 PEDIATRICS 853, 853 (1996) (hereinafter "*Consensus Statements*"). In 1996, the AAP, along with several other pediatric and medical groups, convened an invitational conference to review the available scientific evidence and reach a consensus about whether corporal punishment should be banned. The 1996 conference produced a number of consensus statements. Some conference participants expressed concern over the distinction between correlation and causation of corporal punishment and aggression. However, since the 1996 Conference, research focusing on causation have consistently shown that physical punishment leads to increased aggression in the corporally punished person, controlling for initial levels of aggression. See also Deana A. Pollard, *Banning Child Corporal Punishment*, 77 TUL. L. REV. 575, 602-620 (2003). See also *infra* note 152.

¹⁵⁰ The following organizations oppose corporal punishment in schools: American Academy of Child and Adolescent Psychiatry, American Academy of Family Physicians, American Academy of Pediatrics, American Counseling Association, American of School Administrators, American Bar Association, American Civil Liberties Union, American Humane Association, American Humanist Association, American Medical Association, American Orthopsychiatric Association, American Psychiatric Association, American Psychological Association, American Public Health Association, American School Counselor Association, Association for Childhood Education International, Association of Junior Leagues, Council for Exceptional Children, Defense for Children International, Friends Committee on Legislation, International Society for the Study of Dissociation, National Association for State Departments of Education, National Association for the Advancement of Colored People, National Association for the Education of Young Children, National Association of Elementary School Principals, National Association of Pediatric Nurse Practitioners, National Association of School Nurses, National Association of School Psychologists, National Association of Social Workers, National Association for State Boards of Education, National Council of Teachers of English, National Education Association, National Foster Parents Association, National Indian Education Association, National Mental Health Association, National Organization for Women, National Parent Teachers Association, National Women's Political Caucus, Prevent Child Abuse America, Society for Adolescent Medicine, Unitarian Universalist General Assembly, United Methodist Church General Assembly, and the U.S. Department of Defense: Office of Dependents Schools Overseas. See www.shophitting.com. See also Parkinson, *supra* note 89 at nn. 20 & 21 (listing organizations that oppose school paddling).

promote internalization of moral lessons¹⁵¹ and attitudes that manifest in desirable long-term social behavior.¹⁵² Although some studies have indicated that parental corporal punishment may effectively produce immediate compliance,¹⁵³ this is akin to use of force in exigent circumstances, and is not the school's purpose for administering corporal punishment as defined herein.

Positive reinforcement, such as praise or extra privileges, is more effective than any

¹⁵¹ Moral internalization means "taking over the values and attitudes of society as one's own so that socially desirable behavior is motivated not by anticipation of external consequences but by intrinsic or internal factors." J.E. Grusec & J.L. Goodnow, *Impact of parental discipline methods on the child's internalization of values: A reconceptualization of current points of view*, 30 DEVELOP. PSYCHOL. 4 (1994). See also Elizabeth T. Gershoff, *Corporal Punishment by Parents and Associated Child Behaviors and Experiences: A Meta-Analytic and Theoretical Review*, 128 PSYCHOL. BULL. 539, 541-542, 550 (2002). In this meta-analysis, Professor Gershoff analyzes 88 studies on the use of parental corporal punishment that were conducted over a period of 62 years, and draws conclusions by synthesizing convergent findings in the research such as: the association between corporal punishment and child aggressiveness, including the child's use of violence against family members later in life; the association between corporal punishment and physical abuse of children by parents; the association between use of corporal punishment and less moral internalization of corporally punished children; and lower socio-economic status of families that employ corporal punishment. *Id.* at 541, 550-551, 553, 557, 561-562. See also Gershoff & Bitensky, *supra* note 40 at 233-238. For criticism regarding research finding negative effects from corporal punishment, see, e.g., R.E. Larzelere, B.R. Kuhn & B. Johnson, *The intervention selection bias: An underrecognized confound in intervention research*, 130 PSYCH. BULL. 289 (2004); Diana Baumrind, "When are Causal Inferences Justified in the Debate about Physical Discipline "Effects"?" Available at <http://ihd.berkeley.edu/baumrindls.htm>.

¹⁵² Most of the studies on the efficacy of corporal punishment relate to parental corporal punishment, but there is no reason to disregard evidence of corporal punishment's effect on children based on who perpetrates the violence. Indeed, to the extent that research on school corporal punishment is available, it is convergent with studies on parental use of corporal punishment and similarly indicates that it is counterproductive to educational objectives. See, e.g., MURRAY A. STRAUS, *BEATING THE DEVIL OUT OF THEM* 112-115 (2005); *infra* notes 155-157.

¹⁵³ Gershoff, *supra* note 151 at 541-542, 549-550 (citations omitted); Gershoff & Bitensky, *supra* note 40 at 233-234 (citations omitted). However, the majority of studies prove that nonviolent strategies are at least as effective, or more effective, than corporal punishment in producing short-term compliance, and no study has shown corporal punishment to be more effective than other forms of punishment that do not carry the risks of corporal punishment. See Gershoff & Bitensky, *supra* n. 40 at 233-234. See also, e.g., Dan E. Day & Mark W. Roberts, *An Analysis of the Physical Punishment Component of a Parent Training Program*, 11 J. ABNORMAL CHILD PSYCHOL. 141, 149 (1983) (concluding that spanking and other methods of enforcing time-outs were equally effective); Robert E. Larzelere et al., *Punishment Enhances Reasoning's Effectiveness as a Disciplinary Response to Toddlers*, 60 J. MARRIAGE & FAM. 388, 402 (1998) (concluding corporal punishment is less effective as a backup for reasoning than non-corporal punishment); Robert E. Larzelere et al., *The Effects of Discipline Responses in Delaying Toddler Misbehavior Recurrences*, 18 CHILD & FAM. BEHAV. THERAPY 35, 53-54 (1996) (finding that the delay between discipline and recurrence of misbehavior was longer for punishment combined with reasoning than for punishment alone); Joseph C. LaVoie, *Type of Punishment as a Determinant of Resistance to Deviation*, 10 DEVELOP. PSYCHOL. 181, 186-88 (1974) (comparing the effectiveness of reasoning without withholding resources, withdrawal of love, and adverse stimulus in the form of a loud buzzer when used as methods of punishment, and concluding that the adverse stimulus was most effective); Mark W. Roberts & Scott W. Powers, *Adjusting Chair Timeout Enforcement Procedures for Oppositional Children*, 21 BEHAV. THERAPY 257, 267-70 (1990) (concluding that barrier methods and spanking were equally effective).

form of punishment in producing future good behavior in children.¹⁵⁴ Power-assertive methods of control – such as corporal punishment – promote external attributions for behavior and minimize attributions to internal motivations.¹⁵⁵ Thus, most studies¹⁵⁶ have found that physical punishment is associated with less moral internalization and less long-term compliance, and that the more children receive physical punishment, the less likely they are to feel remorse upon hurting others or to empathize with others.¹⁵⁷

Where reasons for good behavior are not internalized, the misbehavior is likely to recur when the threat of punishment is low,¹⁵⁸ consistent with general deterrence theory.¹⁵⁹ This may explain why vandalism is more common in schools that use corporal punishment.¹⁶⁰ In addition, the use of physical force by adults models physical violence as an acceptable social behavior to be used by larger, stronger persons against smaller, less powerful persons, which is counterproductive to the goal of teaching socially acceptable conflict resolution and restraint of aggression.¹⁶¹ Convergent research indicates that corporal punishment increases aggression in the corporally punished child,¹⁶² and it is a fact that students in schools that liberally permit corporal punishment commit more acts of violence against one another.¹⁶³ Corporal punishment's adverse impact on children's social development is an invasion of children's self-determination, and its inefficacy renders it arbitrary state action.

¹⁵⁴ See, e.g., Alexander K.C. Leung et al., *Counseling Parents About Childhood Discipline*, 45 AM. FAM. PHYSICIAN 1185, 1185-88 (1992), citing Mary Lou Kelley et al., *Acceptability of Positive and Punitive Discipline Methods: Comparisons Among Abusive, Potentially Abusive, and Nonabusive Parents*, 14 CHILD ABUSE & NEGLECT 219 (1990); Patricia Cohen, *Response: How Can Generative Theories of the Effects of Punishment Be Tested?* 98 PEDIATRICS 834, 835 (1996); J. Burton Banks, *How to Teach Good Behavior: Tips for Parents*, 66 AM. FAM. PHYSICIAN 1463, 1463 (2002) (reprinting a handout distributed by the American Academy of Family Physicians); Position Paper of the Society for Adolescent Medicine, *supra* note 6 at 388 (citations omitted).

¹⁵⁵ Gershoff, *supra* note 151 at 541 (citations omitted).

¹⁵⁶ Eighty-five percent, according to Gershoff & Bitensky, *supra* note 40 at 234.

¹⁵⁷ Gershoff, *supra* note 151 at 550 (citations omitted); Gershoff & Bitensky, *supra* note 40 at 234. See also N. Lopez, J. Bonenberger & H. Schneider, *Parental disciplinary history, current levels of empathy, and moral reasoning in young adults*, 3 N. AM. J. PSYCHOL. 193 (2001).

¹⁵⁸ Gershoff & Bitensky, *supra* n. 40 at 234 (citations omitted); Gershoff, *supra* note 151 at 541 (citations omitted).

¹⁵⁹ See, e.g., Deana A. Pollard, *Sex Torts*, 91 MINN. L. REV. 769, 812-815 (2007) (discussing deterrence theory and the importance of a perception of high risk of punishment for deterrence to be effective).

¹⁶⁰ See STRAUS, *supra* note 152 at 112-113 & Chart 7-7; Ralph S. Welsh, *Delinquency, Corporal Punishment, and the Schools*, CRIME & DELINQUENCY, 336-354 (1978). Available online at <http://nospank.net/welsh1.htm>.

¹⁶¹ Gershoff & Bitensky, *supra* note 40 at 234. See also L. D. ERON, L. O. WALDER & M. M. LEFKOWITZ, *LEARNING OF AGGRESSION IN CHILDREN* (1971).

¹⁶² See *infra* Section IV.B.2.

¹⁶³ STRAUS, *supra* note 153 at 112-113 & Chart 7-7; D. Arcus, *School Shooting Fatalities and School Corporal Punishment: A Look At The States*, 28 AGGRESSIVE BEHAV. 173 (2002). Some may argue that school corporal punishment and student violence are correlations, and that school paddling does not *cause* student violence. See Gershoff, *supra* note 151 at 565-566 for a discussion regarding causation. However, numerous studies have found that parental corporal punishment causes increased aggression in children, and it is fair to assume that school corporal punishment similarly angers children and increases their levels of aggression. At the very least, the fact of high levels of student violence in schools that use corporal punishment indicates that corporal punishment is not effectively eradicating student violence.

2. Corporal Punishment Is Associated With Increased Anger, Aggression, And Anti-Social Behavior

Social science research has established positive correlations between corporal punishment and subsequent antisocial, violent, and criminal behavior by children subjected to it.¹⁶⁴ Among the findings: the more children are corporally punished, the more they aggressed against others subsequently, controlling for baseline aggression levels, race, gender, and socioeconomic status of the family;¹⁶⁵ aggressive and antisocial habits that are evident by age 8 are predictive of antisocial and violent behavior in late adolescence and young adulthood;¹⁶⁶ use of corporal punishment against young males increases the likelihood that they will later be convicted of a serious crime;¹⁶⁷ the more corporal punishment mothers received as children, the greater their current level of anger, which in turn predicted greater use of corporal punishment on their own children;¹⁶⁸ child corporal punishment is associated with increased risks of child and adult depression¹⁶⁹ and greater unresolved marital conflict later in life;¹⁷⁰ and corporal punishment teaches children that it is acceptable to inflict physical pain on others in some circumstances.¹⁷¹ A 2002 meta-analysis of 27 studies found that in every study, physical punishment was associated with increased aggression.¹⁷² More recent studies conducted around the world associate physical punishment with increased physical aggression, verbal aggression, physical fighting and bullying, antisocial behavior, and behavior problems generally.¹⁷³ The studies have

¹⁶⁴ See, e.g., Gershoff & Bitensky, *supra* note 40 at 233-238 (citations omitted); Gershoff, *supra* note 151 at 541-542, 550-551 (citations omitted).

¹⁶⁵ See Gershoff & Bitensky, *supra* note 40 at 236. See also, e.g., Leonard P. Eron, Response: *Research and Public Policy*, 98 PEDIATRICS 821, 822-23 (1996). Although genetics play a role in the initial level of aggression, a number of recent studies have shown that corporal punishment increases a child's aggression level regardless of the child's original baseline level of aggression. Gershoff & Bitensky, *supra* note 40 at 237 (citations omitted).

¹⁶⁶ Eron, *supra* note 165 at 823. See also, e.g., Marjorie Lindner Gunnoe & Carrie Lea Mariner, *Toward a Developmental-Contextual Model of the Effects of Parental Spanking on Children's Aggression*, 151 ARCHIVES PEDIATRICS & ADOLESCENT MED. 768, 771 (1997); Elizabeth A. Stormshak et al., *Parenting Practices and Child Disruptive Behavior Problems in Early Elementary School*, 29 J. CLINICAL CHILD PSYCHOL. 17 (2000); Zvi Strassberg et al., *Spanking in the Home and Children's Subsequent Aggression Toward Kindergarten Peers*, 6 DEV. & PSYCHOPATHOLOGY 445 (1994); Timothy Brezina, *Teenage Violence Toward Parents as an Adaptation to Family Strain: Evidence From a National Survey of Male Adolescents*, 30 YOUTH & SOC'Y 416 (1999); Ronald L. Simons et al., *Socialization in the Family of Origin and Male Dating Violence: A Prospective Study*, 60 J. MARRIAGE & FAM. 467 (1998); ROBERT R. SEARS ET AL., PATTERNS OF CHILDREARING 325-37 (1957).

¹⁶⁷ See Murray A. Straus, *Spanking and the Making of a Violent Society*, 98 PEDIATRICS 837, 838 (1996). Clearly, many factors converge to impact people's choices to commit crimes.

¹⁶⁸ Straus, *supra* note 167 at 839. See also Robert L. Nix et al., *The Relation Between Mothers' Hostile Attribution Tendencies and Children's Externalizing Behavior Problems: The Mediating Role of Mothers' Harsh Discipline Practices*, 70 CHILD DEV. 896, 896 (1999).

¹⁶⁹ See *infra* Section IV.B.4.

¹⁷⁰ See Straus, *supra* note 167 at 840.

¹⁷¹ See Gershoff, *supra* note 151 at 541. See also Joan McCord, *Unintended Consequences of Punishment*, 98 PEDIATRICS 832, 832-33 (1996); Anthony M. Graziano et al., *Subabusive Violence in Child Rearing in Middle-class American Families*, 98 PEDIATRICS 845, 846 (1996).

¹⁷² Gershoff & Bitensky, *supra* note 40 at 234.

¹⁷³ A Grogan-Kaylor, *Corporal punishment and the growth trajectory of children's antisocial behavior*, 10 CHILD MALTREATMENT 283 (2005); L. S. Pagani, R.E. Tremblay, D. Nagin, M. Zoccolillo, F. Vitaro, & P. McDuff, *Risk factor models for adolescent verbal and physical aggression toward mothers*, 28 INT'L J. BEHAV. DEV. 528 (2004); D. A. Nelson, C. H. Hart, C.

found uniformly that it is particularly damaging to physically punish teenagers.¹⁷⁴

Longitudinal studies focused on cause and effect indicate that child corporal punishment *causes* increased aggression in children.¹⁷⁵ The theory is that children who are subjected to harsh discipline become angry and learn to attribute hostile intentions to others, have less fully developed consciences, and have been taught that violence is an acceptable method of conflict resolution.¹⁷⁶ Students subjected to corporal punishment can become rebellious as a result, and are more likely to demonstrate vindictive behavior, seeking retribution against school officials and others in society.¹⁷⁷ The social problems created by child corporal punishment are often life-long, as children carry their attitudes and methods of dealing with conflict into adulthood.¹⁷⁸ Children who are hit may show signs of “battered child syndrome,” resulting from anger, hurt, and loss of ability to bond as a result of physical punishment to their bodies.¹⁷⁹ The research has consistently found that people who were physically

Yang, J. A. Olsen, & S. Jin, *Aversive parenting in China: Associations with child physical and relational aggression*, 77 *CHILD DEV.* 554 (2006); J. E. Lansford, J., L. Chang, K. A. Dodge, P. S. Malone, P. Oburu, K. Palmérus, D. Bacchini, C. Pastorelli, A. S. Bombi, A. Zelli, S. Tapanya, N. Chaudhary, K. Deater-Deckard, B. Manke, & D. Quinn, *Physical discipline and children’s adjustment: Cultural normativeness as a moderator*, 76 *CHILD DEV.* 1234 (2005); T. N. Sim, & L. P. Ong, L. P., *Parent physical punishment and child aggression in Singapore Chinese preschool sample*, 67 *J. MARRIAGE & FAM.* 85 (2005); S. A. Ohene, M. Ireland, C. McNeely, & I. W. Borowsky, *Parental expectations, physical punishment, and violence among adolescents who score positive on a psychosocial screening test in primary care*, 117 *PEDIATRICS*, 441 (2006); A. Grogan-Kaylor, *The effect of corporal punishment on antisocial behavior in children*, 28 *SOC. WORK RES.* 153 (2004); V. C. McLoyd, & J. Smith, *Physical discipline and behavior problems in African American, European American, and Hispanic children: Emotional support as a moderator*, 64 *J. MARRIAGE & FAM.* 40 (2002). *See also* Gershoff & Bitensky, *supra* note 40 at 234-235 (citations omitted).

¹⁷⁴ Robert E. Larzelere, *A Review of the Outcomes of Parental Use of Nonabusive or Customary Physical Punishment*, 98 *PEDIATRICS* 824, 824 (1996). Interestingly, this researcher, who supports corporal punishment of children, has narrowed the ages during which he believes that corporal punishment is appropriate to ages two to six only, the period during which the greatest cognitive damage occurs from corporal punishment. *Id.* at 824-27; *see infra* note 191. *See also* Mark H. Johnson, *Into the Minds of Babes*, *SCIENCE*, Oct. 8, 1999, at 247 (concluding that after age six, spanking leads to detrimental effects).

¹⁷⁵ STRAUS, *supra* note 152 at 171-172; Pollard, *supra* note 149 at 602-610.

¹⁷⁶ *See* STRAUS, *supra* note 152 at 110-116 (discussing data associating school corporal punishment, student violence, and state homicide rates based on the “cultural spillover theory,” which holds that the more a society “legitimizes” violence – such as by allowing corporal punishment in schools – the greater the tendency for those engaged in illegitimate behavior to resort to the use of force). *See also* Gershoff & Bitensky, *supra* note 40 at 234-235; Gershoff, *supra* note 151 at 541; Pollard, *supra* note 149 at 602-620.

¹⁷⁷ Position Paper of the Society for Adolescent Medicine, *supra* note 6 at 388 (citations omitted).

¹⁷⁸ They also carry memories of being hit in school. One law professor friend of mine who was hit in a Colorado school in the 1970’s recalled that his principal told him that he needed a paddling because his “brain fell into his butt and needed to be paddled back up into his head.”

¹⁷⁹ *See, e.g.,* Frederick E. John, *Child Abuse – The Battered Child Syndrome*, 2 *AM. JUR. PROOF OF FACTS* 2D 365 (updated July, 2008). While some would like to draw a sharp line between “child abuse” and “corporal punishment,” the truth is that whether corporal punishment is considered “child abuse” is a matter of degree, and states draw the line between corporal punishment and “abuse” in different places. *See* Pollard, *supra* note 149 at 621-622. It is known that corporal punishment is a precursor to child abuse, because it is not effective and caregivers increase the physical punishment when it does not work, leading to abuse. *Id.*

punished in childhood are likely to perpetrate violence against their own family members as adults.¹⁸⁰ They also could develop “authoritarian” personalities.¹⁸¹

The highly convergent social science findings demonstrate that corporal punishment leads to higher levels of aggression and antisocial behavior in children, which is counterproductive to the school’s disciplinary goals and objective to instill respect for authority.¹⁸² States that continue to paddle students in school – a sign that violence is acceptable – consistently have the highest percent of their residents in state or federal prison.¹⁸³ In a country with an unusually high rate of violence,¹⁸⁴ state action should not exacerbate the problem. Arousing anger in children that contributes to aggressive and antisocial behavior is bad public policy.¹⁸⁵

3. Corporal Punishment Impedes Children’s Cognitive Development And Is Counterproductive To An Effective Educational Environment

Longitudinal studies have revealed a clear negative correlation between the frequency of corporal punishment and speed of cognitive development, measured by standardized intelligence tests such as the Stanford-Binet IQ test.¹⁸⁶ In one study, children who were

¹⁸⁰ Gershoff, *supra* note 151 at 541-542, 550-551; Gershoff & Bitensky, *supra* note 40 at 240. Youth who have experienced physical punishment are more likely to report having hit a dating partner than persons who have not been subjected to corporal punishment. Murray A. Straus, *Cross-cultural reliability and validity of the Revise Conflict Tactics Scales: A Study of University Student Dating Couples in 17 Nations*, 38 CROSS-CULTURAL RESEARCH 407 (2004). Adult men and women who report having been physically punished frequently as children also report frequent use of verbal and physical aggression and other ineffective problem solving behaviors with their spouses. A.D. Cast, D. Schweingruber, & N. Berns, *Childhood physical punishment and problem solving in marriage*, 21 J. INTERPERSONAL VIOLENCE, 244 (2006). *See also* Murray A. Straus & Glenda Kaufman Kantor, *Corporal Punishment of Adolescents by Parents: A Risk Factor in the Epidemiology of Depression, Suicide, Alcohol Abuse, Child Abuse, and Wife Beating*, 29 ADOLESCENCE 543 (1994).

¹⁸¹ *See* T.W. ADORNO, ET AL, *THE AUTHORITARIAN PERSONALITY: STUDIES IN PREJUDICE* (New York: Harper & Row 1950).; BERNARD SPILKA, RALPH W. HOOD, JR., BRUCE HUNSBERGER & RICHARD GORSUCH, *THE PSYCHOLOGY OF RELIGION: AN EMPIRICAL APPROACH* 99 (2003).

¹⁸² *See generally id.*; Bauer et al., *supra* note 5 (discussing adverse effects of school corporal punishment and discriminatory administration of its use).

¹⁸³ The southern states, such as Louisiana, Texas, Mississippi, Oklahoma, Alabama, Georgia, South Carolina, and Missouri, consistently have the highest percentage of their citizens in prison, while the northeastern states – including Massachusetts and New Jersey, the first two states to ban school paddling — consistently have the lowest percentage of their citizens in prison. *See*, www.ojp.gov/bjs/abstract/pjim05.htm, www.ojp.gov/bjs/abstract/pjim04.htm, www.ojp.gov/bjs/abstract/pjim03.htm, for midyear statistics from the Department of Justice, Office of Justice Programs for years 2005, 2004, and 2003, respectively. *See also* Pollard, *supra* note 149 at 602-613. *See also* D. Arcus, *School shooting fatalities and school corporal punishment*, 28 AGGRESS. BEHAV. 173 (2002).

¹⁸⁴ *See* Straus, *supra* note 167 (the United States is the most violent of advanced industrialized nations, with a homicide rate 3 times that of Canada, and 8 times that of Western European countries).

¹⁸⁵ *See infra* Section IV.C.

¹⁸⁶ *See, e.g.*, Murray A. Straus & Mallie J. Paschall, *Corporal Punishment by Mothers and Child’s Cognitive Development: A Longitudinal Study of Two Age Cohorts*, Paper Presented at the Sixth International Family Violence Research Conference in Durham, NH (July 27, 1999) (transcript available at the University of New Hampshire Family Research Laboratory). The theory was tested on 806 children ages two to four and 704 children ages five to nine in the first year. Corporal punishment was tested by whether the mother was observed hitting the child

hit the most had the lowest increase in cognitive development one year later, while the children who were never hit had by far the greatest increase one year later; children exposed to intermediate levels of corporal punishment fell in between the other two groups in speed of cognitive development.¹⁸⁷ This is consistent with other research showing that fright, stress, and other strong negative feelings can interfere with cognitive functioning and result in cognitive deficits such as erroneous or limited coding of events and diminished elaboration.¹⁸⁸ It is clear that being slapped or spanked is frightening, painful, and arouses strong negative emotions, including humiliation and sadness, that produce neurological changes that interfere with optimal cognitive functioning.¹⁸⁹ Research has shown that the use of corporal punishment is generally negatively correlated with educational achievement, including the likelihood of earning a college degree, which could relate to the syndrome of “learned helplessness.”¹⁹⁰

Childhood cognitive development is critical, considering that what a person learns in childhood provides the foundation for subsequent cognitive development.¹⁹¹ The more

during an interview and by questions about the frequency of spanking in the prior week. Cognitive ability was tested at the outset and two years later by established age-appropriate methods. The study controlled for the mother's age and education, whether the father was present in the household, the number of children in the family, the mother's supportiveness and cognitive stimulation, ethnic group, and the child's age, gender, and birth weight. Similar depressed IQ test scores were found for the older children, but to a lesser degree. *See also* Judith R. Smith & Jeanne Brooks-Gunn, *Correlates and Consequences of Harsh Discipline for Young Children*, 151 ARCHIVES PEDIATRICS & ADOLESCENT MED. 777, 781 (1997). Researchers examined the incidence, predictors, and consequences of harsh discipline in a sample of low-birth-weight (high-risk) children at one and three years of age. They independently measured the mothers' hitting and scolding of the children as disciplinary practices. They measured the children's I.Q. (Stanford-Binet Intelligence Scale) at age three to determine whether harsh discipline had an impact on cognitive development. The most important finding was that the girls were more vulnerable to cognitive damage resulting from harsh discipline than the boys. On average, girls who experienced high levels of physical punishment between one and three years of age scored an average of eight I.Q. points lower at age three than girls who did not receive harsh punishment.

¹⁸⁷ *See* Smith & Brooks-Gunn, *supra* note 186.

¹⁸⁸ *See, e.g.,* Friderike Heuer & Daniel Reisberg, *Emotion, Arousal, and Memory for Detail*, in THE HANDBOOK OF EMOTION AND MEMORY: RESEARCH AND THEORY 151, 172-75 (Sven-Åke Christianson ed., 1992). Mark Meerum Terwogt & Tjeert Olthof, *Awareness and Self-Regulation of Emotion in Young Children*, in CHILDREN'S UNDERSTANDING OF EMOTION 209, 217-34 (Carolyn Saami & Paul L. Harris eds., 1989).

¹⁸⁹ *See, e.g.,* Heather A. Turner & David Finkelhor, *Corporal Punishment as a Stressor Among Youth*, 58 J. MARRIAGE & FAM. 155, 163-65 (1996); D. Cicchetti & F. A. Rogosch, *The impact of child maltreatment and psychopathology on neuroendocrine functioning*, 13 DEV. & PSYCHOPATHOLOGY 783 (2001); R. M. Sapolsky, *Stress Hormones: Good and Bad*, 7 NEUROBIOLOGY OF DISEASE 540 (2000); Hilary K. Mead & Theodore P. Beauchaine, *Neurological Adaptation to Violence Across Development* (July, 2008) (unpublished manuscript, on file with the author).

¹⁹⁰ STRAUS, *supra* note 152 at 138, *citing* M.E.P. SELIGMAN & G. GARBER, HUMAN HELPLESSNESS (1982). *See also* Murray A. Straus & Anita K. Mathur, *Corporal Punishment of Adolescents and Academic Attainment*, Paper Presented at the Annual Meeting of the Pacific Sociological Association in San Francisco, Cal. (Apr. 7, 1995) (transcript available at the University of New Hampshire Family Research Laboratory). *See also, e.g.,* J. Eckenrode, M. Laird & J. Doris, *School performance and disciplinary problems among abused and neglected children*, 29 DEV. PSYCHOL. 53 (1993).

¹⁹¹ Mark H. Johnson, *Into the Minds of Babes*, SCIENCE 247 (Oct. 8, 1999). Cognitive learning theory is based on the concept that learning occurs in “layers,” such that early childhood

children are exposed to violence such as corporal punishment, or even the threat of violence, the greater the adverse impact on children's cognitive potential and ability to learn, which impacts children's intellectual growth indefinitely.¹⁹²

School corporal punishment constructs an educational environment that is "unproductive, nullifying, and punitive,"¹⁹³ and is favored in districts with low per pupil expenditures on educational and psychological services, and high use of parental spanking and adult illiteracy,¹⁹⁴ thus perpetuating the cycle of violence in children "already programmed to be aggressive" at home.¹⁹⁵ It destabilizes the school environment by upsetting the corporally punished student,¹⁹⁶ as well as other students and teachers who can hear the punishment being inflicted.¹⁹⁷ This adversely impacts the students' and teachers' capacity to focus on academics.¹⁹⁸ No credible evidence exists that school paddling leads to better control of the classroom,¹⁹⁹ and the available research shows that eliminating corporal punishment has not resulted in an increase in student behavioral problems.²⁰⁰

Children who are corporally punished generally resent being hit and feel anger toward the spanking authority.²⁰¹ Predictably, school corporal punishment is associated with less respect for school authority and higher rates of suspension, drop out, and vandalism of school property.²⁰² School corporal punishment causes anxiety in students that

experiences form the foundation for how the child perceives his environment thereafter and what environmental data will form subsequent cognitive associations. Violence experienced in childhood, including corporal punishment, or even the threat of violence, impacts frontal areas of the brain that are important to long term planning, thereby impacting developmental growth indefinitely. In addition, once a cognitive schema develops associating teachers, the classroom, or education generally with stress, fear, humiliation, or pain, the schema will likely operate to impede future educational accomplishments, based on the fact once schemas are in place, they are very resistant to change. Telephone Interview with Theodore P. Beauchaine, Professor of Psychology, Univ. of Washington in Seattle, WA (July 17, 2008). *See also*, Pollard, *supra* note 46 at 917-925 (discussing the nature of stereotyping and cognitive bias, including creation and destruction of schemas).

¹⁹² Interview with Theodore P. Beauchaine, *supra* note 191.

¹⁹³ Position Paper of the Society for Adolescent Medicine, *supra* note 6 at 388 (citations omitted).

¹⁹⁴ Bauer, et al., *supra* note 5 at 288.

¹⁹⁵ Position Paper for the Society of Adolescent Medicine, *supra* note 6 at 388.

¹⁹⁶ In one account, a child was paddled in a Texas elementary school and was so distressed that he could not think the rest of the day. When the school bell rang, he ran home to tell his mother what happened to him, but was so upset that he ran in front of a truck and was struck by the truck, causing injury to his head resulting in permanent scars. He arrived home covered with blood, which his mother and little sister witnessed. Interview with Amber Winborn (the little sister, who is now in her 40's), Houston, Texas, April 17, 2008.

¹⁹⁷ *See, e.g.*, www.stophitting.com/disatschool/jack-conrath-testimony.php; Human Rights Watch/ACLU, *supra* note 5 at 25-26.

¹⁹⁸ Interview with Theodore P. Beauchaine, *supra* note 191.

¹⁹⁹ Position Paper for the Society of Adolescent Medicine, *supra* note 6 at 388 (citations omitted).

²⁰⁰ Bauer, et. al., *supra* note 5 at 292 (citations omitted).

²⁰¹ *See, e.g.*, Murray A. Straus & Kimberly A. Hill, Corporal Punishment, Child-to-Parent Bonding, and Delinquency, Paper Presented at the Fifth International Family Violence Research Conference in Durham, NH (July 1, 1997) (study based on parental spanking; transcript available at the University of New Hampshire Family Research Laboratory).

²⁰² S.O. LIETER ER AL, THE DROP OUTS 175 (1962); Kenneth Woodman, *Dealing With Vandalism* (Report to the annual convention of the National Association of Secondary School

engenders negative feelings about education, and interferes with the learning process, thereby hindering educational achievement. Educational and intellectual achievement has long been recognized as fundamental aspects of liberty,²⁰³ deprivation of which is counterproductive to states' legitimate educational goals.

4. Corporal Punishment Is Associated With Subsequent Psychological And Psychiatric Problems And Substance Abuse

Studies have consistently found that the frequency and severity with which children experience corporal punishment is positively correlated with mental health problems, including anxiety and depression, alcohol and drug abuse, Educationally-Induced Post-Traumatic Stress Disorder,²⁰⁴ and general psychological maladjustment.²⁰⁵ Elevated levels of the stress hormone cortisol have been detected in children as young as one year of age as a result of anxiety-provoking interactions with mothers who frequently use corporal punishment.²⁰⁶ Male adolescents exposed to violence are more likely to

Principals, on Violence and Vandalism, 1976); Ralph S. Welsh, *Delinquency, Corporal Punishment, and the Schools*, CRIME & DELINQUENCY 336-354 (1978); ADAH MAURER, PADDLES AWAY: A PSYCHOLOGICAL STUDY OF PHYSICAL PUNISHMENT IN SCHOOLS (1981).

²⁰³ See, e.g., *Allgeyer v. Louisiana*, 165 U.S. at 589; *Meyer v. Nebraska*, 262 U.S. 390; *Pierce v. Society of Sisters*, 268 U.S. 510; *infra* Section IV.C.

²⁰⁴ This disorder is symptomatically analogous to Post-Traumatic Stress Disorder. See Position Paper for the Society of Adolescent Medicine, *supra* note 6 at 388.

²⁰⁵ Gershoff & Bitensky, *supra* note 40 at 238-239 (citations omitted); Gershoff, *supra* note 151 at 541, 550-551 (citations omitted); C. M. Rodriguez, *Parental discipline and abuse potential effects on child depression, anxiety, and attributions*, 65 J. MARRIAGE & FAM. 809 (2003); T. F. Lau, J. H. Kin, H. Tsui, A. Cheung, M. Lau, & A. Yu, *The relationship between physical maltreatment and substance abuse use among adolescents: A survey of 95,788 adolescents in Hong Kong*, 37 J. ADOLESCENT HEALTH 110 (2005); A. C. Steely & R. P. Rohner, *Relations among corporal punishment, perceived parental acceptance, and psychological adjustment in Jamaican youths*, 40 CROSS-CULTURAL RES. 268 (2006); Heather A. Turner & Paul A. Muller, *Long-term effects of child corporal punishment on depressive symptoms in youth adults: Potential moderator and mediators*, 25 J. FAM. ISSUES 761 (2004); M. K. Eamon, *Antecedents and socioemotional consequences of physical punishment on children in two-parent families*, 25 CHILD ABUSE & NEGLECT 787 (2001). In 1999, Canadian researchers released the results of a study with nearly 10,000 participants ages 15 to 64, to determine whether there was a relationship between a history of slapping or spanking and the lifetime prevalence of four categories of psychiatric disorders. See Harriet L. MacMillan et al, *Slapping and spanking in childhood and its association with lifetime prevalence of psychiatric disorders in a general population sample*, 161 CAN. MED. ASS'N J. 805 (1999). The researchers found a linear association between the frequency of being slapped or spanked as a child and anxiety disorders, alcohol abuse or dependence, and externalizing problems. The strongest associations were between slapping or spanking and alcohol abuse or dependence and one or more externalizing problems, such as drug abuse. *Id.* at 806-808. See also, e.g., Murray A. Straus & Glenda Kaufman Kantor, *Corporal punishment of adolescents by parents: A risk factor in the epidemiology of depression, suicide, alcohol abuse, child abuse, and wife beating*, 29 ADOLESCENCE 543 (1994); H. A. Turner & P. A. Muller, *Long term effects of child corporal punishment on depressive symptoms in young adults: Potential moderators and mediators*, 25 J. FAM. ISSUES 761 (2004); S. J. Holmes & L.N. Robins, *The influence of childhood disciplinary experience on the development of alcoholism and depression*, 28 J. CHILD PSYCHOL. & PSYCHIATRY 399, 413 (1987); Bauer et al., *supra* note 5 at 290 (10% of paddled students had Post-Traumatic Stress Disorder as a result of school corporal punishment).

²⁰⁶ Bugental, D.B., Martorello, G.A., & Barraza, V., *The hormonal costs of subtle forms of infant maltreatment*, 43 HORMONES AND BEHAVIOR 237-244 (2003).

become violent, whereas females are more likely to become depressed.²⁰⁷ One recent study found that corporal punishment by a teacher was “the strongest past predictor for the child’s depression.”²⁰⁸ Impaired mental health associated with corporal punishment, particularly depression, persists into adulthood.²⁰⁹ Corporal punishment causes lower self-esteem,²¹⁰ which in turn may lead to self-destructive behavior.²¹¹ Mental health is “essential . . . to the pursuit of happiness.”²¹² Corporal punishment’s adverse impact on mental health renders it a serious liberty violation.

Based on the research summarized herein, the American Academy of Pediatrics issued this consensus statement in 1996: “[C]orporal punishment within the schools is not an effective technique for producing a sustained, desired behavioral change and is associated with the potential for harm including physical injury, psychological trauma, and inhibition of school participation.”²¹³ The Society for Adolescent Medicine similarly concluded: “[C]orporal punishment is an ineffective method of discipline and has major deleterious effects on the physical and mental health of those inflicted . . . [it] has never been shown to enhance moral character development, [or] increase the students’ respect for authority . . . *children are being physically and mentally abused* [by school paddling].”²¹⁴

Kenneth Karst wrote a half century ago: “no rule of law should outlive its basis in legislative fact.”²¹⁵ School corporal punishment has outlived its basis in legislative fact

²⁰⁷ R.D. Lutzman & R. R. Swisher, *The interactive relationship among adolescent violence, street violence, and depression*, 33 J. COMM. PSYCHOL. 355 (2005). See also Mead & Beauchaine, *supra* n. .

²⁰⁸ Csorba, J., Rózsa, S., Vetro, A., Gadoros, J., Makra, J., Somogyi, E., Kaczvinsky, E., & Kapornay, K., *Family- and school-related stresses in depressed Hungarian children*. 16 EUROPEAN PSYCHIATRY 18, 25 (2001).

²⁰⁹ Ronald C. Kessler & William J. Magee, *Childhood family violence and adult recurrent depression*, 35 J. Health & Soc. Behav. 13 (1994); J. Strauss, C. L. Barr, C. J. George, N. King, S. Shaikh & B. Devlin, et al., *Association study of brain-derived neurotrophic factor in adults with a history of childhood onset mood disorder*, 131 AM. J. MED. GENETICS: NEUROPSYCHIATRIC GENETIC 16 (2004).

²¹⁰ See, e.g., Position Paper of the Society for Adolescent Medicine, *supra* note at 388 (citations omitted). Federal District Court Judge H. Franklin Waters wrote that corporal punishment may be “humiliating and demeaning,” but that this serves the purpose of a “deterrent effect on future conduct.” *Wise v. Pea Ridge Sch. Dist.*, 675 F. Supp. 1524, 1531 & n. 1 (W.D. Ark. 1987), *aff’d*, 855 F.2d 560 (8th Cir. 1988).

²¹¹ See MacMillan, *supra* note 205 See also, e.g., STANLEY COOPERSMITH, THE ANTECEDENTS OF SELF-ESTEEM, 178-179 (1967).

²¹² *Meyer v. Nebraska*, 262 U.S. at 402.

²¹³ See *Consensus Statements*, *supra* note 149.

²¹⁴ Position Paper for the Society of Adolescent Medicine, *supra* note 6 at 388 (emphasis added; citations omitted).

²¹⁵ Karst, *supra* note 146 at 108. See also *Planned Parenthood v. Casey*, 505 U.S. at 861-862 (Court was “required” to reject *Lochner* era analysis based on “untruth” of social facts assumed in *Lochner*). Similarly, the *Brown v. Board of Education* Court concluded that the social facts upon which *Plessy* was decided were “so clearly at odds with the facts apparent to the Court in 1954 that the decision to reexamine *Plessy* was on this ground alone *not only justified but required*.” *Planned Parenthood v. Casey*, 505 U.S. at 863 The *Brown* Court had found that “separate but equal” was a farce because segregation “generates a feeling of inferiority . . . that may affect [negro children’s] hearts and minds in a way unlikely ever to be undone . . . [and creates] a sense of inferiority [that] affects the motivation of a child to learn . . . [and] has a tendency to (retard) the educational and mental development of Negro children.” *Brown v. Board of Education*, 347 U.S. 483, 494 & n. 11 (1952). *Brown* was an equal protection case,

for decades, and the legal status of school corporal punishment is a quintessential “doctrinal anachronism discounted by [contemporary] society.”²¹⁶ Children have a fundamental right to avoid school corporal punishment because the social science is convergent and concludes that its adverse impact on students and education is multi-dimensional, profound, and enduring.

C. PERSONAL AUTONOMY, INTELLECTUAL FREEDOM, AND INTIMACY

The core of liberty is the individual’s right to freedom from government interference with personal autonomy, including intellectual development,²¹⁷ personal choices,²¹⁸ and intimate associations,²¹⁹ as means for controlling one’s destiny and defining the meaning of life.²²⁰ “Fundamental” liberty rights have therefore revolved around respect for private, personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, including educational decisions impacting intellectual development, bodily autonomy, abortion, sexual privacy, private spaces, and reputation or “stigma.”²²¹

The Court has repeatedly articulated that liberty includes freedom of thought. As early as 1897, the Court stated that liberty includes the “right of the citizen to be free in the enjoyment of his faculties; to be free to use them in all lawful ways . . .”²²² In the seminal case of *Meyer v. Nebraska*, the Court struck down a state law prohibiting teaching a foreign language to elementary schoolchildren, because fluency in a foreign language is rarely attained unless instruction begins at an early age, thus recognizing the lost educational opportunity imposed by the state law.²²³ The right to full use of one’s intellectual capacity is fundamental to personal development and free will; limiting human intellectual potential is contrary to the most basic meaning of liberty.

Protecting private spheres such as psychic well-being, self-concept, and relationships has always been a primary liberty concern.²²⁴ Liberty protects individuals’ ability to bond emotionally with others because human bonding powerfully influences human happiness.²²⁵ Protecting the parent-child relationship, extended family relationships, friendship, and sexual relationships are important because it is through these

but the Court’s focus was on the “right” of education and the effect of segregation on a Negro child’s psyche. See *Planned Parenthood v. Casey*, 505 U.S. at 862-863.

²¹⁶ *Planned Parenthood v. Casey*, 505 U.S. at 855.

²¹⁷ See, e.g., *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *Meyer v. Nebraska*, 262 U.S. 390, *Pierce v. Society of Sisters*, 268 U.S. 510.

²¹⁸ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, *Roe v. Wade*, 410 U.S. 113, *Planned Parenthood v. Casey*, 505 U.S. 833.

²¹⁹ See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494, *Griswold v. Connecticut*, 381 U.S. 479; *Lawrence v. Texas*, 539 U.S. 558.

²²⁰ *Lawrence v. Texas*, 539 U.S. 558.

²²¹ See, e.g., *Roe v. Wade*, 410 U.S. at 152-153; *Goss v. Lopez*, 419 U.S. 565.

²²² *Allgeyer v. Louisiana*, 165 U.S. at 589.

²²³ 262 U.S. at 399-400.

²²⁴ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479; *Lawrence v. Texas*, 539 U.S. at 567; *Planned Parenthood v. Casey*, 505 U.S. at 767. For example, the Court has relied on the potential damage to a woman’s psyche if she could be forced to carry and bear an unwanted child to find that individual liberty is broad enough to encompass a woman’s abortion decision. *Roe v. Wade*, 410 U.S. at 153.

²²⁵ See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting); *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) (protection of association with friends and family).

relationships that humans self-actualize and find security and support.²²⁶ Liberty also protects against psychological and social damage that can result from “stigma,” such as protecting minors from stigma that can result from school discipline.²²⁷

Scientific research indicates that hitting children to “teach” them desirable social behavior is counterproductive and adversely impacts children’s cognitive development and scholastic achievement. Paddling schoolchildren therefore constitutes an egregious invasion of intellectual freedom that impacts self-actualization and economic security. Child corporal punishment’s association with depression, drug abuse, lower self-esteem, and emotional problems may be irreversible and can shape forever the child’s future capacity to bond with others and to form stable, lasting relationships. School corporal punishment is a profound violation of liberty based on the indefinite potential sequelae of personal autonomy infringement.

D. BODILY INTEGRITY: PHYSICAL RESTRAINT, PAIN, AND INVASION

Physical autonomy, often referred to as “bodily integrity,” has consistently been protected as a liberty right integral to self-determination.²²⁸ The government is prohibited from physical invasion of an individual’s body absent very strong countervailing state needs.²²⁹ Health risks posed by physically intrusive state action,²³⁰ physical pain,²³¹ and bodily restraint²³² are historic elements of liberty analysis. Clearly, school paddling is physically invasive and intended to cause great bodily pain, and in fact has caused permanent injury and even death.²³³ It also creates a variety of emotional and physical health risks.²³⁴ The pain, restraint, and invasion inherent in corporal punishment render it a liberty deprivation worthy of strict judicial scrutiny.

²²⁶ *Moore v. City of East Cleveland*, 431 U.S. at 503-504 (families serve to pass down moral and cultural values and provide economic support); *Parham v. J.R.*, 442 U.S. 584 (1979) (protecting the parent-child relationship); *Lawrence v. Texas*, 539 U.S. at 572 (protecting relationship choices).

²²⁷ *Goss v. Lopez*, 419 U.S. 565 (protecting students from stigma resulting from suspension). See also, e.g., *Lawrence v. Texas*, 539 U.S. 558 (protecting homosexuals from stigma and discrimination); *Vitek v. Jones*, 445 U.S. 480 (1980) (protecting prisoners from stigma resulting from mandatory drug treatment); *Roe v. Wade*, 410 U.S. at 152-153 (protecting women from the stigma of unwed motherhood).

²²⁸ As stated by Justice O’Connor: “Because our notions of liberty are inextricably intertwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause.” *Cruzan v. Director, Missouri Department of Health*, 479 U.S. 261, 287 (1990) (O’Connor, J., concurring).

²²⁹ See, e.g., *Rochin v. California*, 342 U.S. 165; *Schmerber v. California*, 384 U.S. 757; *Winston v. Lee*, 470 U.S. 753.

²³⁰ For example, the Court has reviewed the level of risk involved in forced immunization (*Jacobson v. Massachusetts*, 197 U.S. 11), extracting a bullet from muscle tissue (*Winston v. Lee*, 470 U.S. 753), and forcing a woman to bear a child (*Planned Parenthood v. Casey*, 505 U.S. at 896) (prohibiting abortion invades the “private sphere of the family [and] . . . bodily integrity of the pregnant woman”).

²³¹ See *Ingraham v. Wright*, 430 U.S. 651.

²³² See, e.g., *Youngberg v. Romero*, 457 U.S. 307, 321 (1997) (retarded adult has a right to freedom from bodily restraint); *Parham v. J.R.*, 442 U.S. 584 (1979) (a child has a substantial liberty interest in not being confined unnecessarily for medical treatment).

²³³ See *supra* notes 15, 28-29.

²³⁴ See *supra* Section IV.B.2. & 4.

E. STATE LAWS

State laws are the “most reliable” proof of a national consensus.²³⁵ State laws reflect norms,²³⁶ often contain relevant legislative findings, and create expectations of governmental conduct.²³⁷ State laws may reveal the outcome of a legislative analysis of the individual’s liberty interest balanced against the government’s interest.²³⁸

Where a majority of state laws support a claimed liberty right, they should be considered carefully to interpret liberty,²³⁹ particularly if there is a modern trend in the law.²⁴⁰ The right against double jeopardy,²⁴¹ the right to abortion²⁴² and the right to engage in private consensual homosexual activity²⁴³ were recognized in part based on a state law consensus or trend to recognize the rights.²⁴⁴ A legal trend that rejects traditional government action should be considered most compelling where the trend results from strong social or scientific data, or reflects progressive concepts of privacy and self-actualization, especially where the trend enhances protection of liberty.²⁴⁵

²³⁵ *Washington v. Glucksberg*, 521 U.S. 702, 711 (1997), quoting *Stanford v. Kentucky*, 492 U.S. 361, 373 (1989). Also, in *Roe v. Wade*, the Court took note of the fact that most recent decisions in state and federal court had found state abortion statutes unconstitutional, which seemed to indicate a “trend” toward protecting the right to abortion. 410 U.S. at 143 (AMA finding a “trend” to make abortion more available). See also *id.* at 154 (most recent challenges to state abortion laws had been successful).

²³⁶ See, e.g., *Lawrence v. Texas*, 539 U.S. at 573 (discussing norms reflected by state law trends).

²³⁷ See generally, e.g., *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979).

²³⁸ For example, in the incorporation cases, state majority rule was engaged to determine whether certain Bill of Rights applied to the states. See, e.g., *Williams v. Florida*, 339 U.S. 78, 103 (1970); *Benton v. Maryland*, 395 U.S. 784, 794-795 (1969). See also *United States v. Carolene Products*, 304 U.S. at 150, n. 3 (38 states had restricted the sale of filled milk). The *Bowers v. Hardwick* Court relied on the fact that 25 states criminalized sodomy at that time, which undermined the claim of an historical and traditional “right” to sodomy. The Court stated: “to claim that a right to engage in [sodomy] is ‘deeply rooted in this Nation’s history and tradition’ or ‘implicit in the concept of ordered liberty’ is, at best facetious. . . . [and] the sodomy laws of some 25 States should [not] be invalidated on this basis.” *Bowers v. Hardwick*, 478 U.S. at 194, 196. The *Washington v. Glucksberg* Court found that the “majority” of states criminalize assisted suicide. 521 U.S. at 711 (forty-four states and the District of Columbia, as well as two territories prohibit or condemn assisted suicide).

and relied in part on this fact to find no fundamental right to assisted suicide.

²³⁹ *Benton v. Maryland*, 395 U.S. at 794-795 (all states prohibited double jeopardy); *Williams v. Florida*, 399 U.S. at 103 (all states require a 12-member jury to impose death sentence).

²⁴⁰ See e.g., *Lawrence v. Texas*, 539 U.S. at 573.

²⁴¹ *Benton v. Maryland*, 395 U.S. at 794-795.

²⁴² *Roe v. Wade*, 410 U.S. at 116, 130-140.

²⁴³ *Lawrence v. Texas*, 539 U.S. at 579.

²⁴⁴ *Roe v. Wade*, 410 U.S. at 154 (finding a legal trend to protect the right to an abortion); *Lawrence v. Texas*, 539 U.S. at 571-572 (“[W]e think that our laws and traditions of the past half century are of the most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”)

²⁴⁵ See *Lawrence v. Texas*, 539 U.S. at 577, citing *Planned Parenthood v. Casey*, 505 U.S. at 855-856. That is, declaring school corporal punishment unconstitutional would enhance children’s liberty interests without undermining previously-recognized rights that have created individual or societal reliance.

In 1977, only two states had abolished school corporal punishment, which supported the *Ingraham v. Wright* Court's decision that no process was due prior to paddling students.²⁴⁶ However, in the past 30 years, 27 additional states have banned school paddling.²⁴⁷ The state law trend reveals the progressive, contemporary view that school padding violates children's basic rights. This is consistent with recent surveys demonstrating that 77% of Americans oppose school paddling.²⁴⁸ The state law trend and public opinion mitigate in favor of finding that children have a fundamental right to avoid corporal punishment.

F. INTERNATIONAL AND FOREIGN LAW

The Court has traditionally considered foreign law to interpret liberty under the American Constitution.²⁴⁹ Recently, the Court relied on foreign law to define "cruel and unusual" punishment of juveniles and retarded persons based on global "evolving standards of decency," and noted the United States' failure to abide by international declarations concerning children's right to avoid physical discipline.²⁵⁰ Despite criticisms about engaging foreign law to help interpret liberty and other human rights provisions of the Constitution,²⁵¹ recent Supreme Court opinions accurately describe the long tradition of reviewing foreign and international law to help interpret the American Constitution.²⁵²

Foreign law overwhelmingly supports a decision that school corporal punishment is unconstitutional. Virtually no other industrialized country hits children in public schools.²⁵³ Between 1783 and 2002, every industrialized country in the world has acted

²⁴⁶ See *Ingraham v. Wright*, 430 U.S. at 660-663.

²⁴⁷ See, e.g., www.stop hitting.com.

²⁴⁸ See <http://www.surveyyusa.com/50StateDisciplineChild0805SortedbyTeacher.htm>.

Predictably, support for school paddling is stronger among southern and other paddling states.

²⁴⁹ See, e.g., Pollard-Sacks, *supra* note 119. For example, in *Jacobson v. Massachusetts*, the Court relied upon numerous European countries' compulsory vaccination laws to uphold an early Massachusetts law requiring smallpox vaccinations. 197 U.S. at 31-33. The *Washington v. Glucksberg* Court upheld Washington's law against assisted suicide, noting that a blanket prohibition on assisted suicide is the norm in western democracies. 521 U.S. at 711, n. 8.

²⁵⁰ See, e.g., *Roper v. Simmons*, 543 U.S. 551, 560 (2005). In *Roper v. Simmons*, the Court found that imposing the death penalty on juveniles violated the Eighth Amendment in part based on the "stark reality that the United States is the only country in the world" that sanctions the juvenile death penalty, and noted that the United States is one of only two countries that has failed to ratify the United Nations Convention on the Rights of the Child – the other country being Somalia. *Id.* at 575. See also *Adkins v. Virginia*, 536 U.S. 304, 312, 316, n. 21 (2002) (within the "world community," imposing the death penalty for crimes committed by mentally retarded persons is overwhelmingly disapproved, which supported the Court's finding of a "national consensus").

²⁵¹ See, e.g., *Atkins v. Virginia*, 536 U.S. at 322-323 (Rehnquist, J., dissenting); *Id.* at 347 (Scalia, J., dissenting). See also, e.g., Ernest A. Young, *Foreign Law And The Denominator Problem*, 119 HARV. L. REV. 148 (2005). Professor Young argues that the Court factored foreign law into the denominator of the capital punishment equation to decrease the percentage of support for capital punishment in cases such as *Roper v. Simmons*, and that "counting noses" of countries opposed to capital punishment of certain individuals unjustifiably accords authoritative weight to worldwide numbers in interpreting the American constitution. *Id.* at 149-153.

²⁵² See, e.g., *Roper v. Simmons*, 543 U.S. at 604: "Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency." (O'Connor, J., dissenting) (citations omitted).

²⁵³ See *infra* note 298.

to prohibit school corporal punishment except the U.S., Canada²⁵⁴ and one province in Australia.²⁵⁵ Indeed, there is a growing trend to prohibit parental spanking as well, in accordance with the United Nations deadline for all Member States to ban all violent forms of child discipline by 2009.²⁵⁶

²⁵⁴ In 2004, the Canadian high court issued a decision that school paddling violates the Canadian Constitution. See *Canadian Foundation for Children, Youth and the Law v. Attorney General in Right of Canada*, [2004] S.C.R. 257. On June 18, 2008, Canadian Senator Celine Hervieux-Payette's bill, which removed a criminal defense to assault charges when the assault consists of corporal punishment of a child, passed the Senate and will come before the House of Commons in the Fall of 2008. If the House passes the bill, it will become the law of Canada, and will make physical punishment of children a crime by removing the exception for children. See <http://www.canada.com/ottawacitizen/news/story.html?id=88e9ab59-fc84-4c68-94cd-e379d90aea39>.

²⁵⁵ The following countries have banned school corporal punishment in the following years: 1783 Poland; 1820 Netherlands; 1845 Luxembourg; 1860 Italy; 1867 Belgium; 1870 Austria; 1881 France; 1890 Finland; 1900 Japan; 1917 Russia; 1923 Turkey; 1936 Norway; 1949 China; 1950 Portugal; 1958 Sweden; 1967 Denmark; 1967 Cyprus; 1970 Germany; 1970 Switzerland; 1982 Ireland; 1983 Greece; 1986 United Kingdom (Includes: England, Scotland, Wales, and Northern Ireland); 1990 New Zealand; 1990 Namibia; 1996 South Africa; 1998 England (This ban solidifies a ban imposed in 1986, extending the ban to ALL private schools); 1998 American Samoa; 1999 Zimbabwe; 2000 Zambia; 2000 Thailand; 2000 Trinidad and Tobago; 2001 Kenya; 2002 Fiji. Source: EPOCH-USA Website, see www.stophitting.com. By the year 2006, the following countries prohibit school paddling: Albania, Algeria, Andorra, Angola, Armenia, Austria, Azerbaijan, Bahrain, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Burkina Faso, Cameroon, Canada, Cayman Islands, China, Croatia, Cyprus, Democratic Republic of Congo, Denmark, Djibouti, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Ethiopia, Falkland Islands, Fiji, Finland, Gabon, Georgia, Germany, Greece, Greenland, Guinea, Guinea-Bissau, Haiti, Honduras, Hong Kong, Hungary, Iceland, Iran, Iraq, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Latvia, Lesotho, Libyan Arab Jamahiriya, Liechtenstein, Lithuania, Luxembourg, Macedonia (former Yugoslav Republic of), Malawi, Maldives, Mali, Malta, Marshall Islands, Mauritius, Micronesia, Mongolia, Namibia, Netherlands, New Zealand, Norway, Oman, Papua New Guinea, Philippines, Pitcairn Islands, Poland, Portugal, Puerto Rico, Republic of Moldova, Romania, Russian Federation, Saint Helena, Samoa, San Marino, Sao Tome and Principe, Senegal, Serbia and Montenegro, Slovakia, Slovenia, South Africa, Spain, Spitzbergen (Svalbard), Sweden, Switzerland, Taiwan, Thailand, Tonga, Turkey, Ukraine, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, Uzbekistan, Vanuatu, Venezuela, Yemen, Zambia. See Elizabeth Gershoff & EPOCH-USA, *Physical Punishment of Children in the U.S.: A Research Summary* (Appendix D)(publication pending; on file with author), citing Global Initiative to End All Corporal Punishment of Children (2006a). See also www.stophitting.com.

²⁵⁶ The UN Study on Violence Against Children set 2009 as the deadline for all Member States to ban all corporal punishment of children. See www.crin.org/violence/search/closeup.asp?infoID=13320. The following countries have banned all child corporal punishment of children (including parental spanking) in the years indicated: Sweden (1979), Finland (1983), Norway (1987), Austria (1989), Cyprus (1994), Croatia (1994), Denmark (1997), Latvia (1998), Bulgaria (2000), Germany (2000), Israel (2000), Iceland (2003), Romania (2004), Ukraine (2004), Hungary (2005), and Greece (2006), Netherlands (2007), New Zealand (2007), Portugal (2007), Spain (2007), Chile (2007), Uruguay (2007), Venezuela (2007), Costa Rica (2008). Elizabeth Gershoff & EPOCH-USA, *Physical Punishment of Children in the U.S.: A Research Summary* (Appendix C) (publication pending; on file with author). See www.stophitting.com; http://crin.org/email/crinmail_detail.asp?crinmailID=2831. See also Pollard, *supra* note 149 at 587-591. A few state corporal punishment bans of varying strength have been proposed in the United States but have thus far been unsuccessful. For example, Sally Lieber of California filed Assembly Bill 2943 in 2008, Kathleen Wolf of Massachusetts proposed House Bill 3922 in 2007, and James Marzilli of Massachusetts proposed the first anti-spanking bill in 2005, just two weeks after the first American town (Brookline, Massachusetts) approved

Consensus is growing in the international community that physical punishment of children is a human rights violation.²⁵⁷ This principle is implicit in several multilateral human rights treaties, including the U.N. Convention on the Rights of the Child (CRC) (ratified by all 194 Member Nations *except* the United States and Somalia),²⁵⁸ the International Covenant on Civil and Political Rights (ICCPR), and the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention).²⁵⁹ The United States stands in stark contrast to other industrialized nations not only by failing to discourage violent child discipline generally, but by actively engaging violent disciplinary practices through, official government action.²⁶⁰ Attempting to beat schoolchildren into compliance should be recognized as a fundamental liberty violation.

V. SCHOOL CORPORAL PUNISHMENT IS PER SE UNCONSTITUTIONAL

The most compelling and viable argument that school paddling is unconstitutional is based on its inefficacy and potential for counterproductive and harmful consequences, rendering this disciplinary choice *ultra vires* to state legislative authority under the Constitution.²⁶¹ There are two constitutional bases for challenging state laws on account of a weak (or counterproductive) nexus between the state's chosen means and its objectives: equal protection and substantive due process. These two constitutional bases for challenging state laws are "elementary limitation[s] on state power"²⁶² and historically have been intertwined in liberty analysis, sometimes providing alternate

an anti-spanking resolution. See, <http://www.corpun.com/usd00505.htm#15863>; <http://www.thebostonchannel.com/news/4582708/detail.html?subid=22100410&q=1:bp=t>;

²⁵⁷ See SUSAN H. BITENSKY, CORPORAL PUNISHMENT OF CHILDREN: A HUMAN RIGHTS VIOLATION (Transnational Publishers 2006).

²⁵⁸ See Gershoff & Bitensky, *supra* note 40 at 242; Margaret Schaefer, *German Parliament Bans Use of Corporal Punishment in Child Rearing* (July 24, 2000), available at <http://www.nospank.net/deut.htm>.

²⁵⁹ Other treaties include the International Covenant on Economic, Social and Cultural Rights (ICESCR) the American Convention on Human Rights (American Convention), and the two European Social Charters. See BITENSKY, *supra* note 257 at 44-151. The United States has ratified and, therefore, is a party solely to the ICCPR and the Torture Convention. See Gershoff & Bitensky, *supra* note 40 at 242. Both of these treaties have been interpreted as calling for an end to physical punishment of children in all forms. BITENSKY, *supra* note 257 at 44-151.

²⁶⁰ The Court has made clear that due process does not protect against private beatings in the absence of a custodial or other special relationship between the state and the victim. See *DeShaney v. Winnebago Cty. Dept. of Soc. Services*, 489 U.S. 189 (1989). The *DeShaney* Court implied that if the beatings had been perpetrated by state actors, a due process claim would be established. Yet, in the school corporal punishment context, the Court has failed to extend the reasoning of *DeShaney* where state actors perpetrate child-beating.

²⁶¹ The Supreme Court's decision that procedural due process and the Eighth Amendment do not provide children with constitutional protection from school paddling renders these constitutional bases non-viable. See *Ingraham v. Wright*, 430 U.S. 651. The Ninth Amendment provides textual authority to protect non-textual rights, such as the right of privacy, dignity, and autonomy. See *Griswold v. Connecticut*, 381 U.S. 479, 486-499 (Goldberg, J., concurring); David R. Hague, *The Ninth Amendment: A Constitutional Challenge to Corporal Punishment in Public Schools*, 55 U. KAN. L. REV. 429 (2007). However, the Ninth Amendment has been largely ignored by the Court, so may also be non-viable as a practical reality.

²⁶² *Plyler v. Doe*, 457 U.S. at 213.

bases for the same conclusion.²⁶³ The core constitutional issue under either clause is one of common sense and respect for basic human dignity: states lack jurisdiction to discriminate against some of its citizens arbitrarily or to deprive all of its citizens of personal freedom arbitrarily.²⁶⁴

Section IV argued that children have a fundamental liberty right not to be beaten by state actors. Therefore, state laws authorizing school paddling should be subjected to strict judicial scrutiny of the nexus between the state action and the state's objectives. However, even if a child's right to be free from school corporal punishment is not deemed fundamental, state laws authorizing public school corporal punishment are unconstitutional under less stringent constitutional tests because they are not efficacious and therefore "arbitrary." In addition, where a state law discriminates against a disfavored class based on historical prejudice or hostility toward the class, it is "arbitrary" under the Equal Protection Clause.

A. SUBSTANTIVE DUE PROCESS: EFFICACY-BASED ARBITRARINESS

The Supreme Court has created a variety of tests over the past century to test state laws subject to substantive due process challenges, all of which require a nexus between the state law and legitimate state objectives, the strength of the nexus dependent upon the importance of the individual right at stake. The fundamental rights paradigm is often the articulated test, whereby the Court first determines whether the right infringed is "fundamental," and if so, strict scrutiny applies, and if not, rational basis review applies.²⁶⁵ When state law deprives an individual of personal autonomy, the Court has generally analyzed the government's objective carefully, even under rational basis review.²⁶⁶ In protecting personal autonomy, sometimes the Court disregards

²⁶³ See *Lawrence v. Texas*, 539 U.S. at 575: "Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests." In *Lawrence v. Texas*, the basis for finding the state's sodomy law invalid rested on substantive due process for Justices Kennedy, Stevens, Souter, Ginsburg, and Breyer, but on equal protection grounds for Justice O'Connor. See also, e.g., *Zablocki v. Redhail*, 434 U.S. 374 (1978) (Majority opinion found the right to marry an unenumerated right in the liberty clause, and Justice Powell's concurring opinion rested on equal protection grounds).

²⁶⁴ "The Equal Protection Clause . . . does essentially nothing that the Due Process Clause cannot do on its own." *Washington v. Glucksberg*, 521 U.S. 702, 756 n. 3 (1997) (Souter, J., concurring). See also, e.g., *Bolling v. Sharpe*, 347 U.S. 497, 498-499 (1953) (although the Fifth Amendment does not contain an equal protection clause, discrimination by the federal government may violate due process because the concepts of equal protection and due process both stem from the "American ideal of fairness.")

²⁶⁵ The Court first articulated the dual standard of review in a footnote in *U.S. v. Carolene Products*, 304 U.S. at 152-4, n. 4 (the judiciary should review state laws protecting public health with extreme deference, but should engage a "more exacting judicial scrutiny" where state laws impinge on fundamental rights or prejudice politically powerless groups). See also *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. at 155 ("Where certain 'fundamental rights' are involved, the Court has held that limiting those rights may be justified only by a 'compelling state interest' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.")

²⁶⁶ To the contrary, economic regulation is given extreme deference under rational basis review. See, e.g., *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984); CHEMERINSKY, *supra* note 97 at 625-628. Personal grooming regulations for police officers have been given similar deference because of their close relationship to the state's police power. See *Kelley v. Johnson*, 425 U.S. 238, 247 (1976).

fundamental rights analysis and simply balances the privacy interest at stake against the state's objectives without articulating any standard of review.²⁶⁷ Over the past twenty years, the Court has created additional levels of substantive due process review, sometimes articulated,²⁶⁸ sometimes not,²⁶⁹ in apparent recognition that personal autonomy deserves meaningful protection even where the Court is unwilling to declare the claimed right fundamental,²⁷⁰ or unwilling to employ strict scrutiny.²⁷¹

The seminal case of *Meyer v. Nebraska*²⁷² explained that state laws infringing on personal choices must actually advance a legitimate state objective to meet due process demands. The Nebraska law prohibiting elementary students from learning German was an unconstitutional interference with the parents' right to control the upbringing of their children, because the law was counterproductive to the state's purported objective of a well-educated citizenry, rendering the law "arbitrary."²⁷³ Similarly, in *Pierce v. Society of Sisters*,²⁷⁴ a statute that outlawed private schooling exceeded the state's legislative power because private education is not harmful, rendering the law unrelated to the state's police power. In *Moore v. City of East Cleveland*,²⁷⁵ the Court articulated its obligation to analyze laws infringing on personal autonomy critically: "when the government intrudes on choices concerning family living arrangements, the Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."²⁷⁶ The city's legitimate goals of preventing overcrowding and minimizing traffic and parking congestion were served "marginally at best" by a city ordinance defining "families" in accordance with a white social construct, because the ordinance would not prevent a nuclear family with several licensed drivers to share a household, but would prevent an extended family with one licensed driver to share a household.²⁷⁷

²⁶⁷ See, e.g., *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990); *Youngberg v. Romero*, 457 U.S. 307, 315-316 (1982). Some scholars have termed these cases involving an intermediate level of scrutiny the "protected liberty" line of cases. See, e.g., Matthew Coles, *Lawrence v. Texas & The Refinement Of Substantive Due Process*, 16 STAN. L. & POL. REV., 23, 25-27 (2005).

²⁶⁸ The Court explicitly rejected rational basis and strict scrutiny in *Planned Parenthood v. Casey*, adopting instead an "undue burden" test in abortion cases. 505 U.S. at 874.

²⁶⁹ In *Troxel v. Granville*, 530 U.S. 57 (2000), the Court struck down a child visitation provision which allowed "any person" to obtain visitation rights with a minor child over a parent's objection whenever a court found that such visitation served the "best interests" of the child. A majority of the Court recognized the "fundamental" right of parents to control their children's upbringing, yet did not articulate a standard of review in declaring the Washington law unconstitutional. *Id.* at 67, 72-73. The dual standard of review was disregarded again in *Lawrence v. Texas*, where the Court held that the Texas sodomy law "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Id.* at 578.

²⁷⁰ See, e.g., *Lawrence v. Texas*, 539 U.S. at 558. See also, Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1936 (2004).

²⁷¹ See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833; *Troxel v. Granville*, 530 U.S. 57.

²⁷² 262 U.S. 390 (1923).

²⁷³ *Id.* at 403. The Court also held that the teacher's right to teach was infringed. *Id.* at 400. The Court stated that "education and acquisition of knowledge [are] . . . matters of supreme importance" to the American people." *Id.* at 400.

²⁷⁴ 268 U.S. 510 (1925).

²⁷⁵ 431 U.S. 494 (1977).

²⁷⁶ *Id.* at 499, quoting *Poe v. Ullman*, 367 U.S. 497, 554 (1961) (Harlan, J., dissenting).

²⁷⁷ *Moore v. City of East Cleveland*, 431 U.S. at 499-500. See also *id.* at 508-511 & nn. 6-9 (Brennan, J., concurring).

More recently, in *Cruzan v. Director, Missouri Dept. of Health*,²⁷⁸ the Court employed a balancing test to determine that the nexus between Missouri's goal of avoiding erroneous termination of an incompetent's life and its heightened "clear and convincing" evidentiary burden to prove the incompetent's actual wishes (as opposed to the substituted consent of family members) was sufficient to outweigh any loss of liberty resulting from the higher burden of proof.²⁷⁹ Despite no finding of a "fundamental" right, the Court analyzed the relationship between the state's goals and its means before declaring the law constitutional.²⁸⁰

Even when explicitly applying rational basis review in due process challenges to laws infringing personal autonomy, the Court has critically analyzed the law's efficacy. For example, in *Washington v. Glucksberg*,²⁸¹ the Court found no fundamental right to assisted suicide and upheld Washington's prohibition of it under rational basis review. However, the Court did not summarily defer to Washington's policy decision, but actually reviewed the state's reasons, including protecting the vulnerable from coercion, and protecting disabled and terminally ill persons from prejudice, negative and inaccurate stereotypes, and "societal indifference."²⁸² The Court found that Washington's fear that physician-assisted suicide could initiate a "path to voluntary and perhaps involuntary euthanasia," and that such a path "could prove extremely difficult to police and contain" supported Washington's decision to avoid that path.²⁸³ Still, the Court did not summarily defer to the state's logic. The Court reviewed evidence from the Netherlands indicating that assisted suicide has in fact been misused and applied to patients without their explicit consent, rendering Washington's policy decision about the risk of abuse "neither speculative nor distant."²⁸⁴

The Court's decision in *Lawrence v. Texas* reaffirmed that meaningful judicial scrutiny of state laws is obligatory where personal autonomy is at stake. The *Lawrence v. Texas* Court carefully characterized the liberty interest at stake by analyzing the relevant elements of liberty: history and precedent;²⁸⁵ the nature of the infringement, such as stigma resulting from the law and the law's impact on the human psyche, the emotional need to bond and to form intimate relationships,²⁸⁶ and self-actualization,²⁸⁷ the state

²⁷⁸ 497 U.S. 261 (1990).

²⁷⁹ *Id.* at 280-284.

²⁸⁰ *Id.* See, also, e.g., *Youngberg v. Romero*, 457 U.S. at 315-316.

²⁸¹ 521 U.S. 702 (1997).

²⁸² *Id.* at 732.

²⁸³ *Id.* at 732-733.

²⁸⁴ *Id.* at 734 (citations omitted). See also, e.g., *Michael H. v. Gerald G.*, 478 U.S. 186 (1989).

In *Michael H.*, the Court found no fundamental right for a father to have a relationship with his biological daughter born into an extant marital relationship, but in determining whether the law was arbitrary under rational basis review, analyzed two state policies that the Court determined were actually promoted by the law presuming that a woman's husband is the father of her baby, such as the policy of "promoting peace and tranquility of States and families," a goal that is "obviously impaired by the facilitating of suits against husband and wife asserting that their children are illegitimate." *Id.* at 125. But see *Bowers v. Hardwick*, 478 U.S. at 196, where the Court determined that no fundamental right to sodomy exists, then applied rational basis review in a perfunctory five-sentence analysis and upheld the law. See also Pollard-Sacks, *supra* note 119 at 35-39 (criticizing the *Michael H.* Court's analysis of the nexus between the law and the state's goals).

²⁸⁵ *Id.* at 564-573.

²⁸⁶ *Id.* at 575-576.

²⁸⁷ *Id.* at 578.

law trend to de-criminalize sodomy;²⁸⁸ and the rejection of *Bowers v. Hardwick* in the world community.²⁸⁹ No fundamental right was identified, but the Court analyzed the nature of the personal autonomy infringement created by the Texas law as part of its investigation into the nexus between the law and its objectives.²⁹⁰ The Court found that no legitimate state interest could support the Texas law's intrusion into personal liberty because it was not rationally related to a valid police power, such as protecting minors or preventing public obscenity or prostitution.²⁹¹

Supreme Court precedent establishes that substantive due process requires state laws infringing on personal autonomy to be objectively rational and effectively to further a legitimate state objective to survive constitutional scrutiny. Laws authorizing or allowing state actors to beat children are irrational because they do not further the state's objectives of producing a non-violent, well-educated, and productive citizenry, but to the contrary, increase anger and aggression among paddled students, impede cognitive development and interfere with a healthy learning environment, and may actually "produce" criminals.²⁹² Federal courts have recognized the frustration of state objectives resulting from the use of corporal punishment in the prison environment, finding that corporal punishment is "easily subject to abuse in the hands of the sadistic or unscrupulous . . . [and] generates hate toward the keepers who punish and the system which permits it."²⁹³ Corporal punishment has the same impact on children, and it similarly frustrates educational objectives.

Paddling students causes severe physical pain and emotional distress, and may interfere with personal relationships, thereby impacting children's self-concept and personal development in a deep sense, repugnant to the American concept of liberty pronounced by the Court from *Meyer v. Nebraska* to *Lawrence v. Texas*. In sum, school corporal punishment causes an "inestimable . . . deprivation . . . [of] social economic, intellectual, and psychological well-being of the individual, and . . . poses [an obstacle] to individual achievement . . ."²⁹⁴ The potential personal damage caused by corporal punishment is profound and irreversible. Therefore, even if there were some efficacy to beating students (and this Article rejects this contention), the risks to the children and to

²⁸⁸ *Lawrence v. Texas*, 539 U.S. at 572-573 (cataloging the states that criminalized sodomy in 1961 (all 50) to the time of *Bowers* (24 plus the District of Columbia in 1986) to the time of *Lawrence* (13 in 2003).

²⁸⁹ *Id.* at 573. Criminalization of sodomy was rejected by the European Convention on Human Rights, binding on 21 nations at the time of *Bowers* and 45 nations at the time of *Lawrence*. Engaging an objective analysis grounded the *Lawrence* Court in reality because the objective facts revealed a real life consensus that overwhelmingly mitigated in favor of recognizing *Lawrence's* claimed liberty right, and the Court implied that, had the *Bowers* Court conducted a more complete review of the claimed liberty interest, it would have known that *Hardwick's* privacy claim was supported by the American Law Institute and European law at the time *Bowers* was decided. *See id.* at 572-573.

²⁹⁰ The Court explicitly adopted *Stevens's* dissent in *Bowers* to characterize the nature of the liberty at stake. *See Lawrence v. Texas*, 539 U.S. at 577-578, quoting *Bowers v. Hardwick*, 478 U.S. at 216 (*Stevens, J., dissenting*).

²⁹¹ *Lawrence v. Texas*, 539 U.S. at 578. The Court discussed the state objectives of instilling morality and respect for the traditional family that sufficed in *Bowers v. Hardwick*, but tacitly adopted Justice *Blackmun's* dissenting opinion therein, which found a lack of rational nexus between the legislative facts and the "ill effects" the law sought to prevent. *See Bowers v. Hardwick*, 478 U.S. at 209, n. 3 (*Blackmun, J., dissenting*).

²⁹² *See supra* Section IV.B.

²⁹³ *Jackson v. Bishop*, 404 F.2d 571, 579-580 (8th Cir. 1968).

²⁹⁴ *Plyler v. Doe*, 457 U.S. at 222.

the state itself is too high; a rational state would not choose corporal punishment as a disciplinary method. School corporal punishment cannot survive even rational basis review because it is counterproductive to the state's educational objectives, and therefore arbitrary.

B. EQUAL PROTECTION: PREJUDICE-BASED ARBITRARINESS

Public school students are the only class of Americans who are subject to corporal punishment at the hands of state actors.²⁹⁵ Even corporal punishment of minors in juvenile detention²⁹⁶ and convicted felons has been abandoned since the 1960's:²⁹⁷ "if a prisoner is beaten mercilessly for a breach of discipline, he is entitled to . . . protection . . . while a schoolchild who commits the same breach of discipline and is similarly beaten is simply not covered."²⁹⁸ Since minors as a group and public school children have not been declared a suspect class,²⁹⁹ in the absence of finding a fundamental right to avoid corporal punishment, the equal protection test presumably would be rational basis review.³⁰⁰

However, as in substantive due process, the Court has engaged a variety of equal protection nexus tests,³⁰¹ depending on the importance of the interest adversely affected

²⁹⁵ The discipline defense to torts and crimes allows a parent, guardian, or "other person entrusted with the care and supervision of a minor" to hit children. See Pollard, *supra* note 149 at 635-644 & nn. 379-380, 396-397, 412, 425 & accompanying text. See generally DAN B. DOBBS, *THE LAW OF TORTS* 52-54 & 155-256 (2000).

²⁹⁶ See H.C. v. Jarrard, 786 F.2d 1080, 1085-1086 (11th Cir. 1986) (showing 16 year old juvenile detainee violated due process; although school corporal punishment is routine in numerous states, "no state authorizes the routine corporal punishment of detainees, and such punishment would violate due process").

²⁹⁷ See *Ingraham v. Wright*, 430 U.S. at 660-661 & n. 15, *citing* Jackson v. Bishop, 404 F.2d 571, 580 (8th Cir. 1968). See also *id.* at 685, n. 1 (White, J., dissenting). See also H.C. Samuel v. Busnuck, 423 F. Supp. 99, 101 (D.C. Md. 1976), *citing* Screws v. U.S., 325 U.S. 91 (1945) and Williams v. U.S. 341 U.S. 97, 101 (1951). See also Richard P. Shafer, *When does police officer's use of force during arrest become so excessive as to constitute violation of constitutional rights, imposing liability under Federal Civil Rights Act of 1871* (42 U.S.C.A. § 1983), 60 A.L.R. FED. 204 (1982). "Physical contact" with soldiers for "disciplinary" purposes is similarly prohibited. See, U.S. Army, Enlisted Initial Entry Training (IET), Policies and Administration, Sec. 2-6 (g) (TRADOC Reg. 350-6) (July 3, 2001).

²⁹⁸ *Id.* at 689 (White, J., dissenting). A review of the leading 30 industrialized nations reveal that none allow corporal punishment of prisoners, and only 3 (including the United States) allow it in public schools. United Nations Children's Fund, *A League Table of Child Maltreatment Deaths in Rich Nations: Innocenti Report Card No. 5*, at 26 & Figure 3. Florence, Italy: Innocenti Research Centre, available at <http://www.unicef-icdc.org/publications/pdf/recard5e.pdf>.

²⁹⁹ See, e.g., *Plyler v. Doe*, 457 U.S. 202, 223-4 (1982) (finding that minor students do not constitute a suspect class, despite recognizing that they cannot vote and "might be considered politically powerless to an extreme degree," that equal protection analysis requires that a discriminatory statute further some "substantial goal of the state" in order to be considered "rational.") The Court's language arguably implied a "quasi-suspect" class and intermediate level of scrutiny. See *id.* at 216-218 & nn. 14-16. See also CHEMERINSKY, *supra* note 97 at 714-717.

³⁰⁰ See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967); *Plyler v. Doe*, 457 U.S. at 218, n. 15, *citing* *Dunn V. Blumstein*, 405 U.S. 330 (1972) and *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (other citations omitted). The three tiers are strict scrutiny, intermediate scrutiny, and rational basis. See *Plyer v. Doe*, 457 U.S. at 216-218 & nn. 15-16.

³⁰¹ See, e.g., *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. at 451 ("[O]ur cases reflect a continuum of judgmental responses to differing classifications which have been

and the vulnerability of the class members,³⁰² and has required a truly rational nexus between the state's ends and means in equal protection challenges to state laws infringing on personal autonomy:³⁰³ “[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained.”³⁰⁴ An efficacy-based equal protection challenge to state-authorized corporal punishment converges with the due process analysis herein.

In addition, even conservative justices agree that, at its core, the equal protection clause protects against “arbitrary and irrational classifications, and against invidious discrimination stemming from prejudice and hostility. . . .”³⁰⁵ Laws that reflect legislative animus or prejudice toward a disfavored class are arbitrary under a prejudice-based equal protection analysis. The Court’s decisions in *City of Cleburne, Texas v. Cleburne Living Center* and *Lawrence v. Texas* rested in part on a determination that the laws smacked of hostility or prejudice toward the disfavored class.³⁰⁶ In *Romer v. Evans*,³⁰⁷ the state argued that a state constitutional amendment

explained in opinions by terms ranging from “strict scrutiny” at one extreme to “rational basis” at the other.”) See also *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 99 (Marshall, J., dissenting) (“the level of scrutiny employed . . . should vary with the constitutional and societal importance of the interest adversely affected. . . .”) See also, e.g., Jeffrey Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161 (1984); Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004).

³⁰² Public schoolchildren epitomize some characteristics of a suspect class. They cannot vote and are politically powerless, a predicament thought to “command extraordinary [judicial] protection from the majoritarian political process.” *Plyler v. Doe*, 457 U.S. at 216, n. 14. See also *Lawrence v. Texas*, 539 U.S. at 585 (O’Connor, J., concurring) (quoting *Railway Express Agency Inc. v. New York*, 336 U.S. 106, 112-113 (1949) (concurring opinion) (“nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom the will apply [the law] and thus to escape the political retribution that might be visited upon them if larger numbers were affected.”) Children cannot escape their associations with adults who are vested with authority to control them, and their vulnerability is manifested by laws that except them as a class from general tort and criminal laws prohibiting intentional infliction of physical pain and suffering. These factors mitigate in favor of careful judicial scrutiny of laws that single out children for physically painful and injurious state action.

³⁰³ “We have been most likely to apply rational basis review to hold a law unconstitutional under the Equal Protection Clause where, as here, the challenged legislation inhibits personal relationships.” *Lawrence v. Texas*, 539 U.S. at 580 (O’Connor, J., concurring) (citations omitted). But note that equal protection challenges to classifications impacting monetary government benefits or other financial interests are similar to economic regulation under substantive due process; the judiciary defers to the government, and the challenger bears the burden of proving no legitimate state objective. See, e.g., *U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980); *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) (challenger bears the burden of negating every conceivable basis of support for a law under rational basis review).

³⁰⁴ *Romer v. Evans*, 517 U.S. 620, 632 (1996). See also, e.g., *Plyler v. Doe*, 457 U.S. 202 (Court critically analyzed a state law requiring undocumented children to pay for public education despite finding no suspect classification and no fundamental right to education, ostensibly applying rational basis review); *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432 (1985) (Court critically analyzed zoning ordinance discriminating against the mentally retarded under rational basis review).

³⁰⁵ See *Plyler v. Doe*, 457 U.S. at 245 (Burger, J., dissenting). This concern about laws reflecting prejudice similarly animates the Court in due process analysis. See *supra* note 302 & accompanying text.

³⁰⁶ See *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. at 450 (“[The zoning ordinance] requiring the permit in this case appears to us to rest on an irrational prejudice

that repealed local legislation protecting gays from discrimination was rationally related to the state's legitimate purpose of securing freedom of association for all Colorado citizens.³⁰⁸ The state asserted that the liberty of employers and landlords was violated if they were required to associate with gays in contradiction of their personal or religious views about homosexuality.³⁰⁹ The Colorado amendment effectively furthered the state's objectives, but it was declared "a denial of equal protection of the laws in the most literal sense,"³¹⁰ because it was "born of animosity" towards homosexuals, an illegitimate government objective.³¹¹

Supreme Court precedent supports the proposition that laws that "reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective" are per se unconstitutional.³¹² State laws authorizing student corporal punishment are unconstitutional because they do not further legitimate educational objectives and are grounded in obsolete, negative assumptions about children that subject them to hostility and abuse in the same way that mentally retarded persons and homosexuals have historically been subjected to prejudice. The Puritan concept that children are "born evil,"³¹³ "mischievous,"³¹⁴ and need to have "the devil beaten out of them,"³¹⁵ based in part on biblical text,³¹⁶ are entrenched in American and world history, but reflect a lack of understanding about developmental psychology³¹⁷ and have justified subjecting children to violence, including murder, for centuries.³¹⁸ State laws excepting children from assault and battery laws reflect this longstanding prejudice towards children and hostile attribution regarding their mindset and behavior.³¹⁹ They are unconstitutional

against the mentally retarded. . ."). In *Lawrence v. Texas*, Justice O'Connor employed an equal protection analysis, and discussed the animus and rejection of homosexuals generally and under Texas law. See *Lawrence v. Texas*, 539 U.S. at 579-585 (O'Connor, J., concurring).

³⁰⁷ 517 U.S. 620, 632 (1996).

³⁰⁸ *Id.* at 635.

³⁰⁹ The amendment purportedly denied gays "special rights," so that state resources could be preserved to "fight discrimination against suspect classes." *Id.* at 630.

³¹⁰ *Id.* at 633.

³¹¹ *Id.* at 634. The breadth of the law revealed a desire to harm homosexuals. *Id.*

³¹² *Plyler v. Doe*, 457 U.S. at 216, n. 14.

³¹³ See, e.g., Deana A. Pollard, *Banning Corporal Punishment: A Constitutional Analysis*, 52 *Amer. U. L. Rev.* 447, 477-478 & nn. 159-168 (2002), citing, *inter alia*, PHILIP GREVEN, SPARE THE CHILD (2d. ed 1992); STRAUS, *supra* note 152; Mason P. Thomas, *Child Abuse & Neglect, Part I: Historical Overview, Legal Matrix, & Social Perspectives*, 50 *N.C.L.Rev.* 293 (1972).

³¹⁴ See *Ingraham v. Wright*, 430 U.S. at 659, quoting the Fifth Circuit's en banc opinion, 525 F.2d at 917.

³¹⁵ The Puritans viewed children as "young vipers" and "hateful" persons who must have the devil literally beaten out of them to get them to conform. See Piele, *Neither Corporal Punishment Cruel Nor Due Process Due: The United States Supreme Court's Decision in Ingraham v. Wright*, 7 *J. L. & EDUC.* 1, 9 (1978). STRAUS, *supra* note 152 at 3.

³¹⁶ See, e.g., Proverbs, 23:13-14, 13:24. See also generally GREVEN, *supra* note 313.

³¹⁷ See, e.g., STRAUS, *supra* n. at 52, 62-63 (children are naturally inclined not always to obey their parents, which is developmentally normal). See also IRWIN A. HYMAN, *THE CASE AGAINST SPANKING* 16 (1997) (children need to differentiate themselves from their parents to feel independent, which may produce disobedience).

³¹⁸ See Pollard, *supra* note 149 at 579-580 (describing history of violence towards children, including capital punishment of children who swore under colonial law).

³¹⁹ Research has shown that parents are more likely to hit their children if they attribute hostile behavior to their children, i.e., bad motive, as opposed to viewing their children's behavior as developmentally normal and age-appropriate. See, e.g., Pollard, *supra* note 149 at 610-611.

under a prejudice-based equal protection analysis because they reflect the view that children deserve corporal punishment because they are children.

C. OTHER CONSTITUTIONAL CONSIDERATIONS

Other constitutional considerations warrant searching judicial scrutiny of school corporal punishment. State laws that infringe a variety of constitutional rights should be reviewed with special care.³²⁰ For example, the Court has indicated that where both free exercise and the parental right to rear are infringed by a state law, the Court's deference to the legislature may be less than in cases in which only one constitutional right is infringed.³²¹ School corporal punishment infringes students' liberty interest in bodily integrity, educational, and intellectual freedom, and may negatively impact intimate relationships. It also infringes parents' liberty interest in controlling the upbringing of their children. Corporal punishment potentially infringes both the students' and parents' religious freedom, as some people find corporal punishment repugnant to their religious ideals.³²² The variety of constitutional liberties potentially infringed by school corporal punishment should heighten the state's burden to prove the law's efficacy and reasonableness.

The fact that black children are consistently receiving more blows at the hands of school officials than children of other races warrants special protection of this politically powerless and historically oppressed group.³²³ Conscious and unconscious racial bias no doubt play a role in the disparate impact of corporal punishment on blacks.³²⁴ The gross racial disparity in the administration of corporal punishment warrants careful judicial scrutiny.

³²⁰ See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (religious freedom and the right to control children's upbringing were infringed by state law requiring two years of state compulsory education beyond that allowed by Amish religion; additional two years was not sufficiently tied to state goal of protecting children from ignorance).

³²¹ See Employment Division, Department of Human Resources v. Smith, 494 U.S. 872, 881 (1990), citing *Wisconsin v. Yoder*, 406 U.S. 205.

³²² For example, some Christians believe that corporal punishment of children is not consistent with Christianity based on New Testament text, because Christ never hit a child or instructed a parent to hit a child, and indeed, delighted in children and made statements about child-rearing that are conceptually irreconcilable with punitive, harsh childrearing. See Pollard, *supra* note 149 at 631-632, citing, *inter alia*, Ephesians 6:4, Colossians 3:21, and Matthew 18:1-6, 10-14 (Rev. Am. Standard).

³²³ For a poignant exposition of the depth and breadth of American oppression of blacks by reference to the Tulsa riot of 1921, see ALFRED L. BROPHY, *RECONSTRUCTING THE DREAMLAND* (2002).

³²⁴ Disparate impact is insufficient to prove a constitutional violation. See *Washington v. Davis*, 426 U.S. 229 (1976); *McCleskey v. Kemp*, 481 U.S. 279 (1987). Research has proven that blacks are subjected to assumptions that they are more violent than whites, and, inferentially, more deserving of harsh punishment. See, e.g., Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 355 (1987); Pollard, *supra* note 46 at 913, 937-946 & 959-964 (discussing race-based stereotypes that are unconscious and/or inaccurate factually, but which give rise to attitudes and implicit bias about blacks).

Finally, the fact that alternatives to corporal punishment are available is relevant under any level of scrutiny as a practical matter, because it bears on government motive.³²⁵ Alternative disciplinary methods that do not carry the risks of corporal punishment include verbal reprimands, extra homework, detention, positive behavior support models and “token economies,” cleaning school premises, and exclusion from the classroom or from school events.³²⁶ These options render corporal punishment unnecessary and support a determination that it is unconstitutional based on its inefficacy and risks of harm to students and to society.

CONCLUSION

Many people have been legally punished by way of corporal beatings throughout American history. Fortunately, the practice of government-executed corporal punishment has been declared unconstitutional. A glaring exception exists relative to some of America’s smallest and most vulnerable citizens – public schoolchildren.

A wealth of scientific research demonstrates that corporal punishment of children damages them cognitively, motivationally, physically, psychologically, and emotionally. The professional consensus that corporal punishment is an ineffective form of discipline and carries dangerous consequences for children and society at large renders this form of state action irrational. Most of the world and a majority of the United States have responded by banning school corporal punishment. Unfortunately, nearly half of the states have failed to respond appropriately to safeguard children from the dangerous consequences of corporal punishment.

The responsibility to create a kinder, gentler society resides with many people, including parents. But the government is uniquely positioned and particularly responsible for synthesizing scientific and other data to produce sound public policy. When state governments fail to recognize the unreasonableness of their own policies, it is incumbent upon the federal courts to uphold the Constitution in challenges to the government action. But the federal judiciary has been asleep at the wheel for more than thirty years when it comes to protecting children from beatings by state actors. The ultimate responsibility to safeguard citizens from liberty deprivations lies with the Supreme Court, but it, too, has chosen to ignore the plight of schoolchildren. The judiciary should act on this issue immediately and declare school corporal punishment unconstitutional. Until then, relatively innocent, quintessentially powerless, and strikingly black Americans will continue to pay the immediate price, with incalculable ultimate social costs.

³²⁵ See RESTATEMENT, *supra* note 31. Indeed, federal courts have considered the fact of alternatives to corporal punishment in addressing constitutional challenges to school corporal punishment, despite not applying strict scrutiny. See, *supra* notes 51, 62 & accompanying text.

³²⁶ See N. CUTTS & N. MOSELY, PRACTICAL SCHOOL DISCIPLINE AND MENTAL HYGIENE 78 (1941); E. PHILLIPS, D. WEINER & N. HARING, DISCIPLINE, ACHIEVEMENT, AND MENTAL HEALTH (1966); R. DREIKURS & L. GREY, LOGICAL CONSEQUENCES: A NEW APPROACH TO DISCIPLINE (1968); K. JAMES, CORPORAL PUNISHMENT IN PUBLIC SCHOOLS 9-10 (1963); T. AYLLON & N.H. AXRIN, THE TOKEN ECONOMY: A MOTIVATIONAL SYSTEM FOR THERAPY AND REHABILITATION (1968).