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Article
***1165 STATE ACTORS BEATING CHILDREN: A CALL FOR JUDICIAL RELIEF**
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The United States stands in stark contrast to the industrialized world relative to children's human rights generally, and particularly in relation to public school corporal punishment. Despite an enormous body of social science research establishing both the inefficacy of corporal punishment and the very serious social harms that can result from it, twenty-one states have failed to respond appropriately, and the judiciary has largely rejected constitutional challenges to this violent form of discipline. The only Supreme Court case to address the issue, *Ingraham v. Wright*, was decided over thirty years ago, at a time when the social science disfavoring corporal punishment was not nearly as compelling as it is today. Currently, most scientists believe that many of the social ills that plague the United States, including violence, drug abuse, and failed interpersonal relationships, result from or are exacerbated by violence directed at children, including corporal punishment. Accordingly, professional child welfare and health organizations unanimously oppose school corporal punishment. Contemporary scientific data reveal the very serious liberty infringement inherent in public school corporal punishment. And yet, obsolete and erroneous constitutional jurisprudence governs the corporal punishment controversy. A national policy prohibiting the use of violence and pain to teach good civic behavior is long past due. The failure of nearly half of the United States to adopt policies consistent with children's and society's best interests necessitates a judicial declaration that school *1166 corporal punishment is an unconstitutional liberty infringement and also violates the Equal Protection Clause.

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***1167** 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 the floor, and he continued to beat her. 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. He then ordered Jessica Smith to return to her classroom and resume her studies. [\[FN1\]](#)

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 diligently Jessica's claims that her brutal beating violated the ***1168** 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 overreaching by other branches. [\[FN2\]](#) But the judge yawned and dismissed the case, and on June 23, 2008, the United States Supreme Court once again looked the other way. [\[FN3\]](#) This Article addresses 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 1970s, federal courts reviewed a variety of constitutional challenges to school corporal punishment, including substantive due process. [\[FN4\]](#) A number of federal courts briefly considered the issue of whether corporal punishment constitutes a legislative deprivation of substantive due process. However, no court ever engaged in a meaningful and objective analysis of the nexus between corporal punishment and the state's educational goals in accordance with the substantive due process analytical paradigm established in *Meyer v. Nebraska* [\[FN5\]](#) and its progeny. The Supreme Court's refusal to review the substantive due process issue in *Ingraham v. Wright*, and its rejection of Eighth 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. [\[FN6\]](#) The *Ingraham* 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: the Court adopted an executive deprivation model and never analyzed the legislative deprivation issue.

***1169** 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 more pressing issue relevant to all instances of school corporal punishment-- its social efficacy and propriety--remains unexamined by the judiciary, despite a wealth of social science research that demonstrates beyond any reasonable doubt that corporal punishment is an inef-

fective educational tool that creates unnecessary and very serious risks to children. Schools continue to administer corporal punishment 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 and 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 the following: 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 militate 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 of this Article reveals how American schools use corporal punishment, and exposes the gross racial disparity in its use. Part II explains existing school corporal punishment jurisprudence. Part III argues that courts have never analyzed the issue of legislative deprivation adequately, and that the prevailing test to establish an executive deprivation is 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, render it an irrational and arbitrary practice that cannot withstand constitutional scrutiny. Furthermore, historical societal prejudice and stereotypes about children reflected in state laws authorizing corporal punishment also render it unconstitutional even engaging minimal constitutional scrutiny.

***1170 I. Corporal Punishment in American Public Schools**

Although nearly the entire industrialized world has rejected the concept that subjecting school children to physical pain and violence results in good behavior and desirable social skills, [\[FN7\]](#) nearly half of the United States continue to "paddle" public students as young as three years of age and as old as eighteen years of age. This section defines school corporal punishment, exposes the prevalence and method of school paddling in the United States, and quantifies its disproportionate impact on black American public school students.

A. Prevalence of School Paddling

Twenty-one states still authorize corporal punishment, often referred to as "paddling," in public schools for disciplining students. [\[FN8\]](#) ***1171** Children subjected to school corporal punishment are generally from less-educated, poor regions of the United States in which public support for physical punishment and spanking in the home is prominent. [\[FN9\]](#) 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 were paddled according to school reports submitted to the U.S. Department of Education. [\[FN10\]](#) By 2006, the number of paddled students had dropped to 223,190. [\[FN11\]](#) Although on average less than 1% of students in paddling districts are paddled, over 9% of students (45,197 total) were paddled in Mississippi during the 2002-2003 school year, and 7.5% of students (38,131) were paddled during the 2004-2005 school year. [\[FN12\]](#) Texas ***1172** public schools paddled 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. [\[FN13\]](#)

B. Corporal Punishment Versus Use of Force to Subdue

The American Academy of Pediatrics defines corporal punishment as the willful and deliberate infliction of physical

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pain on the person of another to modify undesirable behavior. [FN14] This definition fails to distinguish between the use of force in exigent circumstances and the decision to inflict pain on students as routine punishment. Although this distinction is critical to a proper constitutional analysis, courts have overlooked or conflated it in many school corporal punishment cases. [FN15] For analytic purposes, school corporal punishment should be defined as the routine infliction of physical pain subsequent to misconduct to punish the student's behavior after an opportunity to deliberate about the appropriate punishment. Anytime schools use physical force in a manner or for reasons that do not fit this definition, such as to subdue a violent student in exigent circumstances, the state action should not be analyzed as corporal punishment. [FN16] Rather, it *1173 should be analyzed consistent with criminal and tort privileges, Fourth Amendment "seizure" analysis, or other executive "excessive force" analyses. [FN17]

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, [FN18] for using "abusive language" toward a school bus driver, [FN19] for continuing to play dodgeball after being instructed to stop, [FN20] for disrupting class, [FN21] for failing to turn in a homework assignment, [FN22] or for humming in the boys' bathroom [FN23] typify school corporal punishment. Similarly, slapping a student for breaking an egg while attempting a technology class experiment; [FN24] striking boys in the testicles for disciplinary reasons; [FN25] piercing a student's arm with a straight pin as punishment; [FN26] *1174 "kicking the shit" out of a student for throwing a dodgeball towards the coach in response to the coach's request to hand over the ball; [FN27] knocking a student's eye out of its socket during a student's fight with another student; [FN28] placing a student in a choke hold, resulting in loss of consciousness and broken nose and teeth; [FN29] slamming a student to the floor and dragging the student to the principal's office for being disruptive in class; [FN30] and forcing painful, excessive exercise, resulting in death [FN31] for talking to another student during roll call, [FN32] may constitute corporal punishment, [FN33] but a factual determination regarding the need for 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." [FN34] Typically, a principal, teacher, coach, or other school official *1175 administers corporal punishment by striking students on the buttocks with a wooden paddle from one to twenty times. [FN35] The paddles used by elementary schools are often about half as tall as the students being struck. [FN36] 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. [FN37]

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 be paddled. Although black students comprise approximately 16% of American public school students, they comprise between 34 and 39% of the students reportedly receiving corporal punishment at school. [FN38] In *1176 southern states the disparity is greater. For example, in Georgia in 2006, blacks comprised 39.76% of the student population, yet 58.89% of the students paddled; whites comprised 48.30% of the student population and received only 37.68% of the paddlings. [FN39] In South Carolina, blacks comprised 40.95% of the student population in 2006 but received a whopping 73.17% of paddlings. [FN40] Similar racial discrepancies existed in Mississippi and Texas in 2006. [FN41] The 2004 data for Tennessee shows that, although blacks made up less than one-fourth of the student body, they received more than half (52%) of the paddlings, whereas whites comprised 71% of the student body and received only 46% of paddlings. [FN42] Blacks are thus paddled up to two and a half times more frequently than whites in districts that paddle. [FN43] *1177 This recent data is consistent with historical data on the racial disparity of school corporal punishment between black and white students in southern states. [FN44] For example, in 1993, there were approximately three times as many white students as black students nationwide, yet the number of black students paddled was very close to the number of white students paddled. [FN45] Male students are paddled much more often than female students in general, but black females are paddled disproportionately compared with white females. [FN46] One *1178 study also found that black males are sixteen times more likely to be paddled than white females.

[\[FN47\]](#)

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. [\[FN48\]](#) The disparate treatment of black students likely 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, implicitly associating them with violence. This bias renders black males vulnerable to others' hostile attributions and punitive attitudes. [\[FN49\]](#)

II. Existing Jurisprudence: Executive Deprivation of Substantive Due Process Analysis Adopted

Federal courts entertained constitutional challenges to school corporal punishment occasionally prior to the Supreme Court's seminal decision in 1977 in *Ingraham v. Wright*. Prior to *Ingraham*, a few federal courts tentatively engaged the means-to-ends test for legislative deprivations of substantive due process set forth in the Supreme Court's seminal substantive due process case, *Meyer v. Nebraska*. However, the pre-*Ingraham* substantive due process *1179 analysis of school corporal punishment appears to have been influenced substantially by societal and historical acceptance of child corporal punishment as well as judicial deference to schools' authority to regulate and train children, as opposed to an objective, science-based analysis. The *Ingraham* Court declined to address substantive due process altogether and ultimately no federal court engaged a meaningful means-to-ends legislative deprivation analysis of whether school corporal punishment violates substantive due process. Instead, federal courts adopted an excessive force executive deprivation model. Thus, the social science pertaining to the efficacy and dangers of corporal punishment has been disregarded entirely in favor of a case-by-case inquiry as to whether corporal punishment was executed excessively. This section presents a chronology of federal court treatment of substantive due process challenges to school corporal punishment and explains the jurisprudential history behind the current executive-based analysis.

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*, [\[FN50\]](#) Florida public school students received severe beatings at Drew Junior High, which were representative of the school's pattern of administering cruel and severe student beatings, often with little or no proof of misconduct. [\[FN51\]](#) A Florida district court *1180 dismissed Eighth and Fourteenth Amendment challenges [\[FN52\]](#) 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 might also violate due process. [\[FN53\]](#) Considering the age of the 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. [\[FN54\]](#) 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. [\[FN55\]](#)

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. [\[FN56\]](#) The court did not consider whether the students' liberty rights were "fundamental" based on existing precedent, [\[FN57\]](#) instead simply adopting rational basis review [\[FN58\]](#) for both the students' liberty claims and the parents' right to control their children's upbringing. Based on the controversy regarding *1181 corporal punishment's efficacy, [\[FN59\]](#) the court remanded the legislative deprivation claim for fact-finding. [\[FN60\]](#) The Fifth Circuit sustained the executive deprivation claim based on the "shocking disparity" between the students' offenses and the punishment imposed. [\[FN61\]](#) The government challenged the Fifth Circuit panel's opinion and sought en banc reconsideration, which the court granted.

Before the Fifth Circuit considered *Ingraham* en banc, a North Carolina district court heard *Baker v. Owen*. [FN62] In *Baker*, a child and his mother challenged a teacher's corporal punishment of the child over the mother's objection. They argued 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" [FN63] and that corporal punishment furthered the legitimate state end of correcting pupils and maintaining school order based primarily on its historical use. [FN64] The court noted that corporal punishment is "discouraged by the weight of professional opinion" and that other options are available to correct students and maintain order, [FN65] but deferred to school officials' "professional judgment" without investigating the nexus between corporal punishment and the state's educational objectives. [FN66]

Regarding procedural due process, the *Baker* court found a liberty interest in "personal security," noting the demise of the husband's privilege of physically chastising his wife, and that society had become *1182 intolerant of flogging sailors and physically punishing prisoners. [FN67] The court agreed with *Ingraham* 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. [FN68] The Supreme Court summarily affirmed *Baker*. [FN69]

The following year the Fifth Circuit issued its ten-to-five en banc [FN70] decision in *Ingraham*, 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. [FN71] First, the court found that the Eighth Amendment applies only to punishment imposed for crimes. [FN72] Second, the court summarily dismissed the legislative deprivation claims: "[T]he evidence has not shown that corporal punishment in concept . . . is arbitrary, capricious, or wholly unrelated to the legitimate state purpose of determining educational policy," [FN73] 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." [FN74] 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 *1183 punishment than ten licks." [FN75] The court noted that excessive corporal punishment could warrant civil or criminal liability under state law. [FN76]

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. [FN77] The court distinguished *Goss v. Lopez*, [FN78] in which the Supreme Court had 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 could not damage reputation or constitute a "grievous loss" sufficient to warrant procedural safeguards. [FN79]

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. [FN80] The Court affirmed the Fifth Circuit's en banc opinion in a five-to-four decision. [FN81] 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 was "sharply divided," it could "discern no trend toward its elimination" because only two states had outlawed school paddling at *1184 that time. [FN82] Principally, the Court found that the Eighth Amendment applies only to persons convicted of crimes [FN83] 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." [FN84]

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. [FN85] However, because corporal punishment was "rooted in history" the children's liberty interest was limited, [FN86] rendering state law remedies sufficient to satisfy procedural due process. According to the Court, "there can be no deprivation of substantive rights as long as disciplinary corporal punishment is within the limits of the common-law privilege." [FN87]

The Court deemed Fourth Amendment excessive force analysis, in which courts review a police officer's conduct for reasonableness only after the fact, the "relevant analogy" for procedural due process purposes. 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." [\[FN88\]](#) The Court therefore affirmed the district court's and Fifth Circuit's en banc decisions, contrary to its summary affirmation of Baker.

B. Hall v. Tawney & Its Progeny

After the Supreme Court terminated Eighth Amendment and procedural due process challenges to school corporal punishment and ***1185** declined to address the substantive due process issue in *Ingraham*, 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* [\[FN89\]](#) is the leading case and set the standard that most other federal courts follow. In *Hall*, the court determined that excessive corporal punishment could violate a student's substantive due process rights. [\[FN90\]](#) The court assumed, without analysis, that school corporal punishment is not a legislative deprivation of substantive due process [\[FN91\]](#) and therefore adopted an executive deprivation standard based on Fourth Amendment case law.

But rather than adopt the reasonableness standard the Supreme Court suggested in *Ingraham*, [\[FN92\]](#) the court relied on *Johnson v. Glick* [\[FN93\]](#) to create a much more stringent "shocks the conscience" standard requiring "severe" injury and proof that the school official acted with "malice or sadism." [\[FN94\]](#) In 1989, the Supreme Court abrogated *Johnson* in favor of a reasonableness standard in Fourth Amendment cases. [\[FN95\]](#)

***1186** Most other circuits nonetheless followed *Hall's* analytical paradigm in school corporal punishment cases, [\[FN96\]](#) with a couple of circuits adopting a similar multifactor test grounded in police brutality cases. [\[FN97\]](#) The Fifth Circuit will not review cases alleging executive deprivations and held that no legislative deprivation claim exists if adequate state law remedies exist [\[FN98\]](#)--a position contrary to Supreme Court precedent. [\[FN99\]](#)

***1187** The Supreme Court's decision in *Ingraham v. Wright* left substantive due process the only viable constitutional challenge to school corporal punishment. Early federal courts' apparent nonchalance or discomfort in making decisions regarding the social utility and propriety of school corporal punishment continued to animate post-*Ingraham* federal court decisions and courts essentially abdicated their responsibility to adjudicate the difficult social issues presented by the legislative deprivation means-ends model. Instead, they chose to focus on whether corporal punishment was excessively administered under an executive deprivation model. The federal courts' failure to conduct a meaningful review of the efficacy of the state action relative to the state's legitimate educational objectives created numerous jurisprudential problems that will be discussed in the next section.

III. Problems with Existing School Corporal Punishment Jurisprudence

The Supreme Court's five-to-four decision in *Ingraham v. Wright* created a legacy of problematic constitutional jurisprudence relative to school corporal punishment. Despite refusing to grant certiorari on the issue of substantive due process, the *Ingraham* Court's decision was laden with indications that the justices--like society at large at that time--did not view corporal punishment as a serious problem or a threat to society. The *Ingraham* decision's tone and dicta paved the way for lower courts to avoid critical analysis of the practice of paddling children to teach them civic responsibility and instead to focus on excessive force under an executive deprivation model. Unfortunately, the executive deprivation model misses the critical inquiry regarding the social impact of corporal punishment altogether, essentially assuming its propriety in the absence of excessive force. The problem is compounded by federal courts' erroneous application of the executive deprivation model, which has rendered substantive due process analysis of school corporal punishment inappropriate and obsolete.

***1188** 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. A few federal courts found that corporal punishment does not constitute a legislative deprivation of substantive due process, and the Fifth Circuit panel remanded that controversial issue for factual development in *Ingraham* before its order was nullified by the court's en banc opinion. Thus, no federal court has ever conducted a comprehensive and meaningful investigation of the nexus between corporal punishment and the state's objectives by reference to the available scientific and professional evidence. [FN100] The Supreme Court's decision in *Ingraham* exacerbated the poor analysis and apparent confusion regarding substantive due process jurisprudence by offering substantive due process dictum in its procedural due process analysis. [FN101] The Hall 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* and its progeny. [FN102]

On June 23, 2008, the Supreme Court denied certiorari in *Smith v. School of Excellence in Education*, a case challenging existing Fifth Circuit substantive due process analysis of corporal punishment cases. [FN103] Because 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. [FN104] Federal courts have avoided the legislative deprivation issue for three decades now, during which time over ten million American children have been paddled in public schools. [FN105] The controversy in the 1970s surrounding the efficacy of corporal *1189 punishment and public support for corporal punishment at that time render federal courts' reluctance to entertain the issue at that time somewhat understandable. [FN106] However, there is currently no credible professional support for school corporal punishment. [FN107] The inefficacy and risks posed by corporal punishment have been clearly established since the 1970s, 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. [FN108]

B. Executive Deprivation Challenges

The Hall court's reliance on *Johnson* to create a test for school paddling cases is troublesome. The prisoner's claim in *Johnson* was analyzed under substantive due process specifically because the alleged abuse of force was deemed not punishment. [FN109] Rather, the case *1190 involved a spontaneous need for use of force, rendering "Monday morning quarterback[ing]" [FN110] inappropriate and warranting greater deference to official action by way of a more stringent burden to prove official misconduct. [FN111] Yet, the Hall court adopted this stringent test to prove excessive force relative to routine punishment of children. Under the reasoning of *Johnson*, the Hall 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*. [FN112] Instead, the court chose the most stringent "shocks the conscience" test, which courts employed sporadically in excessive force cases from 1952 [FN113] until 1989, when the Court made clear that Fourth Amendment claims must be analyzed under the more lenient "reasonableness" test. [FN114]

The Supreme Court's decision in *County of Sacramento v. Lewis* [FN115] made clear that Hall'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 *1191 of a suspect, the Court held that the definition of "arbitrary" or "conscience shocking" executive action sufficient to support a substantive due process violation depends on the circumstances surrounding the official action. [FN116] 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. [FN117] 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." [FN118]

School corporal punishment is inflicted on students routinely in custodial settings in the absence of exigent circumstances. [\[FN119\]](#) Lewis established that deliberate indifference, and not intent to harm, is the proper level of culpability. And yet, most federal courts continue to apply the Hall test post-Lewis. [\[FN120\]](#)

*1192 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. [\[FN121\]](#) 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. [\[FN122\]](#)

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," [\[FN123\]](#) are identified in the following subsections and applied in the school corporal punishment context.

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." The Court has traditionally defined history and *1193 tradition to include civil liberties that are "rooted in the traditions and conscience of our people," [\[FN124\]](#) but history and tradition also includes "objective" criteria such as legal precedent and recorded history. [\[FN125\]](#) History and tradition thus includes the Court's own precedent, [\[FN126\]](#) English common law, [\[FN127\]](#) the Framers' intent, [\[FN128\]](#) the laws of the United States, [\[FN129\]](#) foreign law, [\[FN130\]](#) and political philosophy. [\[FN131\]](#) American tradition also includes breaking tradition. [\[FN132\]](#) History and tradition is therefore a "starting point" in liberty analysis, but does not conclude the due process inquiry. [\[FN133\]](#)

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, [\[FN134\]](#) and recent history overwhelmingly supports banning school paddling. [\[FN135\]](#) In addition, the right of personal security constitutes a "historic liberty interest," [\[FN136\]](#) so history on this issue is not favorable to *1194 the practice of corporal punishment. Finally, several other elements of liberty analysis that are critical to understanding the nature of corporal punishment's impact on children have emerged from Supreme Court precedent and are discussed below.

B. Legislative Facts: "Reasoned Judgment" Based on Scientific and Social Fact, and Professional Opinion

The Court has repeatedly expressed its commitment to "reasoned judgment" [\[FN137\]](#) and a rational and objective methodology both in defining liberty and in determining the mandates of due process. [\[FN138\]](#) 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," [\[FN139\]](#) 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." [\[FN140\]](#) Therefore, the Court has historically relied upon medical facts, social facts, and professional opinion to interpret liberty. [\[FN141\]](#)

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 *1195 injurious effects of filled milk on public health. [\[FN142\]](#) In addition, the Court has relied on medical evidence to determine whether a state may invade a

suspect's body to procure criminal evidence. The Court has done so by balancing the degree of liberty infringement, based on the level of health risk and pain, against the state's interest in procuring evidence. [FN143] Similarly, in the abortion cases, the Court has relied extensively on available relevant medical facts--fetal development and viability, [FN144] advances in neonatal medicine, [FN145] and medical risks created by particular abortion procedures [FN146]--and opinions of experts in obstetrics and prenatal medicine such as the American Medical Association. [FN147] These "legislative facts," [FN148] though controversial, [FN149] are a critical part of sound constitutional analysis *1196 because they are the best objective evidence of the efficacy of state action and its impact on individual freedom and social welfare. They also help to avoid interpreting liberty based on the "predilections of those who happen to be Members of [the] Court." [FN150]

Over the past forty years, the vast majority of psychology and pediatric studies have concluded that corporal punishment is not ultimately efficacious and can cause serious harm to children and to society. [FN151] The available scientific evidence indicates 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 nonviolence, appropriate social behavior, and self-discipline. In addition, corporal punishment is associated with 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. [FN152]

***1197 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 promote internalization of moral lessons [FN153] and attitudes that manifest in desirable long-term social behavior. [FN154] Although some studies have indicated that parental *1198 corporal punishment may effectively produce immediate compliance, [FN155] this is akin to use of force in exigent circumstances and is not the reason schools administer corporal punishment as defined herein.

Positive reinforcement, such as praise or extra privileges, is more effective than any form of punishment in producing future good behavior in children. [FN156] Power-assertive methods of control--such as corporal punishment-- promote external attributions for behavior and minimize attributions to internal motivations. [FN157] Thus, most studies [FN158] have found that physical punishment is associated with less *1199 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. [FN159]

When children do not internalize reasons for good behavior their misbehavior is likely to recur when the threat of punishment is low, [FN160] consistent with general deterrence theory. [FN161] This may explain why vandalism is more common in schools that use corporal punishment. [FN162] 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. [FN163] Convergent research indicates that corporal punishment increases aggression in the punished child [FN164] and that students in schools that liberally permit corporal punishment commit more acts of violence against one another. [FN165] 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.

***1200 2. Corporal Punishment Is Associated with Increased Anger, Aggression, and Antisocial Behavior**

Social science research has established positive correlations between corporal punishment and subsequent antisocial, violent, and criminal behavior by children subjected to it. [FN166] Among the findings: the more children are corporally pun-

ished, the more they subsequently aggress against others, controlling for baseline aggression levels, race, gender, and family socioeconomic status; [\[FN167\]](#) aggressive and antisocial habits that are evident by age eight are predictive of antisocial and violent behavior in late adolescence and young adulthood; [\[FN168\]](#) use of corporal punishment against young males increases the likelihood that they will later be convicted of a serious crime; [\[FN169\]](#) the more corporal punishment mothers received as children, the greater their current level of anger, which in turn predicts greater use of corporal punishment on their own children; [\[FN170\]](#) child corporal punishment is associated with increased risks of child and adult depression [\[FN171\]](#) and *1201 greater unresolved marital conflict later in life; [\[FN172\]](#) and corporal punishment teaches children that it is acceptable to inflict physical pain on others in some circumstances. [\[FN173\]](#) A 2002 meta-analysis of twenty-seven studies found that, in every study, physical punishment was associated with increased aggression. [\[FN174\]](#) More recent studies conducted around the world associate physical punishment with increased physical aggression, verbal aggression, physical fighting and bullying, antisocial behavior, and behavioral problems generally. [\[FN175\]](#) The studies have found uniformly that it is particularly damaging to punish teenagers physically. [\[FN176\]](#)

Longitudinal studies focused on cause and effect indicate that child corporal punishment causes increased aggression in children. [\[FN177\]](#) 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. [\[FN178\]](#) As a result, students *1202 subjected to corporal punishment can become rebellious and are more likely to demonstrate vindictive behavior, seeking retribution against school officials and others in society. [\[FN179\]](#) 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. [\[FN180\]](#) Children who are paddled may show signs of "battered child syndrome," resulting in anger, hurt, and loss of ability to bond because of physical punishment. [\[FN181\]](#) The research has consistently found that people who were physically punished in childhood are likely to perpetrate violence against their own family members as adults. [\[FN182\]](#) They also could develop "authoritarian" personalities. [\[FN183\]](#)

*1203 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. [\[FN184\]](#) 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. [\[FN185\]](#) In a country with an unusually high rate of violence, [\[FN186\]](#) state action should not exacerbate the problem. Arousing anger in children, which contributes to aggressive and antisocial behavior, is bad public policy. [\[FN187\]](#)

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 the speed of cognitive development, measured by standardized intelligence tests such as the Stanford-Binet IQ test. [\[FN188\]](#) In one study, children who were *1204 paddled the most had the lowest increase in cognitive development one year later, while the children who were never paddled 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. [\[FN189\]](#) 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. [\[FN190\]](#) It is clear that being slapped or spanked is frightening, painful, and arouses strong negative emotions, including humiliation and sadness, which produce neurological changes that interfere with optimal cognitive functioning. [\[FN191\]](#) Research has shown that the use of corporal punishment generally negatively correlates with educational achievement, including the likelihood of earning a college degree, which could relate to the syndrome of "learned helplessness." [\[FN192\]](#)

*1205 Childhood cognitive development is critical, considering that what a person learns in childhood provides the foundation for subsequent cognitive development. [\[FN193\]](#) The more children are exposed to violence such as corporal punishment, or even the threat of violence, the greater the adverse influence on children's cognitive potential and ability to learn,

which effects children's intellectual growth indefinitely. [\[FN194\]](#)

School corporal punishment constructs an educational environment that is "unproductive, nullifying, and punitive." [\[FN195\]](#) It is favored in districts with low per-pupil expenditures on educational and psychological services and high use of parental spanking and adult illiteracy, [\[FN196\]](#) thus perpetuating the cycle of violence in children "already programmed to be aggressive" at home. [\[FN197\]](#) It destabilizes the school environment by upsetting the corporally punished student [\[FN198\]](#) and other students and teachers who can hear the punishment being *1206 inflicted. [\[FN199\]](#) This adversely impacts the students' and teachers' capacity to focus on academics. [\[FN200\]](#) No credible evidence exists that school paddling leads to better control of the classroom, [\[FN201\]](#) and the available research shows that eliminating corporal punishment has not resulted in an increase in student behavioral problems. [\[FN202\]](#)

Children who are corporally punished generally resent being paddled and feel anger toward the spanking authority. [\[FN203\]](#) Predictably, school corporal punishment is associated with less respect for school authority and higher rates of suspension, drop out, and vandalism of school property. [\[FN204\]](#) School corporal punishment causes anxiety in students, which engenders negative feelings about education and interferes with the learning process, thereby hindering educational achievement. Educational and intellectual achievement have long been recognized as fundamental aspects of liberty, [\[FN205\]](#) 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 positively correlates with mental health problems, including anxiety and depression, alcohol and drug abuse, Educationally Induced Post-Traumatic Stress *1207 Disorder, [\[FN206\]](#) and "general psychological maladjustment." [\[FN207\]](#) 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. [\[FN208\]](#) Male adolescents exposed to violence are more likely to become violent, whereas females are more likely to become depressed. [\[FN209\]](#) One recent study found that corporal punishment by a teacher was "the strongest past predictor for the child's depression." [\[FN210\]](#) Impaired mental health associated with corporal punishment, particularly depression, persists *1208 into adulthood. [\[FN211\]](#) Corporal punishment causes lower self-esteem, [\[FN212\]](#) which in turn may lead to self-destructive behavior. [\[FN213\]](#) Mental health is "essential . . . to the orderly pursuit of happiness." [\[FN214\]](#) Corporal punishment's adverse effect 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." [\[FN215\]](#) 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]. [\[FN216\]](#)

Kenneth Karst wrote a half century ago that "no rule of law should outlive its basis in legislative fact." [\[FN217\]](#) School corporal punishment has *1209 outlived its basis in legislative fact for decades and the legal status of school corporal punishment is a quintessential "doctrinal anachronism discounted by [contemporary] society." [\[FN218\]](#) Children have a fundamental right to avoid school corporal punishment because the social science is convergent and concludes that its adverse influence on students and education is multidimensional, 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, [\[FN219\]](#) personal choices, [\[FN220\]](#) and intimate associations, [\[FN221\]](#) as a means for controlling one's destiny and defining *1210 the meaning of life. [\[FN222\]](#) "Fundamental" liberty rights have therefore revolved around respect for private, personal decisions relating to marriage, procreation, contraception, family relationships, child rearing--including educational decisions affecting intellectual development--bodily autonomy, abortion, sexual privacy, private spaces, and reputation or "stigma." [\[FN223\]](#)

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 all his faculties; to be free to use them in all lawful ways." [\[FN224\]](#) In the seminal case of *Meyer v. Nebraska*, the Court struck down a state law prohibiting teaching a foreign language to elementary schoolchildren. The Court reasoned that 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. [\[FN225\]](#) 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. [\[FN226\]](#) Liberty protects individuals' ability to bond emotionally with others because human bonding powerfully influences human happiness. [\[FN227\]](#) Protecting the parent-child relationship, extended family relationships, friendship, and sexual relationships is important because it is through these relationships that humans self-actualize and find security and support. [\[FN228\]](#) Liberty also protects against psychological and social damage that can result from "stigma," such as *1211 protecting minors from stigma that can result from school discipline. [\[FN229\]](#)

Scientific research indicates that hitting children to "teach" them desirable social behavior is counterproductive and adversely affects children's cognitive development and scholastic achievement. Paddling schoolchildren constitutes an egregious invasion of intellectual freedom that affects self-actualization, economic security, and intimate relations. It is therefore very invasive of children's liberty interest.

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. [\[FN230\]](#) The government is prohibited from physical invasion of an individual's body absent very strong countervailing state needs. [\[FN231\]](#) Health risks posed by physically intrusive state action, [\[FN232\]](#) physical pain, [\[FN233\]](#) and bodily restraint [\[FN234\]](#) are historic elements *1212 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. [\[FN235\]](#) It also creates a variety of emotional and physical health risks. [\[FN236\]](#) The pain, restraint, and invasion inherent in corporal punishment render it a liberty deprivation worthy of strict judicial scrutiny.

E. State Laws

State laws are the "most reliable" proof of a national consensus. [\[FN237\]](#) State laws reflect norms, [\[FN238\]](#) often contain relevant legislative findings, and create expectations of governmental conduct. [\[FN239\]](#) State laws may reveal the outcome of a legislative balancing of the individual's liberty interest against the government's interest. [\[FN240\]](#)

*1213 Where a majority of state laws support a claimed liberty right, they should be considered carefully in interpreting liberty, [\[FN241\]](#) particularly if there is a modern trend in the law. [\[FN242\]](#) The right against double jeopardy, [\[FN243\]](#) the right to abortion [\[FN244\]](#) and the right to engage in private consensual homosexual activity [\[FN245\]](#) were recognized in part based on a state law consensus or trend to recognize the rights. [\[FN246\]](#) 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. [\[FN247\]](#)

In 1977, only two states had abolished school corporal punishment, a fact which supported the Ingraham Court's decision that no process was due prior to paddling students. [\[FN248\]](#) However, in the past thirty years, twenty-seven additional states have banned school paddling. [\[FN249\]](#) The state law trend reveals the progressive, contemporary view that school paddling violates children's basic rights. This is consistent with recent surveys demonstrating that 77% of Americans oppose school paddling. [\[FN250\]](#) The state law trend and public opinion militate in favor of ***1214** 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. [\[FN251\]](#) 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." The Court noted the United States' failure to abide by international declarations concerning children's right to avoid physical discipline. [\[FN252\]](#) Despite criticisms about engaging foreign law to help interpret liberty and other human rights provisions of the Constitution, [\[FN253\]](#) recent Supreme Court opinions accurately describe the long tradition of reviewing foreign and international law to help interpret the American Constitution. [\[FN254\]](#)

***1215** Foreign law overwhelmingly supports a decision that school corporal punishment is unconstitutional. Virtually no other industrialized country paddles children in public schools. [\[FN255\]](#) Between 1783 and 2002, every industrialized country in the world has acted to prohibit school corporal punishment except the U.S., Canada, [\[FN256\]](#) and one province in Australia. [\[FN257\]](#) 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. [\[FN258\]](#)

***1216** Consensus that physical punishment of children is a human rights violation is growing in the international community. [\[FN259\]](#) 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), [\[FN260\]](#) 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"). [\[FN261\]](#) The United States stands in stark contrast to other industrialized nations not only by failing to discourage violent child discipline generally but also by actively engaging violent disciplinary practices through official government action. [\[FN262\]](#)

***1217** 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. In addition, it has been shown to be ineffective and indeed counterproductive to teaching good civic behavior, rendering it a foolish, arbitrary teaching device. Most of the United States and virtually the entire industrialized world have progressed to the point of viewing corporal punishment as a human rights violation based on its inefficacy and danger to children. Attempting to beat schoolchildren into compliance should be recognized as a fundamental liberty violation. It is time for a federal mandate that school corporal punishment is unconstitutional.

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. [\[FN263\]](#) 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" [\[FN264\]](#) and historically have been intertwined in liberty analysis, sometimes providing alternate bases for the same conclusion. [\[FN265\]](#) The core

*1218 constitutional issue under either clause is one of common sense and respect for basic human dignity: states lack jurisdiction to discriminate against some of their citizens arbitrarily or to deprive all of their citizens of personal freedom arbitrarily. [\[FN266\]](#)

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 are 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 necessary strength of the nexus depends on 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"; if so, strict scrutiny applies, and if not, rational basis review applies. [\[FN267\]](#) *1219 When state law deprives an individual of personal autonomy, the Court has generally analyzed the government's objective carefully, even under rational basis review. [\[FN268\]](#) In protecting personal autonomy, the Court sometimes disregards fundamental rights analysis and simply balances the privacy interest at stake against the state's objectives without articulating any standard of review. [\[FN269\]](#) Over the past twenty years, the Court has created additional levels of substantive due process review, sometimes articulated, [\[FN270\]](#) sometimes not, [\[FN271\]](#) apparently recognizing that personal autonomy deserves meaningful protection even where the Court is unwilling to declare the claimed right fundamental [\[FN272\]](#) or to employ strict scrutiny. [\[FN273\]](#)

*1220 The seminal case of *Meyer v. Nebraska* [\[FN274\]](#) explains that state laws infringing on personal choices must actually advance a legitimate state objective to meet due process demands. According to the Court, 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." [\[FN275\]](#) Similarly, in *Pierce v. Society of Sisters*, [\[FN276\]](#) the Court held that 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*, [\[FN277\]](#) the Court articulated its obligation to analyze laws infringing on personal autonomy critically: "[W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." [\[FN278\]](#) 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 from sharing a household but would prevent an extended family with one licensed driver from sharing a household. [\[FN279\]](#)

More recently, in *Cruzan v. Director, Missouri Department of Health*, [\[FN280\]](#) the Court employed a balancing test to determine 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). The Court determined that the nexus was sufficient to outweigh any loss of *1221 liberty resulting from the higher burden of proof. [\[FN281\]](#) 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. [\[FN282\]](#)

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*, [\[FN283\]](#) the Court found no fun-

damental 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, instead reviewing 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." [FN284] 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. [FN285] 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." [FN286]

*1222 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* Court carefully characterized the liberty interest at stake by analyzing the relevant elements of liberty: history and precedent; [FN287] the nature of the infringement, such as stigma resulting from the law and the law's effect on the human psyche, the emotional need to bond and to form intimate relationships, [FN288] and self-actualization; [FN289] the state law trend to de-criminalize sodomy; [FN290] and the rejection of *Bowers v. Hardwick* in the world community. [FN291] The Court did not identify a fundamental right but it 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. [FN292] 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. [FN293]

Supreme Court precedent establishes that substantive due process requires state laws infringing on personal autonomy to be objectively rational and to effectively further a legitimate state objective to survive constitutional scrutiny. Laws authorizing or allowing state actors to paddle children are irrational because they do not further the state's *1223 objectives of producing a nonviolent, well-educated, and productive citizenry. To the contrary, they increase anger and aggression among paddled students, impede cognitive development and interfere with a healthy learning environment, and may actually "produce" criminals. [FN294] 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 and the unscrupulous . . . [and] generates hate toward the keepers who punish and toward the system which permits it." [FN295] 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. These consequences are repugnant to the American concept of liberty pronounced by the Court from *Meyer* to *Lawrence*. 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." [FN296] 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 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 subjected to corporal punishment at the hands of state actors. [FN297] Even corporal punishment of minors in juvenile detention [FN298] and convicted felons *1224 has been abandoned since the 1960s [FN299]: "[I]f 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." [FN300] Because minors as a group and public school children have not been declared a suspect class, [FN301] in the absence of finding a fundamental right to avoid corporal punishment, the equal protection test presumably would be rational basis review.

[\[FN302\]](#)

However, as in substantive due process, the Court has engaged in a variety of equal protection nexus tests [\[FN303\]](#) depending on the importance *1225 of the interest adversely affected and the vulnerability of the class members. [\[FN304\]](#) The Court has required a truly rational nexus between the state's ends and means in equal protection challenges to state laws infringing on personal autonomy [\[FN305\]](#): "[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." [\[FN306\]](#) 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." [\[FN307\]](#) 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 *Cleburne v. *1226 Cleburne Living Center and Lawrence* rested in part on a determination that the laws smacked of hostility or prejudice toward a disfavored class. [\[FN308\]](#) In *Romer v. Evans*, [\[FN309\]](#) the state argued that a state constitutional amendment 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. [\[FN310\]](#) 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. [\[FN311\]](#) 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" [\[FN312\]](#) because it was "born of animosity" towards homosexuals, an illegitimate government objective. [\[FN313\]](#)

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. [\[FN314\]](#) 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. These assumptions subject children 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," [\[FN315\]](#) "mischievous," [\[FN316\]](#) and need to have "the *1227 devil beaten out of them," [\[FN317\]](#) based in part on biblical text, [\[FN318\]](#) is entrenched in American and world history. This concept, however, reflects a lack of understanding about developmental psychology [\[FN319\]](#) and has justified subjecting children to violence, including murder, for centuries. [\[FN320\]](#) State laws excepting children from assault and battery laws reflect this longstanding prejudice against children and hostile attribution regarding their mindset and behavior. [\[FN321\]](#) These laws are unconstitutional 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. [\[FN322\]](#) For example, the Court has indicated that where a state law infringes both free exercise and the parental right to rear, the Court's deference to the legislature may be less than in cases in which a law infringes one constitutional right only. [\[FN323\]](#) School corporal punishment infringes students' liberty interest in bodily integrity, educational and intellectual freedom, and may negatively effect intimate relationships. *1228 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. [\[FN324\]](#) 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 consistently receive more blows at the hands of school officials than children of other races warrants special protection of this politically powerless and historically oppressed group. [\[FN325\]](#) Conscious and uncon-

scious racial biases no doubt play a role in the disparate impact of corporal punishment on blacks. [\[FN326\]](#) The gross racial disparity in the administration of corporal punishment warrants careful judicial scrutiny.

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. [\[FN327\]](#) 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. [\[FN328\]](#) These options *1229 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 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.

[\[FN1\]](#). Professor of Law, Texas Southern University, Thurgood Marshall School of Law. I would like 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. Above all, I thank my husband, David J. Sacks, for his consistent encouragement and support, and the boys, David J. Sacks, Jr., Ryan A. Sacks, Ryan A. Pollard, and Adam J. Sacks for their patience and good behavior.

[\[FN1\]](#). Jessica Smith, whose last name has been changed here to protect her identity, was a student at the School of Excellence in Education in San Antonio, Texas. On June 18, 2004, Jessica arrived on campus, walked across the street to buy a breakfast taco, returned to campus, and arrived to class on time. A while later, she was summoned to the office of Brett Wilkinson, the interim principal for the school. After entering Brett's office, the large (well over six-foot tall) man in his early 30s 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 as a result of the

incident. See Plaintiff's First Amended Original Petition at 2, *Smith v. Sch. of Excellence in Educ.*, No. SA-05-CA-0062 (W.D. Tex. Sept. 15, 2005); Telephone Interview with Dan Hargrove, Attorney for Plaintiff (Dec. 14, 2005). On June 23, 2008, the Supreme Court declined Jessica's appeal from the Fifth Circuit's affirmation of the district court's dismissal of her claim that the beating constituted a deprivation of substantive due process. See *Smith v. Sch. of Excellence in Educ.*, 252 F. App'x 684, 2007 WL 3226296, at *1 (5th Cir. Oct. 30, 2007) (unpublished opinion), cert. den. 128 S. Ct. 2962 (2008); see also Posting of Mark Walsh to The School Law Blog: Supreme Court Declines Appeals on Corporal Punishment, Teacher Testing, and Special Education, http://blogs.edweek.org/edweek/school_law/2008/06/supreme_court_declines_appeals.html (June 23, 2008, 12:29 PST).

[FN2]. "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*, 5 U.S. (1 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 of Se. Pa. v. Casey*, 505 U.S. 833, 864 (1992). This is particularly true where laws infringe on rights of persons who are politically powerless or otherwise are vulnerable to majoritarian viewpoints reflected in legislation. See *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938).

[FN3]. See supra note 1; infra Part II.A. Smith's tort claims were not dismissed.

[FN4]. See infra Part III.A.

[FN5]. *262 U.S. 390 (1923)* (holding that state action must actually advance legitimate state goal to pass constitutional scrutiny).

[FN6]. *430 U.S. 651 (1977)*.

[FN7]. See infra note 258.

[FN8]. 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 Toward and Knowledge of Child Maltreatment*, 28 *Child Abuse & Neglect* 1311, 1312 (2004). 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. See *id.* at 1314. In addition, 76% reported that the school administration would not support them if they reported suspected child abuse. See *id.*; 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, 287-88 (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 UT Admin Code R277-608: Prohibition of Corporal Punishment in Utah's Public Schools, <http://www.rules.utah.gov/publicat/code/r277/r277-608.htm> (last visited Apr. 6, 2009)), 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 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. Office for Civil Rights, U.S. Dep't of Educ., 2000 Elementary and Secondary School Civil Rights Compliance Report (2000). Data compiled by the National Coalition to Abolish Corporal Punishment in

Schools, Columbus, Ohio. See The Center for Effective Discipline, <http://www.stophitting.com/index.php?page=statesbanning> (last visited Apr. 6, 2009). See generally Human Rights Watch/ACLU, *A Violent Education: Corporal Punishment of Children in U.S. Public Schools 42* (2008), available at <http://www.hrw.org/en/reports/2008/08/19/violent-education>.

[FN9]. See Bauer et al., *supra* note 8, at 291. In general, adults who were physically punished as children are more supportive of child corporal punishment. See Position Paper of the Soc'y for Adolescent Med., *Corporal Punishment in Schools*, 32 *J. Adolescent Health* 385, 387 (2003).

[FN10]. See Office for Civil Rights, U.S. Dep't of Educ., *Elementary and Secondary School Civil Rights Compliance Report 1976, 1986, 1990, 2000, 2004 & 2006*. The 2006 data is the most recent data available. See also The Center for Effective Discipline, *supra* note 8 (compiling DOE data). The projected values (number of students paddled per year) are based upon a stratified sample of approximately 6,000 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. 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, U.S. Dep't of Educ. (July 18, 2007, July 23, 2008, July 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 8, at 287; Position Paper for the Soc'y of Adolescent Med., *supra* note 9, at 386.

[FN11]. See Office for Civil Rights, U.S. Dep't of Educ., *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. See *id.*; see also The Center for Effective Discipline, *supra* note 8.

[FN12]. See Office for Civil Rights, U.S. Dep't of Educ., *2004 and 2006 Civil Rights Data Collection, Projected Values for the State of Mississippi*.

[FN13]. See *id.* These large numbers constitute a prevalence rate of only 1.4% and 1.1%, respectively, because Texas has a large number of public school students.

[FN14]. *Comm. on Psychosoc. Aspects of Child & Family Health, Am. Acad. of Pediatrics, Guidance for Effective Discipline*, 101 *Pediatrics* 724, 724 (1998); see also [Ellis v. Cleveland Mun. Sch. Dist., 455 F.3d 690, 694 \(6th Cir. 2006\)](#) ("Corporal punishment is defined as the act of inflicting or causing to be inflicted bodily pain upon a student as a penalty for the commission or omission of an act."); [Ingraham v. Wright, 525 F.2d 909, 916 \(5th Cir. 1976\)](#).

[FN15]. If a school official is attempting to apprehend or subdue, as opposed to punish, a student with physical force, the official use of force should not be considered corporal punishment. See [London v. Dirs. of the DeWitt Pub. Schs., 194 F.3d 873, 876 \(8th Cir. 1999\)](#). Some courts seem confused about the distinction between using force to prevent harm to persons or property and corporal punishment. For example, in *Wise v. Pea Ridge School District*, the court stated that "[s]ome steps had to be taken to prevent the boys from inflicting harm on each other." [675 F. Supp. 1524, 1531 \(1987\)](#), *aff'd*, [855 F.2d 560 \(8th Cir. 1988\)](#) (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 they were necessary to prevent harm. Some states that have outlawed corporal punishment recognize school offi-

cial's need to use physical force on students to protect persons or property, which is not considered corporal punishment. See [Mont. Code Ann. § 20-4-302\(4\) \(1991\)](#); [N.J. Stat. Ann. §18A:6-1 \(West 1989\)](#); N.D. Cent. Code § 15-47-47 (1989); [Vt. Stat. Ann. tit. 16, §1161a \(1988\)](#); [Wis. Stat. Ann. § 118.31 \(West 1988\)](#).

[FN16]. See, e.g., [Widdoes v. Detroit Pub. Schs., 619 N.W.2d 12 \(Mich. Ct. App. 2000\)](#) (holding that teacher's use of force in grabbing student was not corporal punishment); [Doria v. Stulting, 888 S.W.2d 563, 567 \(Tex. Ct. App. 1994\)](#) (explaining that physically escorting student to principal's office did not constitute corporal punishment); see also William H. Danne, Jr., Annotation, [Prison Conditions as Amounting to Cruel and Unusual Punishment, 51 A.L.R.3d 111 \(1973\)](#) (explaining distinction between use of force to control prisoner or to protect persons and "corporal punishment," which is "strictly punitive rather than arguably preventive" use of force, inflicted deliberately in absence of contemporaneous need for use of force); cf. [O'Brien v. Olson, 109 P.2d 8 \(Cal. Ct. App. 1941\)](#) (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 \(6th Cir. 1987\)](#) (noting school official's violence perpetrated against student was not corporal punishment because there was no evidence in record that blows were disciplinary, but rather appeared to arise out of malice).

[FN17]. See *infra* Part III.B.

[FN18]. [Saylor v. Bd. of Educ. of Harlan County, 118 F.3d 507, 508 \(6th Cir. 1997\)](#); [Garcia v. Miera, 817 F.2d 650, 652-53 \(10th Cir. 1987\)](#) (describing situation in which student held upside down by teacher while principal paddled student so hard that student suffered deep bruises and two-inch cut that bled through student's clothes, resulting in permanent scar; student had gotten into fight with another student and told principal that her father had stated that principal should "shape up").

[FN19]. [Woodard v. Los Fresnos Indep. Sch. Dist., 732 F.2d 1243, 1244-45 \(5th Cir. 1984\)](#).

[FN20]. [Wise, 855 F.2d at 562](#).

[FN21]. [Ingraham v. Wright, 525 F.2d 909, 911 \(5th Cir. 1976\)](#).

[FN22]. [Darden v. Watkins, No. 87-5331, 1988 WL 40083, at *1 \(6th Cir. Apr. 28, 1988\)](#).

[FN23]. [Archev v. Hyche, Nos. 90-5631, 90-5863, 1991 WL 100586, at *1 \(6th Cir. June 11, 1991\)](#).

[FN24]. [Smith v. Half Hollow Hills Cent. Sch. Dist., 298 F.3d 168, 170 \(2d Cir. 2002\)](#).

[FN25]. [Mott v. Endicott Sch. Dist. No. 308, 695 P.2d 1010, 1011-13 \(Wash. Ct. App. 1985\)](#), *rev'd*, [713 P.2d 98 \(Wash. 1986\)](#) (reversing appellate court's decision to reinstate teacher).

[FN26]. [Brooks v. Sch. Bd., 569 F. Supp. 1534, 1535 \(E.D. Va. 1983\)](#).

[FN27]. [Johnson v. Newburgh Enlarged Sch. Dist., 239 F.3d 246, 249 \(2d Cir. 2001\)](#) (addressing situation where coach dragged student across floor, choked him, and slammed his head against bleachers four times, *inter alia*, and stopped beating up student only after another student threatened to intervene).

[FN28]. [Neal v. Fulton County Bd. of Educ., 229 F.3d 1069, 1071 \(11th Cir. 2000\)](#).

[FN29]. [Metzger v. Osbeck, 841 F.2d 518, 519-20 \(3d Cir. 1988\)](#).

[FN30]. [Campbell v. McAlister](#), 162 F.3d 94, 94 (5th Cir. 1998).

[FN31]. [Waechter v. Sch. Dist. No. 14-030](#), 773 F. Supp. 1005, 1007 (W.D. Mich. 1991) (addressing case in which 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 child's medical condition and knew that his doctor had ordered no forced exertion).

[FN32]. [Moore v. Willis Indep. Sch. Dist.](#), 233 F.3d 871, 873 (5th Cir. 2000).

[FN33]. See, e.g., Position Paper of the Soc'y for Adolescent Med. supra note 9, at 385 (explaining that 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).

[FN34]. [Ingraham v. Wright](#), 430 U.S. 651, 657, 670 (1977); see also [Baker v. Owen](#), 395 F.Supp. 294, 297 (1975) (explaining that corporal punishment is used for purpose of "correcting" students and "maintaining order" and control of school environment). The Restatement (Second) of Torts sets forth a privilege for a teacher to paddle students if the teacher "reasonably believes [paddling] to be necessary for proper control, training, or education." [Restatement \(Second\) of Torts § 147\(2\) \(1965\)](#) [hereinafter 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. § 150 cmts. (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. [Ingraham](#), 430 U.S. at 662; 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); see also Position Paper for the Soc'y of Adolescent Med., supra note 9, at 387 (advocating school corporal punishment claim that it teaches students respect for authority, good social skills, and improved moral character, arguments rejected by Society based on scientific research).

[FN35]. See [Ingraham](#), 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. See [id.](#) at 657, 688.

[FN36]. See [id.](#) The Pickens County Board of Education in western Alabama provides that paddles can be 24 inches long, 3 inches wide, 6 inches thick, and that physical punishment administered by such paddles "shall not include more than three (3) licks administered to the buttocks." The Pickens County Bd. of Educ., Board Policy Manual 258 (1974), 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 paddled with it. See Nat'l Ctr. for Health Statistics, Ctrs. for Disease Control, CDC Growth Charts: United States (2000), available at http://www.cdc.gov/nchs/about/major/nhanes/growthcharts/clinical_charts.htm.

[FN37]. For a view of representative photos of injuries caused by school paddling, see Project NoSpank, Violated Schoolchildren: Corporal Punishment-Induced Trauma, <http://www.nospank.net/violatn.htm> (last visited Mar. 3, 2009). See [Ingraham](#), 430 U.S. at 657, 675 nn.9-10; see also Position Paper of the Soc'y for Adolescent Med., supra note 9, at 389 (revealing that at least 10,000 to 20,000 students needed medical treatment as 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).

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[FN38]. 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 paddlings. Office for Civil Rights, U.S. Dep't of Educ., 1990 Elementary and Secondary School Civil Rights Survey, Adjusted National Estimated Data (1993); Office for Civil Rights, U.S. Dep't of Educ., Civil Rights Data Collection 2004, Projected Values for the Nation (2004), available at <http://ocrdata.ed.gov/ocr2004rv30/xls/2004Projected.html>; Office for Civil Rights, U.S. Dep't of Educ., Civil Rights Data Collection 2006, Projected Values for the Nation (2006), available at <http://ocrdata.ed.gov/ocr2006rv30/xls/2006Projected.html>.

[FN39]. Office for Civil Rights, U.S. Dep't of Educ., Civil Rights Data Collection 2006, Projected Values for the State of Georgia (2006), available at <http://ocrdata.ed.gov/ocr2006rv30/xls/georgia-projection.xls>.

[FN40]. Whites comprised 52.96% of students, and received 24.49% of paddlings. Office for Civil Rights, U.S. Dep't of Educ., Civil Rights Data Collection 2006, Projected Values for the State of South Carolina (2006), available at <http://ocrdata.ed.gov/ocr2006rv30/xls/southcarolina-projection.xls>.

[FN41]. Office for Civil Rights, U.S. Dep't of Educ., Civil Rights Data Collection 2006, Projected Values for the State of Mississippi (2006), available at <http://ocrdata.ed.gov/ocr2006rv30/xls/mississippi-projection.xls>; Office for Civil Rights, U.S. Dep't of Educ., Civil Rights Data Collection 2006, Projected Values for the State of Texas (2006), available at <http://ocrdata.ed.gov/ocr2006rv30/xls/texas-projection.xls>.

[FN42]. Office for Civil Rights, U.S. Dep't of Educ., Civil Rights Data Collection 2004, Projected Values for the State of Tennessee (2004), available at <http://ocrdata.ed.gov/ocr2004rv30/xls/tennessee-projection.xls>. Remarkably, the reported figures showed substantial racial equalization for Tennessee in 2006. Office for Civil Rights, U.S. Dep't of Educ., Civil Rights Data Collection 2006, Projected Values for the State of Tennessee (2006), available at <http://ocrdata.ed.gov/ocr2006rv30/xls/tennessee-projection.xls> (showing that in 2006, blacks constituted 24.02% of the student population and 21.17% of students paddled were black; whites constituted 70.11% of the student population and 77.31% of students paddled were white).

[FN43]. 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 *Psychol. Pub. Pol'y & L.* 231, 247 (2008) (explaining that black children are 2.5 times more likely to be paddled in public schools than Hispanics or whites, based on 2004-2005 data from Office for Civil Rights of U.S. Department of Education).

[FN44]. For example, in 1992: in Texas, 15% of students were black, but blacks received 28% of paddlings; in South Carolina, 42% of students were black, but blacks received 65% of paddlings; in Tennessee, 23% of students were black, but blacks received 39% of paddlings; in North Carolina, 28% of students were blacks, but blacks received 47% of paddlings; in Mississippi, 48% of students were black, but blacks received 57% of paddlings; in Louisiana, 44% of students were black, but blacks received 61% of paddlings; in Florida, 24% of students were black, but blacks received 36% of paddlings; in Georgia, 39% of students were black, but blacks received 55% of paddlings. Office for Civil Rights, U.S. Dep't of Educ., 1992 Elementary and Secondary School Civil Rights Compliance Report, Projected Values for the State of Texas (1992); Office for Civil Rights, U.S. Dep't of Educ., 1992 Elementary and Secondary School Civil Rights Compliance Report, Projected Values for the State of South Carolina (1992) [hereinafter Office for Civil Rights, 1992 South Carolina Projected Values]; Office for Civil Rights, U.S. Dep't of Educ., 1992 Elementary and Secondary School Civil Rights Compliance Report, Projected Values for the State of Tennessee (1992) [hereinafter Office for Civil Rights, 1992 Tennessee Projected Values]; Office for Civil Rights, U.S. Dep't of Educ., 1992 Elementary and Secondary School Civil Rights Compliance Report, Projected Values for the State of North Carolina (1992); Office for Civil Rights, U.S. Dep't of Educ., 1992 Elementary and Sec-

ondary School Civil Rights Compliance Report, Projected Values for the State of Mississippi (1992); Office for Civil Rights, U.S. Dep't of Educ., 1992 Elementary and Secondary School Civil Rights Compliance Report, Projected Values for the State of Louisiana (1992); Office for Civil Rights, U.S. Dep't of Educ., 1992 Elementary and Secondary School Civil Rights Compliance Report, Projected Values for the State of Florida (1992); Office for Civil Rights, U.S. Dep't of Educ., 1992 Elementary and Secondary School Civil Rights Compliance Report, Projected Values for the State of Georgia (1992).

[FN45]. The total number of black students was about 5.3 million, compared to over 15 million white students; the total number of black students paddled was 127,103 while the total number of white students paddled was 137,621. Office for Civil Rights U.S. Dep't of Educ., 1992 Elementary and Secondary School Civil Rights Compliance Report, Reported and Projected Enrollment Data for the Nation (Final File) 3 (1992).

[FN46]. For example, in 1992 in South Carolina, of 11,660 students paddled, 1,374 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, while white males constituted 26% of the student body and received 30% of school paddlings. Office for Civil Rights, 1992 South Carolina Projected Values, *supra* note 44. Similarly, in Tennessee in 2004, white females comprised 34% of the student body and received less than 9% 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. Office for Civil Rights, 2004 Tennessee Projected Values, *supra* note 42.

[FN47]. 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, 458-59 (1995) (concluding that discriminatory use of corporal punishment results in disparate drop-out rates among black males).

[FN48]. See S. Shaw & J. Braden, Race & Gender Bias in the Administration of Corporal Punishment, 19 Sch. Psych. Rev. 378, 378 (1990).

[FN49]. See Jerry Kang, [Trojan Horses of Race](#), 118 Harv. L. Rev. 1489, 1495 (2005); Linda Hamilton Krieger, [The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity](#), 47 Stan. L. Rev. 1161, 1203 (1995); Justin Levinson, [Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering](#), 57 Duke L.J. 345, 347, 358 (2007); Deana A. Pollard, [Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege](#), 74 Wash. L. Rev. 913, 920 (1999).

[FN50]. [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., [Glaser v. Marietta](#), 351 F. Supp. 555 (W.D. Pa. 1972); [Ware v. Estes](#), 328 F. Supp. 657 (N.D. Tex. 1971), aff'd, [458 F.2d 1360 \(5th Cir. 1972\)](#).

[FN51]. [498 F.2d at 255-59](#). The beatings violated the school district's own policy regarding corporal punishment, as the school imposed excessive licks. *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. Deliford beat Reginald Bloom with 50 licks of the paddle on one occasion, and Principal Willie Wright beat James Ingraham with 20 licks 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- 58. Ingraham's injuries required medical care, including a week of home rest, pain pills, laxatives, sleeping pills, and ice packs. *Id.* at 256. Another boy's hand was broken when a school official hit him on the hand. *Id.* at 257-58; see also [Ingraham](#), [430 U.S. at 657](#) (describing injuries).

[FN52]. The plaintiffs raised procedural due process and substantive due process claims; the latter were based on the students' and parents' liberty rights. [Ingraham, 498 F.2d at 251](#).

[FN53]. [Id. at 248](#). The opinion was written by Judge Rives, joined by Judge Wisdom. Judge Morgan dissented.

[FN54]. [Id. at 263-65](#). 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 and psychological harm, and could cause paddled students to become more aggressive and suffer other socially undesirable consequences. [Id. at 260-64](#).

[FN55]. [Id. at 267-68](#).

[FN56]. [Id. at 269](#).

[FN57]. See, e.g., [Roe v. Wade, 410 U.S. 113, 155 \(1973\)](#) (holding that where certain "fundamental rights" are involved, legislative regulation infringing on those rights can be justified only by compelling state interest and legislative enactments must be narrowly drawn to express only legitimate state interests at stake); [Griswold v. Connecticut, 381 U.S. 479, 487 \(1965\)](#) (holding "zones of privacy created by several fundamental constitutional guarantees" are protected from state law).

[FN58]. 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." [Ingraham, 498 F.2d at 270](#) (quoting [Ware v. Estes, 328 F. Supp. 657, 658-59 \(N.D. Tex. 1971\)](#)).

[FN59]. 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 268-69](#); see also [Glaser v. Marietta, 351 F. Supp. 555, 557 \(W.D. Pa. 1972\)](#); [Ware v. Estes, 328 F. Supp. 657, 659 \(N.D. Tex. 1971\)](#).

[FN60]. [Ingraham, 498 F.2d at 270](#). The court indicated that the school bore the burden of proving the efficacy of corporal punishment. [Id.](#) The Fifth Circuit en banc opinion appears to have reversed this burden. See *infra* note 73 and accompanying text.

[FN61]. [Ingraham, 498 F.2d at 269](#).

[FN62]. [395 F. Supp. 294, 295-96 \(M.D.N.C. 1975\)](#), *aff'd*, [423 U.S. 907 \(1975\)](#).

[FN63]. [Id. at 299](#).

[FN64]. "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 8, at 294 ("Clearly, cultural traditions have been more influential than research findings in determining public policy.").

[FN65]. [Baker, 395 F. Supp. at 300-01](#).

[FN66]. [Id.](#) ("[O]pinion 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.](#)

[\[FN67\]. Id. at 301;](#) see also *infra* notes 297-302 and accompanying text.

[\[FN68\]. Baker, 395 F. Supp. at 302-03.](#) 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.](#)

[\[FN69\]. 423 U.S. 907 \(1975\).](#)

[\[FN70\].](#) 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. [Ingraham v. Wright, 525 F.2d 909, 910 \(5th Cir. 1976\).](#) Five judges dissented from the en banc opinion. [Id. at 920-27.](#)

[\[FN71\]. Id. at 909.](#)

[\[FN72\]. Id. at 914.](#)

[\[FN73\]. Id. at 916](#) (quoting district court). The court's language appears to shift the burden of proof onto the plaintiffs. See *supra* note 60. The court found that maintenance of discipline and order is a "proper object" 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. [Ingraham, 525 F.2d at 916-17.](#)

[\[FN74\]. Ingraham, 525 F.2d at 917.](#)

[\[FN75\]. Id.](#)

[\[FN76\]. Id.](#)

[\[FN77\]. Id. at 919.](#)

[\[FN78\]. 419 U.S. 565 \(1975\).](#)

[\[FN79\]. Ingraham, 525 F.2d 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).

[\[FN80\].](#) 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, "[i]s 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. 651, 659 n.12 \(1977\)](#) (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* Part III.

[\[FN81\].](#) Justice White wrote a lengthy dissenting opinion, which Justices Brennan, Marshall, and Stevens joined. [Ingraham,](#)

[430 U.S. at 683](#) (White, J., dissenting). Justice Stevens also wrote a dissenting opinion. [Id. at 701](#) (Stevens, J., dissenting).

[FN82]. [Id. at 660-61](#). The two states were Massachusetts and New Jersey. [Id. at 663](#).

[FN83]. [Id. at 664-71](#).

[FN84]. [Id. at 670-71](#).

[FN85]. [Id. at 674](#).

[FN86]. "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](#).

[FN87]. [Id. at 676](#). This is dictum, because 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." [Id. at 679 n.47](#) (emphasis added); see also infra notes 98-99 and accompanying text.

[FN88]. [Ingraham, 430 U.S. at 682](#).

[FN89]. [621 F.2d 607, 607 \(4th Cir. 1980\)](#).

[FN90]. [Id. at 611](#).

[FN91]. 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.* 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 611-12. 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, 286-87 (1994) (arguing that lower courts' interpretation of Supreme Court's holding in *Ingraham* has been "intellectually dishonest").

[FN92]. See [Ingraham, 430 U.S. at 679-80](#).

[FN93]. [481 F.2d 1028 \(2d Cir. 1973\)](#), overruled by [Graham v. Connor, 490 U.S. 386 \(1989\)](#) (relying on generic substantive due process analysis of [Rochin v. California, 342 U.S. 165 \(1952\)](#), and adopting stringent "shocks the conscience" test for liberty violations requiring proof of malice or sadism, as opposed to relying on any specific contained in Bill of Rights).

[FN94]. "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." [Hall, 621 F.2d at 613 \(citing Johnson, 481 F.2d 1033\)](#). The court also relied on *Rochin v. California*, and [Jenkins v. Averett, 424 F.2d 1228 \(4th Cir. 1970\)](#). [Hall, 621 F.2d at 613](#).

[FN95]. [Graham, 490 U.S. at 386](#); see infra Part III.B.

[FN96]. See, e.g., [Gottlieb v. Laurel Highlands Sch. Dist.](#), 272 F.3d 168, 173 (3d Cir. 2001); [Johnson v. Newburgh Enlarged Sch. Dist.](#), 239 F.3d 246, 252-54 (2d Cir. 2001); [Neal v. Fulton County Bd. of Educ.](#), 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"); [Saylor v. Bd. of Educ.](#), 118 F.3d 507, 514 (6th Cir. 1997), cert. denied, 522 U.S. 1029 (1997); [Lillard v. Shelby County Bd. of Educ.](#), 76 F.3d 716, 726 (6th Cir. 1996); [Webb v. McCullough](#), 828 F.2d 1151, 1158 (6th Cir. 1987); [Garcia v. Miera](#), 817 F.2d 650, 655 (10th Cir. 1987); [Thrasher v. Gen. Casualty Co. of Wis.](#), 732 F. Supp. 966, 970 (W.D. Wis. 1990) (noting that Seventh Circuit has not adopted test, and instead following Tawney and its progeny).

[FN97]. [Wise v. Pea Ridge Sch. Dist.](#), 855 F.2d 560, 564 (8th Cir. 1988) (adopting four-factor variation of 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 (3d Cir. 1988) (employing 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, 1302-04 (9th Cir. 1996), relying on [Sinloa Lake Owners Ass'n v. City of Simi Valley](#), 882 F.2d 1398, 1408-09 (9th Cir. 1989), cert. denied, 494 U.S. 1016 (1990), overruled in part by [Armendariz v. Penman](#), 75 F.3d 1311, 1319 (9th Cir. 1996). See also 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); Parkinson, supra note 91, at 285-302 (reviewing standards circuit courts have adopted for substantive due process challenges to school corporal punishment in wake of Ingraham v. Wright).

[FN98]. "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](#), 858 F.2d 269, 272 (5th Cir. 1988) (citing [Woodard v. Los Fresnos Indep. Sch. Dist.](#), 732 F.2d 1243, 1245 (5th Cir. 1984)); see also [Moore v. Willis Indep. Sch. Dist.](#), 233 F.3d 871, 876 (5th Cir. 2000); [Fee v. Herndon](#), 900 F.2d 804, 805 (5th Cir. 1990); Jones, supra note 97, at 898-900.

[FN99]. See [Zinermon v. Burch](#), 494 U.S. 113, 125-26 (1990) (limiting application of [Parrat v. Taylor](#), 451 U.S. 527 (1981), to procedural due process claims); see also [Hall](#), 621 F.2d at 612 (citing [Monroe v. Pape](#), 365 U.S. 167, 183 (1961)); Erwin Chemerinsky, *Constitutional Law, Principles and Policies* 553-57 (2006); 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) ("[T]he idea that 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 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 paddled the largest number of students, including Texas, which paddles the greatest number of students, and Mississippi, which paddles the highest percentage of students. See supra Part I.A; see also Parkinson, supra note 91, at 297-98 & n.181; infra Part III.B.

[FN100]. See supra Part II.A.

[FN101]. 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. [Hall](#), 621 F.2d at 676.

[FN102]. *Id.* at 611-12.

[FN103]. No. 07-9760, [2008 WL 672390, at *1 \(U.S. June 23, 2008\)](#); 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" [Smith v. Sch. of Excellence in Educ.](#), 252 F. App'x 684, 685 (5th Cir. 2007).

[FN104]. See supra note 95; infra notes 114-20 and accompanying text.

[FN105]. See supra notes 10-11 and accompanying text. Ten million is a very conservative estimate.

[FN106]. However, even by the early 1970s, 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 Part II.A; see, e.g., R. Amsterdam, *Constructive Classroom Discipline & Practice* 82 (1957) (arguing that corporal punishment is ineffective and should not be employed by teachers); N. Cutts & N. Moseley, *Teaching the Disorderly Pupil* 34 (1957) (stating that corporal punishment does not seem to have "a good effect"); J. Howard, *Children in Trouble* 239 (1970) (arguing that school-related problems are involved in at least 80% of court cases involving school discipline).

[FN107]. See infra Part IV.B.

[FN108]. See infra Part IV.B (summarizing 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 the 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. 833, 864 (1992). The Court stated that social advances required the Court to overrule *Lochner v. New York* and *Plessy v. Ferguson* in *West Coast Hotel Co. v. Parrish* and *Brown v. Board of Education*, respectively. See [id.](#) at 861-64. 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 8, 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 result of publicizing risks of undesirable social behavior).

[FN109]. [Johnson v. Glick](#), 481 F.2d 1028, 1032 (2d Cir. 1973). Because 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.* 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 [Johnson](#), 481 F.2d at 1032-33; see also [Graham v. Connor](#), 490 U.S. 386, 392-93 (1989) (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 ever constitutional when perpetrated against criminal suspects or even convicts. See infra notes 298- 99.

[FN110]. See [Samuel v. Busnuck](#), 423 F. Supp. 99, 101 (D.C. Md. 1976).

[FN111]. 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](#), 481 F.2d at 1032-33.

[FN112]. [Ingraham v. Wright](#), 430 U.S. 651, 679-80 (1977).

[FN113]. The Court in [Rochin](#), 342 U.S. 165, 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--"shock[ed] the conscience" of the Court and violated substantive due process and "the community's sense of fair play and decency." *Id.* at 174; see also [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 Eighth Amendment violations at the time *Rochin* was decided. See, e.g., [United States v. Rosenberg](#), 195 F.2d 583, 608 (2d Cir. 1952).

[FN114]. 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." [Graham, 490 U.S. at 393-95](#). Today, both *Rochin v. California* and *Johnson v. Glick* would be analyzed as Fourth Amendment violations. See also [Lewis, 523 U.S. at 850 n.9](#); [Albright v. Oliver, 510 U.S. 266, 274 \(1994\)](#).

[FN115]. [523 U.S. at 833-34](#).

[FN116]. [Id. at 845-50](#).

[FN117]. [Id. at 853-54](#) (quoting [Graham, 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 848-49](#). 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 \(1976\)](#)).

[FN118]. [Id. at 853](#); see also [id. at 849, 851-53](#). "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."); 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, 535-37 \(2006\)](#).

[FN119]. See *supra* Part I.B.

[FN120]. Six years after *County of Sacramento v. Lewis*, the Fourth Circuit reaffirmed *Hall v. Tawney* in [Meeker v. Edmundson, 415 F.3d 317, 320-21, 324 \(4th Cir. 2005\)](#). Note, however, that in *Meeker*, the court referred to intent to harm as a "factor" to consider, while *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 607, 613 \(4th Cir. 1980\)](#) (emphasis added); see also [Ellis ex rel. Pendergrass v. Cleveland Mun. Sch. Dist., 455 F.3d 690, 700 \(6th Cir. 2006\)](#) (explaining that 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" (citing [Webb v. McCullough, 828 F.2d 1151, 1158 \(1987\)](#)) (emphasis added)); [Gottlieb v. Laurel Highlands Sch. Dist., 272 F.3d 168, 173 \(3d Cir. 2001\)](#) (listing "malice or sadism" as element to establish 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"); Neal ex rel. *Fulton County Bd. of Educ.*, 229 F.2d 1069, 1074-75 (11th Cir. 2000) (citing [Lewis, 523 U.S. 833](#), but adopting intent standard greater than deliberate indifference, relying on *Tawney*, inter alia); [W.E.T. v. Mitchell, No. 1:06CV487, 2007 WL 2712924, at *4 \(M.D.N.C. Sept. 14, 2007\)](#) (assuming plaintiff must allege malice or sadism to support substantive due process claim based on *Tawney* analysis); [Thomas v. Bd. of Educ. of W. Greene Sch. Dist., 467 F. Supp. 2d 483, 488 \(W.D. Pa. 2006\)](#); *Brown ex rel. Brown v. Ramsey*, 121 F. Supp. 3d 911, 917-18 (E.D. Va. 2000) (citing *Tawney* to explain malice or sadism is proof "element" in school corporal punishment cases).

[FN121]. See *supra* note 2; see, e.g., Deana Pollard Sacks, [Elements of Liberty, 61 S.M.U. L. Rev. 1557, 1558-62 \(2008\)](#) (discussing "judicial activism" and Court's repeated statements this it is obligated to scrutinize state action objectively to assure state conformity with constitutional guarantees).

[FN122]. See, e.g., [United States v. Carolene Products, 304 U.S. 144, 152 n.4 \(1938\)](#) (noting that heightened scrutiny is appropriate for judicial review of state action affecting powerless social groups such as "discrete and insular minorities").

[FN123]. For a more thorough analysis of the Court's history in defining and analyzing liberty, see generally Pollard Sacks, *supra* note 121.

[FN124]. See [Griswold v. Connecticut, 381 U.S. 479, 487 \(1965\)](#) (Goldberg, J., concurring) (quoting [Snyder v. Massachusetts, 291 U.S. 97, 105 \(1934\)](#)).

[FN125]. See [Duncan v. Louisiana, 391 U.S. 145, 161 \(1968\)](#) (stating that "the existing laws and practices of the Nation" constitute "objective criteria," referring to fact that 49 of 50 states do not require jury trials for some crimes); see also [Rochin v. California, 342 U.S. 165, 171 \(1952\)](#) (explaining that history includes maxims and rules of traditional decisions).

[FN126]. See [Lawrence v. Texas, 539 U.S. 558, 567-68 \(2003\)](#).

[FN127]. See [Benton v. Maryland, 395 U.S. 784, 795-96 \(1969\)](#).

[FN128]. See [Malloy v. Hogan, 378 U.S. 1, 5 \(1964\)](#).

[FN129]. See *infra* Part IV.E.

[FN130]. See *infra* Part IV.F.

[FN131]. See W. [Coast Hotel v. Parrish, 300 U.S. 379, 411-12 \(1937\)](#); [Lochner v. New York, 198 U.S. 45, 57-58 \(1905\)](#).

[FN132]. 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. 497, 542 \(1961\)](#) (Harlan, J., dissenting).

[FN133]. "[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. 833, 857 \(1998\)](#) (Kennedy, J., concurring).

[FN134]. [Lawrence v. Texas, 539 U.S. 558, 571-72 \(2003\)](#).

[FN135]. See *infra* Parts IV.E-F.

[FN136]. [Ingraham v. Wright, 430 U.S. 651, 673-74 \(1977\)](#).

[FN137]. See [Planned Parenthood v. Casey, 505 U.S. 833, 849 \(1992\)](#).

[FN138]. See *id.* at 854; [Poe v. Ullman, 367 U.S. 497, 518 n.9 \(1961\)](#) (Douglas, J., dissenting) ("[D]ue process follows the advancing standards of a free society as to what is deemed reasonable and right It is to be applied ... to facts and circumstances as they arise") (emphasis added); see also [Winston v. Lee, 470 U.S. 753, 760-63 \(1985\)](#) (stating objective factors to consider in characterizing liberty infringement and deciding whether due process was violated, including health risks and other medical evidence).

[FN139]. [Rochin v. California, 342 U.S. 165, 172 \(1958\)](#).

[FN140]. [Planned Parenthood, 505 U.S. at 854-55](#); see also [Lawrence v. Texas, 539 U.S. 558, 578-79 \(2003\)](#) ("[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 proper 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.").

[FN141]. As early as 1905, the Court in [Jacobson v. Massachusetts](#) upheld a mandatory smallpox vaccine against a due process challenge because, although the challenger offered proof of possible injurious effects of the 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. [197 U.S. 11, 34-36 \(1905\)](#). 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](#).

[FN142]. [United States v. Carolene Prods., 304 U.S. 144, 148-49 \(1938\)](#). 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 "[t]here is now an extensive literature indicating wide recognition by scientists and dietitians 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).

[FN143]. See [Winston, 470 U.S. at 763-65](#); [Schmerber v. California, 384 U.S. 757, 769-72 \(1966\)](#).

[FN144]. 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. 113, 141-47 \(1973\)](#). 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](#).

[FN145]. See [Planned Parenthood, 505 U.S. at 860](#). 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 including the A.M.A. regarding the emotional and social effect on women if they were to be required to give their spouses notice prior to an abortion. [Id. at 887-95](#).

[FN146]. [Stenberg v. Carhart, 530 U.S. 914, 924-29 \(2000\)](#). 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.

[FN147]. See [Roe, 410 U.S. at 144-47](#).

[FN148]. See Kenneth L. Karst, [Legislative Facts in Constitutional Litigation](#), 1960 Sup. Ct. Rev. 75, 77.

[FN149]. See, e.g., Suzanne B. Goldberg, [Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication](#), 106 *Colum. L. Rev.* 1955 (2006) (stating "fact-based adjudication" is flawed because it is premised on concept that restrictions on social groups can be evaluated based on facts alone, obscuring role of judicial norm selection); Rachael N. Pine, [Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights](#), 136 *U. Pa. L. Rev.* 655 (1987) (arguing that standards of constitutionality should be informed by empirical truth and that judicial protection of fundamental rights is facilitated by legislative facts); Ann Woolhandler, [Rethinking the Judicial Reception of Legislative Facts](#), 41 *Vand. L. Rev.* 111 (1988) (arguing that analytical paradigms proffered by legal scholars for incorporating legislative facts into judicial analysis have not been adopted, and that this is good thing); see also Allison Morse, [Good Science, Bad Law: A "Multiple Balancing" Approach to Adjudication](#), 46 *S.D. L. Rev.* 410, 431-35 (2001) (arguing that Court should consider natural and social science, to fulfill its mission to protect fundamental rights).

[FN150]. [Moore v. City of East Cleveland, 431 U.S. 494, 502 \(1973\)](#).

[FN151]. See Am. Acad. of Pediatrics, Consensus Statements, 98 Pediatrics 853, 853 (1996). 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 has consistently shown that physical punishment leads to increased aggression in the corporally punished person, controlling for initial levels of aggression. See Deana A. Pollard, [Banning Child Corporal Punishment, 77 Tul. L. Rev. 575, 602-20 \(2003\)](#); see also *infra* note 154.

[FN152]. 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 Association 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 The Center for Effective Discipline, <http://www.stophitting.com/index.php?page=usorgs> (last visited Apr. 6, 2009); see also Parkinson, *supra* note 91, at 278 nn.20-21 (listing organizations that oppose school paddling).

[FN153]. Moral internalization means "taking over the values and attitudes of society as one's own so that socially acceptable 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 Dev. Psychol. 4, 4-5 (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, 541-42, 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, 550-51, 553, 557, 561-62; see also Gershoff & Bitensky, *supra* note 43, at 233- 38. For criticism regarding research finding negative effects from corporal punishment, see, for example, R.E. Larzelere, B.R. Kuhn & B. Johnson, The Intervention Selection Bias: An Underrecognized Confound in Intervention Research, 130 Psychol. Bull. 289, 289-92 (2004).

[FN154]. 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 pun-

ishment and similarly indicates that it is counterproductive to educational objectives. See, e.g., Murray A. Straus, *Beating the Devil out of Them* 112-15 (2005) (summarizing statistical evidence supporting proposition that paddling children increases their aggression and likelihood of aggressing against others, and that state murder rates tend to parallel levels of school corporal punishment); *infra* notes 157-59.

[FN155]. Gershoff & Bitensky, *supra* note 43, at 233-34; Gershoff, *supra* note 153, at 542, 549-50. 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. In addition, no study has shown corporal punishment to be more effective than noncorporal punishment. See Gershoff & Bitensky, *supra* note 43, at 233-34; see, 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., *The Effects of Discipline Responses in Delaying Toddler Misbehavior Recurrences*, 18 *Child & Fam. Behav. Therapy* 35, 53-54 (1996) (finding that delay between discipline and recurrence of misbehavior was longer for punishment combined with reasoning than for punishment alone); 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 backup for reasoning than noncorporal punishment); Joseph C. LaVoie, *Type of Punishment as a Determinant of Resistance to Deviation*, 10 *Dev. Psychol.* 181, 186-88 (1974) (comparing effectiveness of reasoning with withholding resources, withdrawal of love, and adverse stimulus in form of loud buzzer when used as methods of punishment, and concluding that 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).

[FN156]. See Patricia Cohen, *Response: How Can Generative Theories of the Effects of Punishment Be Tested?*, 98 *Pediatrics* 834, 835 (1996); *How to Teach Good Behavior: Tips for Parents*, 66 *Am. Fam. Physician* 1463, 1463 (2002) (reprinting handout distributed by American Academy of Family Physicians); 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)); *Position Paper of the Soc'y for Adolescent Med.*, *supra* note 9, at 388.

[FN157]. Gershoff, *supra* note 153, at 541.

[FN158]. See Gershoff & Bitensky, *supra* note 43, at 234 (noting that 85% of studies have come to this conclusion).

[FN159]. *Id.*; Gershoff, *supra* note 153, at 550; 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, 200-01 (2001).

[FN160]. Gershoff & Bitensky, *supra* note 43, at 234; Gershoff, *supra* note 153, at 541.

[FN161]. See, e.g., Deana A. Pollard, [Sex Torts, 91 Minn. L. Rev. 769, 812-15 \(2007\)](#) (discussing deterrence theory and importance of perception of high risk of punishment for deterrence to be effective).

[FN162]. See Straus, *supra* note 154, at 112-13, Chart 7-7; Ralph S. Welsh, *Delinquency, Corporal Punishment, and the Schools*, in *Crime & Delinquency* 336- 54 (1978), available at <http://nospank.net/welsh1.htm>.

[FN163]. Gershoff & Bitensky, *supra* note 43, at 234; see also L. D. Eron, L. O. Walder & M. M. Lefkowitz, *Learning of Aggression in Children* 72 (1971).

[FN164]. See *infra* Part IV.B.2.

[FN165]. Straus, *supra* note 154, at 112-13, Chart 7-7; D. Arcus, *School Shooting Fatalities and School Corporal Punishment: A Look at the States*, 28 *Aggressive Behav.* 173, 174-75, 180 (2002). Some may argue that school corporal punishment and student violence are correlated, and that school paddling does not cause student violence. See Gershoff, *supra* note 153, at 565-66 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.

[FN166]. See Gershoff & Bitensky, *supra* note 43, at 233-38; Gershoff, *supra* note 153, at 541-42, 550-51.

[FN167]. See Leonard D. Eron, *Research and Public Policy*, 98 *Pediatrics* 821, 822-23 (1996); Gershoff & Bitensky, *supra* note 43, at 236. 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. *Id.* at 237.

[FN168]. Eron, *supra* note 167, at 823; see 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, 420 (1999); 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); Ronald L. Simons et al., *Socialization in the Family of Origin and Male Dating Violence: A Prospective Study*, 60 *J. Marriage & Fam.* 467, 467-70 (1998); Elizabeth A. Stormshak et al., *Parenting Practices and Child Disruptive Behavior Problems in Early Elementary School*, 29 *J. Clinical Child Psychol.* 17, 18 (2000); Zvi Strassberg et al., *Spanking in the Home and Children's Subsequent Aggression Toward Kindergarten Peers*, 6 *Dev. & Psychopathology* 445, 456-58 (1994).

[FN169]. 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. *Id.* at 837.

[FN170]. *Id.* at 839, 840; 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) (explaining that mothers who attribute negative motives to child misbehavior engage in more physical discipline); Pollard, *supra* note 151, at 610-12 (discussing study relating mothers' perceptions of children's motives and mothers' likelihood of using corporal punishment).

[FN171]. See *infra* Part IV.B.4.

[FN172]. See Straus, *supra* note 169, at 840.

[FN173]. See Gershoff, *supra* note 153, at 541; see also Anthony M. Graziano et al., *Subabusive Violence in Child Rearing in Middle-Class American Families*, 98 *Pediatrics* 845, 846 (1996); Joan McCord, *Unintended Consequences of Punishment*, 98 *Pediatrics* 832, 832-33 (1996).

[FN174]. Gershoff & Bitensky, *supra* note 43, at 234.

[FN175]. Andrew Grogan-Kaylor, *Corporal Punishment and the Growth Trajectory of Children's Antisocial Behavior*, 10 *Child Maltreatment* 283, 283, 291 (2005); A. Grogan-Kaylor, *The Effect of Corporal Punishment on Antisocial Behavior in Children*, 28 *Soc. Work Res.* 153, 153 (2004); J. E. Lansford et al., *Physical Discipline and Children's Adjustment: Cultural*

Normativeness as a Moderator, 76 *Child Dev.* 1234, 1234 (2005); 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, 40-41 (2002); D. A. Nelson et al., Aversive Parenting in China: Associations with Child Physical and Relational Aggression, 77 *Child Dev.* 554, 564 (2006); S. A. Ohene et al., Parental Expectations, Physical Punishment, and Violence Among Adolescents Who Score Positive on a Psychosocial Screening Test in Primary Care, 117 *Pediatrics* 441, 445 (2006); L. S. Pagani et al., Risk Factor Models for Adolescent Verbal and Physical Aggression Toward Mothers, 28 *Int'l J. Behav. Dev.* 528, 529 (2004); T. N. Sim & L. P. Ong, Parent Physical Punishment and Child Aggression in Singapore Chinese Preschool Sample, 67 *J. Marriage & Fam.* 85, 85 (2005); see also Gershoff & Bitensky, *supra* note 43, at 234-35.

[FN176]. Robert E. Larzelere, A Review of the Outcomes of Parental Use of Nonabusive or Customary Physical Punishment, 98 *Pediatrics* 824, 827 (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. See *id.* at 827; see also *infra* note 193.

[FN177]. Straus, *supra* note 154, at 171-72; Pollard, *supra* note 151, at 602- 10.

[FN178]. See Straus, *supra* note 154, at 110-16 (discussing data associating school corporal punishment, student violence, and state homicide rates based on "cultural spillover theory," which holds that when society "legitimizes" violence--such as by allowing corporal punishment in schools--it leads to greater tendency for those engaged in illegitimate behavior to resort to use of force); see also Gershoff & Bitensky, *supra* note 43, at 234-35; Gershoff, *supra* note 153, at 541; Pollard, *supra* note 151, at 613.

[FN179]. Position Paper of the Soc'y for Adolescent Med., *supra* note 9, at 388.

[FN180]. They also remember being paddled in school. One law professor friend of mine who was paddled in a Colorado school in the 1970s 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." Interview with Fred Galves, Professor of Law, University of the Pacific, McGeorge School of Law.

[FN181]. See Frederick E. John, [Child Abuse - The Battered Child Syndrome, 2 Am. Jur. Proof of Facts 2d 365](#) (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 151, at 636-39. It is known that because corporal punishment is not effective and caregivers increase the physical punishment when it does not work, corporal punishment is a precursor to child abuse. *Id.* at 621.

[FN182]. Gershoff & Bitensky, *supra* note 43, at 239; Gershoff, *supra* note 153, at 542, 550-51. 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. See Murray A. Straus, Cross-Cultural Reliability and Validity of the Revised Conflict Tactics Scales: A Study of University Student Dating Couples in 17 Nations, 38 *Cross-Cultural Res.* 407, 413, 424-26 (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. Interpers. Violence* 244, 253 (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).

[FN183]. See T.W. Adorno et al., *The Authoritarian Personality: Studies in Prejudice* 384-89 (Harper & Row 1950); Bernard Spilka et al., *The Psychology of Religion: An Empirical Approach* 99 (2003).

[FN184]. See Bauer et al., *supra* note 8, at 291 (discussing adverse effects of school corporal punishment and discriminatory administration of its use); *supra* note 180.

[FN185]. 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 Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2005*, www.ojp.gov/bjs/abstract/pjim05.htm (last visited Apr. 6, 2009); Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2004*, www.ojp.gov/bjs/abstract/pjim04.htm (last visited Apr. 6, 2009); Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2003*, www.ojp.gov/bjs/abstract/pjim03.htm (last visited Apr. 6, 2009); see also D. Arcus, *School Shooting Fatalities and School Corporal Punishment: A Look at the States*, 28 *Aggress. Behav.* 173, 175 (2002).

[FN186]. See Straus, *supra* note 169, at 837 (explaining United States is most violent of advanced industrialized nations, with homicide rate three times that of Canada and eight times that of Western European countries).

[FN187]. See *supra* notes 166-76 and accompanying text.

[FN188]. See, e.g., Murray A. Straus, Emily Douglas & Rose Anne Medeiros, *Corporal Punishment by Mothers and Development of Children's Cognitive Ability: A Longitudinal Study of Two Nationally Representative Age Cohorts*, in *The Primordial Violence: Corporal Punishment by Parents, Cognitive Development, and Crime* (forthcoming). Researchers tested the theory on 806 children ages two to four and 704 children ages five to nine in the first year. Researchers identified the presence of corporal punishment by observing whether the mother hit the child during an interview and by asking questions about the frequency of spanking in the prior week. They tested cognitive ability 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. Researchers found similar depressed IQ test scores 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. Researchers 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 influence 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.

[FN189]. See Smith & Brooks-Gunn, *supra* note 188.

[FN190]. See 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).

[FN191]. See D. Cicchetti & F. A. Rogosch, *The Impact of Child Maltreatment and Psychopathology on Neuroendocrine Functioning*, 13 *Dev. & Psychopathology* 783, 785 (2001); Hillary K. Mead, Theodore P. Beauchaine & Katherine E. Shannon, *Neurobiological Adaptations to Violence Across Development*, *Dev. & Psychopathology* (forthcoming); R. M. Sapolsky, *Stress Hormones: Good and Bad*, 7 *Neurobiology of Disease* 540 (2000); Heather A. Turner & David Finkelhor, *Corporal Punishment as a Stressor Among Youth*, 58 *J. Marriage & Fam.* 155, 163-65 (1996).

[FN192]. Straus, *supra* note 154, at 138 (citing M.E.P. Seligman & G. Garber, *Human Helplessness* (1982)); see J. Eckenrode, M. Laird & J. Doris, *School Performance and Disciplinary Problems Among Abused and Neglected Children*, 29 *Dev. Psychol.* 53, 53 (1993); see also Murray A. Straus & Anita K. Mathur, *Paper Presented at the Annual Meeting of the Pacific Sociological Association in San Francisco, Cal.: Corporal Punishment of Adolescents and Academic Attainment* 6 (Apr. 7, 1995) (transcript available at University of New Hampshire Family Research Laboratory).

[FN193]. Mark H. Johnson, *Into the Minds of Babes*, *Science*, Oct. 8, 1999, at 247. Cognitive learning theory is based on the concept that learning occurs in "layers," such that early childhood 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, effects frontal areas of the brain that are important to long-term planning, thereby affecting 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 Wash., in Seattle, Wash. (July 17, 2008) (notes on file with author); see also Pollard, *supra* note 49, at 917-25 (discussing nature of stereotyping and cognitive bias, including creation and destruction of schemas).

[FN194]. Interview with Theodore P. Beauchaine, *supra* note 193.

[FN195]. Position Paper of the Soc'y for Adolescent Med., *supra* note 9, at 388 (citations omitted).

[FN196]. Bauer et al., *supra* note 8, at 288.

[FN197]. Position Paper for the Soc'y of Adolescent Med., *supra* note 9, at 388.

[FN198]. 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. Interview with Amber Winborn, in Houston, Tex. (Apr. 17, 2008) (recounting story of her younger brother's injury). When the school bell rang, he ran home to tell his mother what had happened to him, but was so upset that he ran in front of a truck, which struck him. *Id.* He sustained an injury to his head resulting in permanent scars. *Id.* He arrived home covered with blood, which his mother and little sister witnessed. *Id.*

[FN199]. See Human Rights Watch/ACLU, *supra* note 8, at 25-26; The Center for Effective Discipline, *Discipline at School* (NCACPS), [http:// www.stop hitting.com/index.php?page=testimonyagainst](http://www.stop hitting.com/index.php?page=testimonyagainst) (last visited Apr. 6, 2009).

[FN200]. Interview with Theodore P. Beauchaine, *supra* note 193.

[FN201]. Position Paper for the Soc'y of Adolescent Med., *supra* note 9, at 388.

[FN202]. Bauer et al., *supra* note 8, at 292.

[FN203]. See, e.g., Murray A. Straus, Emily M. Douglas & Rose Anne Medeiros, *The Primordial Violence: Corporal Punishment by Parents, Cognitive Development, and Crime* (forthcoming) (studying effects of parental spanking).

[FN204]. S.O. Lichter et al., *The Drop Outs* 175 (1962); Adam Maurer, *Paddles Away: A Psychological Study of Physical Punishment in Schools* 90-92 (1981); Ralph S. Welsh, *Delinquency, Corporal Punishment, and the Schools*, *Crime & Delinq.* 336-54 (1978).

[FN205]. See, e.g., [Pierce v. Soc'y of Sisters, 268 U.S. 510 \(1925\)](#) (invalidating law prohibiting private education between ages eight and 16 as unconstitutional interference with parents' rights to control their children's education, as there is nothing inherently harmful about private schooling, rendering state prohibition of such unconstitutional); [Meyer v. Nebraska, 262 U.S. 390 \(1923\)](#) (invalidating law prohibiting teaching foreign languages to children prior to eighth grade as depriving teachers and parents of liberty without due process of law); [Allgeyer v. Louisiana, 165 U.S. 578 \(1897\)](#) (invalidating state economic regulation based on "liberty" of contract, foreshadowing Lochner era); *infra* Part IV.C.

[FN206]. This disorder is symptomatically analogous to Post-Traumatic Stress Disorder. See Position Paper for the Soc'y of Adolescent Med., *supra* note 9, at 388.

[FN207]. M. K. Eamon, Antecedents and Socioemotional Consequences of Physical Punishment on Children in Two-Parent Families, 25 *Child Abuse & Neglect* 787, 787-802 (2001); Gershoff & Bitensky, *supra* note 43, at 238-39 (citations omitted); Gershoff, *supra* note 153, at 541, 550-51 (citations omitted); T. F. Lau et al., The Relationship Between Physical Maltreatment and Substance Use Among Adolescents: A Survey of 95,788 Adolescents in Hong Kong, 37 *J. Adolescent Health* 110-19 (2005); C. M. Rodriguez, Parental Discipline and Abuse Potential Effects on Child Depression, Anxiety, and Attributions, 65 *J. Marriage & Fam.* 809, 810 (2003); A. C. Steely & R. P. Rohner, Relations Among Corporal Punishment, Perceived Parental Acceptance, and Psychological Adjustment in Jamaican Youths, 40 *Cross-Cultural Res.* 268, 269 (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, 761-62 (2004). In 1999, Canadian researchers released the results of a study with nearly 10,000 participants, ages 15 to 64, to determine whether a relationship existed 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, 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 806-08; see Bauer et al., *supra* note 8, at 290 (showing that 10% of paddled students had Post-Traumatic Stress Disorder as result of school corporal punishment); 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); 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); Turner & Muller, *supra*, at 761.

[FN208]. D.B. Bugental, G.A. Martorello & V. Barraza, The Hormonal Costs of Subtle Forms of Infant Maltreatment, 43 *Hormones and Behav.* 237, 237-44 (2003).

[FN209]. R.D. Lutzman & R. R. Swisher, The Interactive Relationship Among Adolescent Violence, Street Violence, and Depression, 33 *J. Comm. Psychol.* 355, 359 (2005); see also Mead, Beauchaine & Shannon, *supra* note 191.

[FN210]. J. Csorba et al., Family- and School-Related Stresses in Depressed Hungarian Children, 16 *Eur. Psychiatry* 18, 25 (2001).

[FN211]. Ronald C. Kessler & William J. Magee, Childhood Family Violence and Adult Recurrent Depression, 35 *J. Health & Soc. Behav.* 13, 13-27 (1994); J. Strauss 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, 18 (2004).

[FN212]. See Position Paper of the Soc'y for Adolescent Med., *supra* note 9, at 388. 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 misconduct." [Wise v. Pea Ridge Sch. Dist., 675 F. Supp. 1524, 1531 & n.1 \(W.D. Ark. 1987\)](#), aff'd, [855 F.2d 560 \(8th Cir. 1988\)](#).

[FN213]. See Stanley Coopersmith, *The Antecedents of Self-Esteem* 178-79 (1967); MacMillan, supra note 207, at 805.

[FN214]. [Meyer v. Nebraska, 262 U.S. 390, 399 \(1923\)](#).

[FN215]. See Am. Acad. of Pediatrics, supra note 151, at 853.

[FN216]. Position Paper for the Soc'y of Adolescent Med., supra note 9, at 388 (citations omitted) (emphasis added).

[FN217]. Karst, supra note 148, at 108; see also [Planned Parenthood v. Casey, 505 U.S. 833, 861-62 \(1992\)](#) (explaining that 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, 505 U.S. at 863](#) (emphasis added). 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. Bd. of Educ., 347 U.S. 483, 494 & n.11 \(1952\)](#). *Brown* was an equal protection case, 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, 505 U.S. at 862-63](#).

[FN218]. [Planned Parenthood, 505 U.S. at 855](#).

[FN219]. See, e.g., [Pierce v. Soc'y of Sisters, 268 U.S. 510 \(1925\)](#) (invalidating law prohibiting private education between ages eight and 16 as unconstitutional interference with parents' rights to control their children's education, as there is nothing inherently harmful about private schooling, rendering state prohibition of such unconstitutional); [Meyer, 262 U.S. 390](#) (invalidating law prohibiting teaching foreign languages to children prior to eighth grade as depriving teachers and parents of liberty without due process of law); [Allgeyer v. Louisiana, 165 U.S. 578 \(1897\)](#) (invalidating state economic regulation based on "liberty" of contract, foreshadowing Lochner era).

[FN220]. See, e.g., [Planned Parenthood, 505 U.S. 833](#) (rejecting *Roe v. Wade* strict scrutiny test in favor of "undue burden" test for constitutionality of state regulation of abortion); [Roe v. Wade, 410 U.S. 113 \(1973\)](#) (holding that where certain "fundamental rights" are involved, legislative regulation infringing on those rights can be justified only by compelling state interest and legislative enactments must be narrowly drawn to express only legitimate state interests at stake); [Griswold v. Connecticut, 381 U.S. 479, 485 \(1965\)](#) (holding that "zone[s] of privacy created by several fundamental constitutional guarantees" are protected from state law).

[FN221]. See, e.g., [Lawrence v. Texas, 539 U.S. 558 \(2003\)](#) (invalidating criminal sodomy law as unconstitutional infringement on individual liberty); [Moore v. City of East Cleveland, 431 U.S. 494 \(1977\)](#) (invalidating city zoning ordinance in recognition of fundamental right of extended families to live together); [Griswold, 381 U.S. 479](#) (invalidating law restricting sale of contraceptives because it violated fundamental right of privacy guaranteed to married persons by Constitution).

[FN222]. [Lawrence, 539 U.S. at 578](#).

[FN223]. See [Goss v. Lopez, 419 U.S. 565, 574-75 \(1975\)](#); [Roe, 410 U.S. at 152-53](#).

[FN224]. [Allgeyer, 165 U.S. at 589](#) (invalidating state economic regulation based on "liberty" of contract, foreshadowing Lochner era).

[FN225]. [Meyer v. Nebraska, 262 U.S. 390, 399-400 \(1923\)](#).

[FN226]. See [Lawrence, 539 U.S. at 567](#); [Planned Parenthood v. Casey, 505 U.S. 833, 843 \(1992\)](#); [Griswold, 381 U.S. at 484-86](#). 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. See [Roe, 410 U.S. at 153](#).

[FN227]. See [Bowers v. Hardwick, 478 U.S. 186, 205 \(1986\)](#) (Blackmun, J., dissenting); [Morrissey v. Brewer, 408 U.S. 471, 482 \(1972\)](#) (protecting association with friends and family).

[FN228]. [Lawrence, 539 U.S. at 572](#) (protecting relationship choices); [Parham v. J.R., 442 U.S. 584, 619-20 \(1979\)](#) (protecting parent-child relationship); [Moore v. City of East Cleveland, 431 U.S. 494, 503-04 \(1977\)](#) (explaining that families serve to pass down moral and cultural values and provide economic support).

[FN229]. [Goss v. Lopez, 419 U.S. 565, 584 \(1975\)](#) (protecting students from stigma resulting from suspension); see, e.g., [Lawrence, 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, 410 U.S. at 152-53](#) (protecting women from stigma of unwed motherhood).

[FN230]. As stated by Justice O'Connor, "[b]ecause our notions of liberty are inextricably entwined 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. Dir., Mo. Dep't of Health, 497 U.S. 261, 287 \(1990\)](#) (O'Connor, J., concurring).

[FN231]. See, e.g., [Winston v. Lee, 470 U.S. 753, 767 \(1985\)](#) (holding that forced extraction of bullet from muscle is violation of due process due to degree of risk and pain involved); [Schmerber v. California, 384 U.S. 757, 772 \(1966\)](#) (deeming forced blood alcohol test constitutional due to minimal pain and invasion and state's need for evidence that would quickly disappear); [Rochin v. California, 342 U.S. 165, 172-73 \(1952\)](#) (holding forced stomach pumping to obtain evidence of suspect's drug possession and ingestion unconstitutional because it "shocked the conscience" of Court).

[FN232]. For example, the Court has reviewed the level of risk involved in forced immunization, see [Jacobson v. Massachusetts, 197 U.S. 11, 39 \(1905\)](#), extracting a bullet from muscle tissue, [Winston, 470 U.S. at 766](#), and forcing a woman to bear a child, [Planned Parenthood v. Casey, 505 U.S. 833, 896 \(1992\)](#) (stating that prohibiting abortion invades "private sphere of the family [and] ... bodily integrity of the pregnant woman").

[FN233]. See [Ingraham v. Wright, 430 U.S. 651, 674 \(1977\)](#).

[FN234]. See, e.g., [Youngberg v. Romeo, 457 U.S. 307, 317-18 \(1997\)](#) (holding retarded adult has right to freedom from bodily restraint); [Parham v. J.R., 442 U.S. 584, 600 \(1979\)](#) (holding child has substantial liberty interest in not being confined unnecessarily for medical treatment).

[FN235]. See supra notes 18, 31-32.

[FN236]. See supra Parts IV.B.2-B.4.

[FN237]. [Washington v. Glucksberg](#), 521 U.S. 702, 710-11 (1997) (quoting [Stanford v. Kentucky](#), 492 U.S. 361, 373 (1989)). Also, in *Roe v. Wade*, the Court noted 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. 113, 143 \(1973\)](#) (explaining that A.M.A. finding "trend" to make abortion more available); see also [id. at 154](#) (pointing out that most recent challenges to state abortion laws had been successful).

[FN238]. See, e.g., [Lawrence v. Texas](#), 539 U.S. 558, 573 (2003) (discussing norms reflected by state law trends).

[FN239]. See, e.g., [Greenholtz v. Inmates of Neb. Penal & Corr. Complex](#), 442 U.S. 1 (1979) (explaining that state law created expectations in parole opportunities that could not be denied without due process); [Wolff v. McDonnell](#), 418 U.S. 539 (1974) (holding that liberty interests in penal "good time" credits may be created by state laws, such that deprivation of credits required compliance with due process).

[FN240]. 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](#), 399 U.S. 78, 103 (1970) (holding Sixth Amendment requirement of unanimous 12-member jury verdict not incorporated to states); [Benton v. Maryland](#), 395 U.S. 784, 794-95 (1969) (holding that Fourteenth Amendment prohibits double jeopardy consistent with Fifth Amendment analysis, overruling *Palko v. Connecticut*, which held that states could subject criminals to double jeopardy despite Fifth Amendment's prohibition of such by federal government); see also [United States v. Carolene Products](#), 304 U.S. 144, 150 n.3 (1938) (explaining that 35 states had restricted 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 a historical and traditional "right" to sodomy. [478 U.S. 186, 196 \(1986\)](#). 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." [Id. at 194, 196](#). The *Washington v. Glucksberg* Court found that the "majority" of states criminalize assisted suicide and relied in part on this fact to find no fundamental right to assisted suicide. 521 U.S. at 711 (explaining that 44 states and District of Columbia, as well as two territories, prohibit or condemn assisted suicide).

[FN241]. [Williams](#), 399 U.S. at 103 (explaining that all states require 12-member jury to impose death sentence); [Benton](#), 395 U.S. at 794-95 (noting that all states prohibited double jeopardy).

[FN242]. See, e.g., [Lawrence](#), 539 U.S. at 573 (invalidating criminal sodomy law as unconstitutional infringement on individual liberty).

[FN243]. [Benton](#), 395 U.S. at 794-95.

[FN244]. [Roe v. Wade](#), 410 U.S. 113, 116, 130-40 (1973).

[FN245]. [Lawrence](#), 539 U.S. at 579.

[FN246]. [Id. at 571-72](#) ("[W]e think that our laws and traditions in the past half century are of 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."); [Roe](#), 410 U.S. at 154 (finding legal trend to protect right to abortion).

[FN247]. See [Lawrence](#), 539 U.S. at 577 (citing [Planned Parenthood v. Casey](#), 505 U.S. 833, 855-56 (1992)). 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.

[FN248]. See [Ingraham v. Wright, 430 U.S. 651, 660-63 \(1977\)](#) (holding school paddling does not violate Eighth Amendment and students have no procedural due process rights prior to being paddled).

[FN249]. See The Center for Effective Discipline, [Discipline at School \(NCACPS\), http://www.stophitting.com/index.php?page=legalinformation](http://www.stophitting.com/index.php?page=legalinformation) (last visited Apr. 6, 2009).

[FN250]. See SurveyUSA--50 State Discipline Child 0805 Sorted by Teacher, <http://www.surveyusa.com/50StateDisciplineChild0805SortedbyTeache> (last visited Apr. 6, 2009). Predictably, support for school paddling is stronger among southern and other paddling states.

[FN251]. See, e.g., Pollard-Sacks, *supra* note 121, at 1587-89 (discussing Supreme Court's use of foreign and international law to interpret Constitution). 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. 11, 31-33 \(1905\)](#). 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. 702, 711 n.8 \(1997\)](#).

[FN252]. See, e.g., [Roper v. Simmons, 543 U.S. 551, 604 \(2005\)](#) (finding that imposing death penalty on juveniles violated Eighth Amendment in part based on "stark reality that the United States is the only country in the world" that sanctions juvenile death penalty, and noting that United States is one of only two countries that has failed to ratify United Nations Convention on Rights of the Child--other country being Somalia); see also [Atkins v. Virginia, 536 U.S. 304, 312, 316 n.21 \(2002\)](#) (explaining that within "world community," imposing death penalty for crimes committed by mentally retarded persons is overwhelmingly disapproved, which supported Court's finding of "national consensus").

[FN253]. See [Atkins, 536 U.S. at 322-23](#) (Rehnquist, J., dissenting) (holding that imposing death penalty on mentally retarded persons is unconstitutional based in part on national consensus grounded in opinion polls and views of professional and religious organizations, *inter alia*); [id. at 347](#) (Scalia, J., dissenting); Ernest A. Young, [Foreign Law and the Denominator Problem, 119 Harv. L. Rev. 148 \(2005\)](#) (arguing that considering foreign policy may be persuasive authority in constitutional decisions, but "counting noses" of countries opposed to capital punishment accords undue authoritative value to foreign law in interpreting American Constitution). 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 149-53](#).

[FN254]. See, e.g., [Roper, 543 U.S. at 604](#) (O'Connor, J., dissenting) ("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.") (citations omitted).

[FN255]. See *infra* note 257.

[FN256]. In 2004, the Canadian high court issued a decision that school paddling violates the Canadian Constitution. See *Canadian Found. for Children, Youth & the Law v. Attorney Gen. in Right of Can.*, [2004] S.C.R. 257 (Can.). 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 came before the House of Commons, where it is currently held up in the political process. 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 Elizabeth Thompson, *Senate Passes Anti-Spanking Bill*, *OttawaCitizen.com*, June 19, 2008, <http://www.canada.com/ottawacitizen/news/story.html?id=88e9ab59-fc84-4c68->

94cd-e379d90aea39.

[FN257]. By the year 2006, the following countries prohibited 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, and Zambia. See Gershoff, E. T., Report on Physical Punishment in the United States: What Research Tells Us About Its Effects on Children. Columbus, OH: Center for Effective Discipline 38 (2008); The Center for Effective Discipline, Discipline and the Law, <http://www.stophitting.com/index.php?page=laws-main> (last visited Apr. 6, 2009).

[FN258]. The UN Study on Violence Against Children set 2009 as the deadline for all Member States to ban all corporal punishment of children. See Child Rights Information Network, Violence Against Children: New NGO Advisory Council for Follow-Up to the UN Study, May 11, 2007, www.crin.org/violence/search/closeup.asp?infoID=13320. The following countries have banned all 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), Greece (2006), Netherlands (2007), New Zealand (2007), Portugal (2007), Spain (2007), Chile (2007), Uruguay (2007), Venezuela (2007), and Costa Rica (2008). See Gershoff, supra note 257, at app. C; The Center for Effective Discipline, supra note 257; Child Rights Information Network, Crinmail 995, July 1, 2008, http://crin.org/email/crinmail_detail.asp?crinmailID=2831 (last visited Apr. 6, 2009); see also Pollard, supra note 151, at 587-91. 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 an antispanking resolution. See Jessica Fargen, Brookline Man Strikes Gold in Crusade vs. Spanking, Boston Herald, May 28, 2005, <http://www.corpun.com/usd00505.htm#15863>; Spanking Illegal in Massachusetts?, TheBostonChannel.com, June 8, 2005, <http://www.thebostonchannel.com/news/4582708/detail.html?subid=22100410&q=1;bp=t>.

[FN259]. See Susan H. Bitensky, Corporal Punishment of Children: A Human Rights Violation 116 (Transnat'l Publishers 2006).

[FN260]. See Gershoff & Bitensky, supra note 43, at 242; Margaret Schaefer, German Parliament Bans Use of Corporal Punishment in Child Rearing, Project NoSpank, July 24, 2000, <http://www.nospank.net/deut.htm>.

[FN261]. 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 259, at 116. The United States has ratified and is therefore a party solely to the ICCPR and the Torture Convention. See Gershoff & Bitensky, supra note 43, at 242. Both of these treaties have been interpreted as calling for an end to physical punishment of children in all forms. See Bitensky, supra note 259, at 116.

[FN262]. 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 County Dep't of Soc. Servs.](#), 489 U.S. 189, 191 (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 paddling.

[FN263]. 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 nonviable. See [Ingraham v. Wright](#), 430 U.S. 651, 652 (1977). The Ninth Amendment provides textual authority to protect nontextual rights, such as the rights of privacy, dignity, and autonomy. See [Griswold v. Connecticut](#), 381 U.S. 479, 486-99 (1965) (Goldberg, J., concurring); David R. Hague, [The Ninth Amendment: A Constitutional Challenge to Corporal Punishment in Public Schools](#), 55 U. Kan. L. Rev. 429, 430 (2007). However, the Court has largely ignored the Ninth Amendment, so it may also be nonviable as a practical reality.

[FN264]. [Plyler v. Doe](#), 457 U.S. 202, 213 (1982).

[FN265]. See [Lawrence v. Texas](#), 539 U.S. 558, 575 (2003) ("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, e.g., [Zablocki v. Redhail](#), 434 U.S. 374 (1978) (finding right to marry unenumerated right in liberty clause with Justice Powell's concurring opinion resting on equal protection grounds).

[FN266]. "[T]he 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, e.g., [Bolling v. Sharpe](#), 347 U.S. 497, 498-99 (1953) (explaining that although Fifth Amendment does not contain Equal Protection Clause, discrimination by federal government may violate due process because concepts of equal protection and due process both stem from "American ideal of fairness").

[FN267]. The Court first articulated the dual standard of review in a footnote in [United States v. Carolene Products](#), 304 U.S. 144, 152-54 & n.4 (1938) (holding that judiciary should review state laws protecting public health with extreme deference, but should engage "more exacting judicial scrutiny" where state laws impinge on fundamental rights or prejudice politically powerless groups). See also [Roe v. Wade](#), 410 U.S. 113, 155 (1973) ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these 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.") (citations omitted).

[FN268]. To the contrary, rational basis review gives economic regulation extreme deference. See [Pension Benefit Guar. Corp. v. R.A. Gray & Co.](#), 467 U.S. 717, 730 (1984) (upholding retroactive application of liability for pensions pursuant to federal law); Chemerinsky, *supra* note 99, at 625-28. 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) (deeming police physical appearance regulations constitutional).

[FN269]. See, e.g., [Cruzan v. Dir., Mo. Dep't of Health](#), 497 U.S. 261 (1990) (establishing liberty embodies constitutional right to reject lifesaving medical treatment, a.k.a., "right to die"); [Youngberg v. Romeo](#), 457 U.S. 307, 315-16 (1982) (holding that states owe duty of care to provide basic medical services to persons who are in states' custody). 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'y Rev. 23, 25-27 (2005).

[FN270]. 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. 833, 874 \(1992\)](#).

[FN271]. In *Troxel v. Granville*, the Court struck down a child visitation provision that 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. [530 U.S. 57, 61, 72-73 \(2000\)](#). 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." [539 U.S. 558, 578 \(2003\)](#).

[FN272]. See, e.g., [Lawrence, 539 U.S. at 586](#) (Scalia, J., dissenting) (noting that majority invalidated Texas sodomy statute but declined to declare "fundamental right" to homosexual sodomy); see also Laurence H. Tribe, [Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name, 117 Harv. L. Rev. 1893, 1936 \(2004\)](#).

[FN273]. See, e.g., [Troxel, 530 U.S. at 80](#) (Thomas, J., concurring) (noting that plurality opinion invalidates parental visitation statute as violating "fundamental right of parents to direct upbringing of their children" without articulating any standard of review); [Planned Parenthood, 505 U.S. at 833](#).

[FN274]. [262 U.S. 390, 399-400 \(1923\)](#).

[FN275]. [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.](#)

[FN276]. [268 U.S. 510, 534 \(1925\)](#).

[FN277]. [431 U.S. 494, 494 \(1977\)](#).

[FN278]. [Id. at 499](#) (citing [Poe v. Ullman, 367 U.S. 497, 554 \(1961\)](#) (Harlan, J., dissenting)).

[FN279]. [Id. at 494, 499-500, 509-11 nn.6-10](#).

[FN280]. [497 U.S. 261, 261 \(1990\)](#).

[FN281]. [Id. at 280-84](#).

[FN282]. [Id.](#); see, e.g., [Youngberg v. Romeo, 457 U.S. 307, 315-16 \(1982\)](#) (holding that states owe duty of care to provide basic medical services to persons who are in states' custody).

[FN283]. [521 U.S. 702, 705-06 \(1997\)](#).

[FN284]. [Id. at 732](#).

[FN285]. [Id. at 732-33](#).

[FN286]. [Id. at 734](#) (citations omitted); see also, [Michael H. v. Gerald G., 491 U.S. 110, 110 \(1989\)](#). 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 rela-

tionship. *Id.* at 127. In determining whether the law was arbitrary under rational basis review, the Court analyzed two state policies that it determined the law, which presumed that a woman's husband is the father of her baby, actually promoted: the policy of "promoting the 'peace and tranquillity [sic] of States and families,'" a goal that is "obviously impaired by facilitating suits against husband and wife asserting that their children are illegitimate." *Id.* at 125. But see [Bowers v. Hardwick, 478 U.S. 186, 196 \(1986\)](#) (determining that no fundamental right to sodomy exists, applying rational basis review in perfunctory five-sentence analysis, and upholding law); see also Pollard-Sacks, *supra* note 121, at 1588 n.275 (criticizing Michael H. Court's analysis of nexus between law and state's goals).

[FN287]. [Lawrence v. Texas, 539 U.S. 558, 564-73 \(2003\)](#).

[FN288]. [Id. at 575-76](#).

[FN289]. [Id. at 578](#).

[FN290]. [Id. at 572-73](#) (cataloging states that criminalized sodomy in 1961 (all 50) to time of Bowers (24 plus District of Columbia in 1986) to time of Lawrence (13 in 2003)).

[FN291]. [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 in an objective analysis grounded the Lawrence Court in reality because the objective facts revealed a real life consensus that overwhelmingly militated in favor of recognizing Lawrence's claimed liberty right. 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.

[FN292]. The Court explicitly adopted Stevens's dissent in Bowers to characterize the nature of the liberty at stake. See *id.* at 577-78 (quoting [Bowers v. Hardwick, 478 U.S. 186, 216 \(1986\)](#) (Stevens, J., dissenting)).

[FN293]. *Id.* 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. 186, 209 n.3 \(1986\)](#) (Blackmun, J., dissenting).

[FN294]. See *supra* Part IV.B.

[FN295]. [Jackson v. Bishop, 404 F.2d 571, 579-80 \(8th Cir. 1968\)](#).

[FN296]. [Plyler v. Doe, 457 U.S. 202, 222 \(1982\)](#).

[FN297]. 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 151, at 635-44 nn.379-80, 396-97, 412, 425, and accompanying text. See generally Dan B. Dobbs, *The Law Of Torts* 52-54, 155-256 (2000).

[FN298]. See [H.C. v. Jarrard, 786 F.2d 1080, 1085-86 \(11th Cir. 1986\)](#) (holding that shoving 16-year-old juvenile detainee violated due process even though school corporal punishment is routine in numerous states).

[FN299]. See [Ingraham v. Wright, 430 U.S. 651, 660-61 & n.15 \(1977\)](#) (citing [Jackson v. Bishop, 404 F.2d 571, 580 \(8th Cir. 1968\)](#)); see also [id. at 685 n.1](#) (White, J., dissenting); [Samuel v. Busnuck, 423 F. Supp. 99, 101 \(D.C. Md. 1976\)](#) (citing

[Williams v. United States, 341 U.S. 97, 101 \(1951\)](#); [Screws v. United States, 325 U.S. 91, 107 \(1945\)](#)); 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. 2-3 (TRADOC Reg. 350-6) (May 8, 2007).

[FN300]. [Ingraham, 430 U.S. at 689](#) (White, J., dissenting). A review of the leading 30 industrialized nations reveals that none allow corporal punishment of prisoners, and only three (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 (2003), available at <http://www.unicef-irc.org/publications/pdf/repcard5e.pdf> (last visited Apr. 2009).

[FN301]. See, e.g., [Plyler, 457 U.S. at 223-24](#) (finding that minor students do not constitute suspect class despite recognizing that they cannot vote and might be considered politically powerless to extreme degree and that equal protection analysis requires that discriminatory statute further some "substantial goal of the state" to be considered "rational"). The Court's language arguably implied a "quasi-suspect" class and intermediate level of scrutiny. See [id. at 216-18 nn.14-16](#); see also Chemerinsky, *supra* note 99, at 714-17.

[FN302]. See [Plyler, 457 U.S. at 218 n.15](#) (citing [Dunn v. Blumstein, 405 U.S. 330, 336 \(1972\)](#)); [Harper v. Va. Bd. of Elections, 383 U.S. 663, 667 \(1966\)](#); [Loving v. Virginia, 388 U.S. 1, 8-9 \(1967\)](#). The three tiers are strict scrutiny, intermediate scrutiny, and rational basis. See [Plyler, 457 U.S. at 216-18 nn.15-16](#).

[FN303]. See [City of Cleburne, Texas v. Cleburne Living Ctr., 473 U.S. 432, 451 \(1985\)](#) ("[O]ur cases reflect a continuum of judgmental responses to differing classifications which have been explained in opinions by terms ranging from 'strict scrutiny' at one extreme to 'rational basis' at the other."); Suzanne B. Goldberg, [Equality Without Tiers, 77 S. Cal. L. Rev. 481, 482 \(2004\)](#); Jeffrey Shaman, [Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny, 45 Ohio St. L.J. 161, 162-63 \(1984\)](#); see also [San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 99 \(1973\)](#) (Marshall, J., dissenting) (finding level of scrutiny "comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn").

[FN304]. 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, 457 U.S. at 216 n.14](#); see also [Lawrence v. Texas, 539 U.S. 558, 585 \(2003\)](#) (O'Connor, J., concurring) (quoting [Ry. Express Agency Inc. v. New York, 336 U.S. 106, 112-13 \(1949\)](#) (Jackson, J., concurring) ("[N]othing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they 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 militate in favor of careful judicial scrutiny of laws that single out children for physically painful and injurious state action.

[FN305]. "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, 539 U.S. at 580](#) (O'Connor, J., concurring). But note that equal protection challenges to classifications affecting 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., [FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 \(1993\)](#) (holding that challenger bears burden of negating every conceivable basis of support for law under rational basis review); [U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 188 \(1980\)](#) (same).

[FN306]. [Romer v. Evans, 517 U.S. 620, 632 \(1996\)](#); see, e.g., [City of Cleburne, 473 U.S. at 435](#) (criticizing zoning ordinance discriminating against mentally retarded under rational basis review); [Plyler, 457 U.S. at 205](#) (analyzing critically 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).

[FN307]. See [Plyler, 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 304 and accompanying text.

[FN308]. See [City of Cleburne, 473 U.S. at 450](#) ("[The zoning ordinance [r]equiring the permit in this case appears to rest on an irrational prejudice 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 as well as under [Texas law. See 539 U.S. at 579-85](#) (O'Connor, J., concurring).

[FN309]. [517 U.S. 620 \(1996\)](#).

[FN310]. [Id. at 635](#).

[FN311]. The amendment purportedly denied gays "special rights," so that state resources could be preserved to "fight discrimination against suspect classes." [Id. at 630-31](#).

[FN312]. [Id. at 633](#).

[FN313]. [Id. at 634](#). The breadth of the law revealed a desire to harm homosexuals. [Id. at 632](#).

[FN314]. [Plyler v. Doe, 457 U.S. 202, 216 n.14 \(1982\)](#).

[FN315]. See, e.g., Straus, *supra* note 154, at 3; Deana A. Pollard, [Banning Corporal Punishment: A Constitutional Analysis, 52 Am. U. L. Rev. 447, 477-78 nn.159-68 \(2002\)](#) (citing Philip Greven, *Spare The Child* (2d ed. 1992)) (arguing that state ban on child corporal punishment would survive constitutional scrutiny); Mason P. Thomas, *Child Abuse & Neglect, Part I: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C. L. Rev. 293 (1972).

[FN316]. See [Ingraham v. Wright, 430 U.S. 651, 659 \(1977\)](#) (quoting [Ingraham v. Wright, 525 F.2d 909, 917 \(5th Cir. 1976\)](#)).

[FN317]. 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 Straus, *supra* note 154, at 3; 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).

[FN318]. See, e.g., Proverbs 23:13-14, 13:24. See generally Philip Greven, *Spare The Child* (2d ed. 1992).

[FN319]. See, e.g., Straus, *supra* note 154, at 52, 62-63 (explaining that children are naturally inclined not always to obey their parents, which is developmentally normal); see also Theodore Dix et al., *Autonomy and Children's Reactions to Being Controlled: Evidence That Both Compliance and Defiance May Be Positive Markers in Early Development*, 78 (4) *Child Development* 1204-21 (July/Aug. 2007).

[FN320]. See Pollard, *supra* note 151, at 579-80 (describing history of violence towards children, including capital punish-

ment of children who swore under colonial law).

[FN321]. 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 Pollard, *supra* note 151, at 610-11.

[FN322]. See [Wisconsin v. Yoder, 406 U.S. 205, 222 \(1972\)](#) (deciding religious freedom and 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).

[FN323]. See [Employment Div. v. Smith, 494 U.S. 872, 881 \(1990\)](#) (citing [Yoder, 406 U.S. 205](#)).

[FN324]. 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 childrearing that are conceptually irreconcilable with punitive, harsh childrearing. See Pollard, *supra* note 151, at 631-32 (citing Ephesians 6:4; Colossians 3:21; Matthew 18:1- 6, 10-14 (Rev. Am. Standard)).

[FN325]. 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* 24-62 (2002).

[FN326]. Disparate impact is insufficient to prove a constitutional violation. See [McCleskey v. Kemp, 481 U.S. 279, 312-13 \(1987\)](#); [Washington v. Davis, 426 U.S. 229, 239 \(1976\)](#). 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 49, at 913, 937- 46, 959-64 (discussing race-based stereotypes that are unconscious or factually inaccurate, but which give rise to attitudes and implicit bias about blacks).

[FN327]. See *Restatement, supra* note 34, § 150. 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 54, 65, and accompanying text.

[FN328]. See T. Ayllon & N.H. Axrin, *The Token Economy: A Motivational System for Therapy and Rehabilitation* 186-91 (1968); N. Cutts & N. Mosely, *Practical School Discipline and Mental Hygiene* 78 (1941); R. Dreikurs & L. Grey, *A New Approach to Discipline: Logical Consequences* 127-69 (1968); K. James, *Corporal Punishment in Public Schools* 9-10 (1963); E. Phillips, D. Weiner & N. Haring, *Discipline, Achievement, and Mental Health* 41 (1966).

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