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Corporal Punishment:

An Analysis of the Constitutionality of Domestic Corporal Punishment

***Abstract:** As contemporary society has increasingly recognized the independent rights of children, the acceptability of parental corporal punishment has been increasingly questioned. I argue that in light of modern research on the negative effects of corporal punishment, the New York law that sanctions parental corporal punishment is unconstitutional. In order to make this argument, the U.S. Supreme Court's interpretation of the Eighth Amendment protection against "cruel and unusual punishment" is analyzed. Factors used by the Court to determine whether a punishment is "cruel and unusual" are assessed in relation to corporal punishment.*

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Introduction

In 2008 the Supreme Court of Minnesota heard a case involving parental use of corporal punishment in the home. The twelve year old boy, G.F., had been leaving home without permission “numerous times” and refused to tell his parents the truth about where he had been going (In Re: The Welfare of the Children of N.F. and S.F.). The parents had attempted to correct G.F.’s behavior by taking away certain privileges and grounding the boy. When these methods failed to correct the behavior, the parents told G.F. that if he were to leave the home without permission again “he would be paddled once for each year of his age” (In Re: The Welfare of the Children of N.F. and S.F.).

Despite the threat, G.F. again left the house when he was instructed to go to bed. Upon returning fifteen to thirty minutes later, his father used “a small maple paddle” to strike the back of G.F.’s upper thighs “approximately twelve times with moderate force” (In Re: The Welfare of the Children of N.F. and S.F.). The imposed punishment caused G.F. to have “a temper tantrum” and the father responded with force, paddling G.F. again on the upper thighs twelve times with moderate force “for being disrespectful” (In Re: The Welfare of the Children of N.F. and S.F.). After this round of punishment, G.F. grabbed a knife and threatened to commit suicide, however, the father disarmed G.F. and paddled him an additional twelve times with moderate force (In Re: The Welfare of the Children of N.F. and S.F.). G.F. was then instructed to go to bed; however, he left the house once again without permission through his bedroom window and was found later that night walking on the street by the police (In Re: The Welfare of the Children of N.F. and S.F.). The Supreme Court of Minnesota found the parents not guilty of any illegal conduct, as the punishment of G.F. was not found severe enough to constitute child abuse (In Re: The Welfare of the Children of N.F. and S.F.).

G.F. is not alone in his experience of corporal punishment. A nationally representative survey of 1,000 parents of children ages one and two in the United States, published in 2004, found that 63% of the parents had used physical punishment (Gershoff & Bitensky, 2007). A second smaller study published in 2007 found that 65% of parents in the United States with children ages one and two had used corporal punishment against their child (Gershoff & Bitensky, 2007). The number of children who have been corporally punished only rises as they increase in age. A 2003 study following 21,000 children found that by the time they reached fifth grade, 80% had been corporally punished by their parents at some point (Gershoff & Bitensky, 2007).

This thesis will analyze the constitutionality of corporal punishment of children by their parents. Corporal punishment of minors has been an accepted right of parents since the founding of this nation and can be traced back to the beginning of civilization, however, an evolving understanding of children as distinct people, worthy of the same minimal human rights as adults, has caused other nations to question the legitimacy of the ancient practice and the same must be done in the United States. The evolving standards of moral decency regarding children's fundamental rights, coupled with modern research about the effectiveness of corporal punishment and the negative side effects result in a significant conclusion. Laws sanctioning domestic corporal punishment violate the Eighth Amendment "cruel and unusual punishment" clause of the United States Constitution.

While the majority of the arguments within this paper deal with the United States Constitution and therefore are applicable to the 49 states that permit "reasonable" corporal punishment, this thesis will argue specifically that the law permitting corporal punishment in New York State is unconstitutional. The New York Statute under attack is listed as a defense

against criminal liability in the state penal code, stating “The use of physical force upon another person which would otherwise constitute an offense is justifiable and not criminal under any of the following circumstances: 1. A parent, guardian or other person entrusted with the care and supervision of a person under the age of twenty-one or an incompetent person, and a teacher or other person entrusted with the care and supervision of a person under the age of twenty-one for a special purpose, may use physical force, but not deadly physical force, upon such person when and to the extent that he reasonably believes it necessary to maintain discipline or to promote the welfare of such person” (§ 35.10). This law directly permits parents to use violence that is not excessive against their children. Children therefore are not protected against physical injury in an equal manner with the rest of the state population.

The law violates the Eighth Amendment which states “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted” (U.S. Const. amend. VIII). Corporal Punishment of prisoners has already been deemed “cruel and unusual punishment,” and the fact that the same punishment is legally applied to children when considered overly cruel for criminals convicted of felonies makes little sense. The only United States Supreme Court case that has dealt directly with corporal punishment of children was *Ingraham v. Wright* in 1977. This case dealt with the legality of corporal punishment as a method of discipline in schools, and while the ability for a teacher to corporally punish students was upheld, the Eighth Amendment was found to be inapplicable since it has traditionally only dealt with criminal statutes (*Ingraham v. Wright*, at 664). This argument would not preclude the Amendment’s prohibition of domestic corporal punishment in New York where the law sanctioning corporal punishment is listed in the state’s penal code as a justification, and thus pertains to criminal statutes.

Beneficial Societal Impact

In addition to these legal arguments, banning corporal punishment would have a beneficial effect to society. In a large analysis of previous studies on the effects of corporal punishment published in 2002, Elizabeth Gershoff found that moderate corporal punishment was linked to decreased moral internalization, mental health, and parent-child relationship, with increased aggression, delinquent behavior, antisocial behavior, risk of child abuse, and risk of abusing one's own spouse and children (Gershoff, 2002, p. 544). Corporal punishment has been linked to increased rate of depression and suicide (Straus, 1994, p. 77). Furthermore, corporal punishment of children who later graduated with a college degree has been correlated with lower levels of occupational success and a lower income (Straus, 1994, p. 144). These effects take root during childhood and last into adulthood, resulting in greater societal problems that could be potentially decreased by prohibiting corporal punishment, as occurred in Sweden, the first country to pass a law against any form of corporal punishment against minors in 1979.

A 1999 Swedish study of the generation brought up while corporal punishment was illegal found a decrease in compulsory measures of social work intervention, meaning that despite new laws preventing parents from violently punishing their children, less children required forced intervention for their safety on behalf of the state (Durrant, 1999, p. 6). This effect was probably due to the significant reduction in corporal punishment rates subsequent to the ban. As parents realized that any violence against their children was not tolerated, they moved to alternate means of punishment.

The overall rate of crime committed by youth in Sweden subsequent the ban was found to remain stable, however, theft by children between ages 15 and 17 declined by 21% between 1975 and 1996 (Durrant, 1999, p. 6). The proportion narcotics crime suspects within the same

age group decreased by 75% percent between 1970 and 1996 (Durrant, 1999, p. 6). Overall usage of both alcohol and drugs by minors decreased after the ban, as did the rate of suicide (Durrant, 1999, p. 6). Cases of assault against young children by those in the age group 15-19 also decreased in the decade between 1984 and 1994 (Durrant, 1999, p. 6).

Many factors contribute to crime rate, drug usage, alcohol usage, and suicide rate, yet with the large amount of research that has determined corporal punishment to be correlated to increased personal traits that would contribute to alcohol usage, drug usage, and crime, coupled the findings of this Swedish study that compared a generation reared without corporal punishment against generations with corporal punishment, suggests that banning corporal punishment could be the cause. If so, banning corporal punishment would have similar positive societal effects everywhere.

Legislation v. Court Order

The Swedish method of banning corporal punishment through a legislative declaration with no specific punishment is no doubt the best means to make the transition. The legislative declaration was able to demonstrate to parents that the state disapproved of any use of violence against children, while not significantly hurting families where parents were found to corporally punish their children. When the Swedish law was passed, a public education campaign took place in order to inform the public both of the existence of the new law as well as the law's objectives (Durrant, 1999, p. 7). During this campaign, the Ministry of Justice carried out a highly expensive pamphlet distribution, providing a pamphlet to each Swedish household that had young children. The pamphlet contained information on the law as well as alternative disciplinary strategies that could be used in the event that a child misbehaved (Durrant, 1999, p. 8). During the two months following the ban, information about the law was also placed on milk

cartons, where it was hoped that the ban would become a topic of discussion at mealtime (Durrant, 1999, p. 8).

If the New York statute permitting corporal punishment was declared unconstitutional by the Supreme Court of the United States, there would be no public education campaign organized by the state. In addition, the law providing that corporal punishment is a proper justification for otherwise criminal behavior would be revoked, therefore, unlike in Sweden, there would be potential punishment for using violence against a child. The New York statute providing for third degree assault, which states “A person is guilty of assault in the third degree when: 1. With intent to cause physical injury to another person, he causes such injury to such person or to a third person; or 2. He recklessly causes physical injury to another person” would potentially apply to parents who corporally punish their child (Penal Law § 120.00).

Assault in the third degree is a class A misdemeanor in New York, meaning that those found guilty of the offense can theoretically face up to a year in prison. This would be a major objection for those arguing in favor of the current New York statute; however, there are means to avoid the problem. Just as the goal of the ban on corporal punishment in Sweden was to educate parents on corporal punishment and alternate means, ultimately with the hope of decreasing corporal punishment usage, increasing child safety, and allowing for earlier yet less coercive intervention by the state, the same would be the goal of banning corporal punishment in New York. The fact that a year in prison is the maximum sentence does not mean that it is the likely sentence. Through the plea bargaining process, the result of any prosecuted case of corporal punishment would most likely be a small fine.

Despite the fact that Sweden’s law carries no specific punishment and is primarily a declaration, Sweden can, and has prosecuted citizens for violating the prohibition on violence

against minors. The reason that the majority of cases in Sweden have not been prosecuted is not due to lack of authority, but due to selective enforcement. The fact that a law exists does not mean that law enforcement resources need to be spent investigating crimes, nor does it mean that charges need to be pressed. A law simply allows for the prosecution of crimes under special circumstances or more significant incidents. Thus, the fact that a court opinion ruling the New York statute permitting corporal punishment would result in corporal punishment existing as a punishable offense does not mean that families would be torn apart with parents sent to prison and children sent to foster homes.

As in Sweden, rather than greater family separation, the opposite would occur. Many children today are taken out of the custody of their legal guardians when the guardian oversteps the legitimate authority they have in child rearing. Although corporal punishment is legal in New York State, child abuse is not. An abused child as defined in part by the New York Family Court Act is “a child less than eighteen years of age whose parent or other person legally responsible for his care (i) inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ” (Family Court Act § 1012). Also illegal in New York, a neglected child, among other things, is defined as a child less than eighteen years of age whose parent or legal guardian has inflicted or allowed to be inflicted “excessive corporal punishment” (Family Court Act § 1012). Children throughout the state are taken from their homes because parents have committed these atrocities against their children.

Parents who have committed these acts against their children have surely lost the right to rear the children; however, banning corporal punishment will allow social workers and child

protective services to intervene at an earlier stage, thus preventing some of the child neglect and abuse that would otherwise be permitted to occur. The Swedish hoped that the ban on corporal punishment would similarly “encourage earlier intervention in cases of children at risk in order to make child welfare work more proactive and less reactive” (Durrant, 1999, p. 18). Likewise in New York, banning corporal punishment in the home would allow social workers to legally intervene earlier, but intervene in a way to correct the familial relationship before it has become uncorrectable. Thus, despite concerns that the family unit will be at risk subsequent a ban on corporal punishment, the reality is that a lower rate of families will be broken apart, leaving those together more healthy and respectful.

The educational campaign that was achieved in Sweden following the ban would surely be less effective with a court opinion than if a law were to be passed by the state’s legislature. Other researchers have agreed that a legislative declaration like that done in Sweden would be the optimal means to prohibit corporal punishment (Shmueli, 2010, p. 319). The difficulty of passing such a law through today’s state legislature makes this method unlikely in the near future.

The rate of parents who used corporal punishment and the frequency that corporal punishment was used declined in the decade between 1975 and 1985, and can be expected to have continued dropping as the negative effects of corporal punishment become more known (Straus, 1994, p. 28-29). Nevertheless, corporal punishment continues to be a commonly used means of punishment passed down from generation to generation, therefore, the significant political capital that would be consumed in any successful bill would most likely deter a majority of the legislative representatives. As more and more foreign countries ban corporal punishment in the home, and as more citizens become aware of the negative side effects of corporal

punishment, it is likely that over time a legislative bill could be passed, however, until that date, children's rights are being infringed, and terrible long term effects are resulting from corporal punishment. Thus, for reasons of expediency it is necessary to achieve corporal punishment prohibition through a court decision.

Defining Corporal Punishment

Before proceeding further into the arguments of this thesis, a definition of corporal punishment must be established. The Merriam-Webster dictionary provides a very simple definition encompassing what many understand corporal punishment against minors to entail, defining the action as "punishment administered by an adult (as a parent or teacher) to the body of a child ranging in severity from a slap to a spanking" (Corporal Punishment). Slapping and spanking are the most common forms of corporal punishment in western culture but they are not the exclusive means of corporal punishment.

Murray Straus adopted a definition of corporal punishment that was preferable for research relating to corporal punishment. The definition, later adopted by Gershoff in her meta-analysis of corporal punishment research, is "the use of physical force with the intention of causing a child to experience pain, but not injury, for the purpose of correction or control of the child's behavior" (Straus, 1994, p. 4). This definition is more inclusive of any type of physical force against a child, so long as it is for the purpose of punishment and does not injure the child. The fact that corporal punishment is not any use of violence, but only violence used for the purpose of correcting and controlling the child's behavior is crucial. This definition is also significant in that the infliction of injury is excluded from the definition. Corporal punishment traditionally has included any form of physical violence for the purpose of punishment, however, this fact allowed for critics of the conclusions made by modern research on corporal punishment

to claim that moderate corporal punishment is not associated with negative side effects. Such critics have claimed that the high intensity end of the violence spectrum alone causes negative side effects. In using this definition, Straus, Gershoff, and other researchers were able to eliminate the upper end of the violence spectrum. They distinguished physical force that caused injury as child abuse, thus allowing for research to clearly demonstrate the negative side effects of moderate corporal punishment. For this reason, the majority of the research on negative behavioral traits linked to corporal punishment which are cited in this thesis utilize the above definition.

A neglected child as defined by New York State includes a child who has received “excessive corporal punishment” (Family Court Act § 1012). Thus excessive corporal punishment is already illegal in New York. This thesis will make an argument that any form of corporal punishment is unconstitutional, including light, moderate, and infrequent corporal punishment.

Parental Rights v. Rights of Minors

A major argument for those who support a parent’s ability to corporally punish their children is the historical acceptance that parents can rear their child in the manner that they feel is in the best interest of the child. Those claiming that a ban on corporal punishment is unconstitutional based on the infringement of a parents right to child rearing certainly have significant evidence to support their claim. For example, the United States Supreme Court in *Troxel v. Granville*, a case dealing with a parent’s authority to control visitation rights to the child, cited *Quilloin v. Walcott*, which stated “The history and culture of Western civilization reflects a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond

debate as an enduring American tradition” (Troxel v. Granville, at 66). Citing *Pierce v. Society of Sisters*, a 1925 Supreme Court case dealing with the right of a parent to choose whether to send their children to either private or public school, the Supreme Court in 1944 stated that “It is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder” (Prince v. Massachusetts, at 166).

Prince v. Massachusetts also cites the court’s 1923 decision in *Meyer v. Nebraska* where it was ruled that children had the right to be taught languages aside from “the nation’s common tongue” as a case of parental right to child rearing (Prince v. Massachusetts, at 166). It is in regard to those decisions that the court claimed that it had historically “respected the private realm of family life which the state cannot enter” (Prince v. Massachusetts, at 166). Indeed, taken out of context, cases such as this one could potentially make a compelling argument that the right of a parent to rear their child is one that is protected by the right to privacy interpreted through the Ninth Amendment to the United States Constitution. Yet in reading on through *Prince v. Massachusetts*, the court wrote “the family itself is not beyond regulation in the public interest” and then stated “nor rights of parenthood are beyond limitation” (Prince v. Massachusetts, at 166). The court found that the state in its capacity as *parens patriae* could act “to guard the general interest in youth’s well being” and could “restrict the parent’s control by requiring school attendance, regulating or prohibiting the child’s labor and in many other ways” (Prince v. Massachusetts, at 166).

Prince v. Massachusetts may have proclaimed the ability for state interference in familial life; however, the court ruled that the state could not prevent children from engaging in preaching work on the sidewalk, as it infringed upon the religious freedom of the parent (Prince

v. Massachusetts, at 162). The court held that if a law infringes upon religious freedom, it is unconstitutional unless “necessary for or conducive to the child’s protection against some clear and present danger” (Prince v. Massachusetts, at 167). While these court cases are far from the only one’s dealing with a parent’s right to rear their children and educate them, the cases cited by those who claim parents have the right to rear their children as they see fit each have something in common. The child in each of these cases has not been in danger, nor have the child’s fundamental rights been infringed upon. Parents have a valuable role in the upbringing of youth, and the court has protected that right when it is impinged by grandparent’s power to rear the child, by the state’s ability to determine how to educate the child, and by other violations of that right. In this sense those claiming that parents have a fundamental right to control their children’s upbringing are correct, however, when the rights of children conflict with the parent’s right, the court has found it acceptable and even necessary to regulate the upbringing of children.

One such case was *Planned Parenthood of Central Mo. v. Danforth* in 1976, which dealt with a minor’s ability to have an abortion without parental consent. The defendants of the law, which mandated parental consent for a minor to have an abortion, cited cases such as *Meyer v. Nebraska* and *Pierce v. Society of Sisters* in an effort to argue that parental discretion like that provided in the law “has been protected from unwarranted or unreasonable interference from the state” (*Planned Parenthood of Central Mo. v. Danforth*, at 72). In this case where the right of the minor to make decisions about procreation was violated, the court held that such a law was unconstitutional. The court held that “Constitutional rights to not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights” (*Planned Parenthood of Central Mo. v. Danforth*, at 74).

In deciding the constitutionality of a New York statute that prohibited the distribution of contraceptives to children under sixteen years of age, the Supreme Court in *Carey v. Population Services Int'l* held that such a law was unconstitutional based on the same logic as court rulings allowing for minors to choose to have an abortion. The court in this opinion stated that “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone” (*Carey v. Population Services Int'l*, at 692).

These cases thus show that the parental claim to have authority to corporally punish children based on the Ninth Amendment right to privacy in child rearing is not valid if corporal punishment is shown to violate any right of the child. Children are people just as adults and are afforded the same constitutional protections. Corporal punishment has been ruled to violate the Eighth Amendment for criminals, and adults are protected under charges of assault in New York, yet the same actions are sanctioned by the law providing that corporal punishment of minors is a justification for physical violence. With children’s rights applicable and the ability for the state to intervene in order to protect those rights, it will be determined whether corporal punishment in the home violates the Eighth Amendment.

Eighth Amendment Applicability

In 1970, James Ingraham, an eighth grade student in Florida, was subjected to “more than 20 licks with a paddle while being held over a table in the principal’s office” (*Ingraham v. Wright*, at 657). The boy was beaten due to his slow response to the teacher’s instructions and as a result of his punishment he suffered from a hematoma that needed medical attention and prevented him from attending school for several days (*Ingraham v. Wright*, at 657). In the same year, Roosevelt Andrews, a ninth grade student at the same school, was paddled for small

infractions several times at school, twice resulting in the inability for him to fully use his arm for a week (*Ingraham v. Wright*, at 657).

These two children filed suit resulting in *Ingraham v. Wright*, the only United States Supreme Court case directly dealing with corporal punishment of minors. The case dealt with the constitutionality of corporal punishment in the school and found that no rights of the students had been infringed by the punishment. *Ingraham v. Wright* is the case most similar to any that would consider the constitutionality of corporal punishment in the home. Therefore, the Court's opinion will be analyzed in detail.

A simple summary of *Ingraham v. Wright* may cause one to assume that the Supreme Court would rule in the same manner regarding domestic corporal punishment as it did regarding corporal punishment in the school system. The punishment is essentially the same, made on the same class of citizens, however, there are profound differences between the law in question in *Ingraham v. Wright* and New York Penal Code statute § 35.10.

Although other reasons, such as the reasonableness and historical tradition of corporal punishment in schools were mentioned, the court found that the Eighth Amendment had traditionally been associated strictly with the criminal process and therefore the Amendment did not apply to school children who were beaten in public schools (*Ingraham v. Wright*, at 664). This interpretation, which was a primary reason that the Court found the student's rights were not violated, came largely from a historical analysis of the Amendment.

The first version of a law involving "cruel and unusual punishment" was the English Bill of Rights in 1688 (*Ingraham v. Wright*, at 664) (*Trop v. Dulles*, at 100). The English version was a reaction to the cruelty of English judges and therefore had the intended effect of preventing excessively harsh punishments in criminal law. The Court cited the original draft of

the law which stated “The requiring excessive bail of persons committed in criminal cases and imposing excessive fines, and illegal punishments, to be prevented,” although the reference to criminal cases specifically was taken out in the final version (*Ingraham v. Wright*, at 665). The court claimed that this omission was “without substantive significance” because the preamble of the final draft of the law had a similar reference to criminal cases (*Ingraham v. Wright*, at 665). This final draft of the English Bill of Rights was later used by Virginia for its version of the law in the Virginia Declaration of Rights of 1776. The Eighth Amendment of the United States Constitution, ratified in 1791, was then taken from the Virginia version (General Interest: Bill of Rights) (*Ingraham v. Wright*, at 664).

The Court in *Ingraham v. Wright* concluded through this historical review that the original intent of the law must have been to prevent “cruel and unusual punishment” only when dealing with criminals (*Ingraham v. Wright*). There was, however, a great deal of distance between the original draft of the English law and the Eighth Amendment clause which diminishes the credibility of this argument. The founding fathers that assembled the Bill of Rights did so with over 100 years, a bloody revolution, the Atlantic Ocean, and two versions of the law between the Eighth Amendment and the original British draft that included mention of criminal cases specifically. The founding fathers created a Bill of Rights that they felt would be comprehensive of the most basic and fundamental rights of man which should not be infringed by government. To do so, they looked to state declarations of rights in order to determine what individual rights needed protection. The Virginia Declaration of Rights had no mention of criminal cases specifically, and the drafters of the Bill of Rights looked to the Virginia Declaration of Rights in adopting similar wording, they did not look to the first draft of a century old British law. If some of those ratifying the Eighth Amendment had known about the genesis

of the wording, the majority would have seen the language for what it was: a generic protection against “cruel and unusual punishment.”

If one looks at the Bill of Rights as a whole, rights pertaining specifically to criminal law and procedure were explicitly stated. The Sixth Amendment, which ensures the criminally accused will receive a speedy trial by their peers, begins with “In all criminal prosecutions” (U.S. Const. amend. VI). The Sixth Amendment demonstrates the Framers were capable of specifying the intent of rights restricted to criminal procedure. The fact that no such restriction was written into the Eighth Amendment therefore suggests that no intention of the restriction existed. (Mortorano, 2014, p. 499).

The Supreme Court in *Ingraham v. Wright* further admitted that the purpose of the Eighth Amendment was different than the original British law that preceded it. The Court found that while the British law was developed in order to curtail the cruel punishments of judges specifically, the American equivalent, while concerned with restricting judges acting outside their legal authority, was primarily concerned with the “legislative definition of crimes and punishments” (*Ingraham v. Wright*, at 665). Thus, the Court accepts that the intent of the American version of the wording was different from the British intent. Therefore, it seems illogical to assume that the two versions would have the same scope simply due to the ambiguous connection between the two laws. Equivalent wording can have very different meanings based on the context, and the fact that the Court conceded the intent of the laws was different suggests that the Framers version of “cruel and unusual punishment” had no significant connection to the original English draft’s meaning in either purpose or scope. It appears more likely that the Framers found in the Virginia Declaration of Rights an important protection against any “cruel and unusual punishment” by judges, legislatures, or any other authority.

Four justices on the Court dissented in *Ingraham v. Wright*, three of whom agreed in that contrary to the majority opinion, “The Eighth Amendment places a flat prohibition against the infliction of ‘cruel and unusual punishments’” (*Ingraham v. Wright*, at 684). The justices felt that the protection from “cruel and unusual punishment” reflects “a societal judgment that there are some punishments that are so barbaric and inhumane that we will not permit them to be imposed on anyone, no matter how opprobrious the offense” (*Ingraham v. Wright*, at 684). This interpretation stems from the wording of the text and is far more likely to be the original interpretation of the Amendment as well. The above statement is one that few Americans would disagree with, and one that many would support, for it appears accurate both legally and morally. The dissenting justices then continued, stating “If there are some punishments that are so barbaric that they may not be imposed for the commission of crimes, designated by our social system as the most thoroughly reprehensible acts an individual can commit, *a fortiori*, similar punishments may not be imposed on persons for less culpable acts” (*Ingraham v. Wright*, at 684). This argument makes great sense. Corporal punishment against prisoners and criminals has been banned, and yet small children who may displease their parents through the most miniscule action are not protected against the very same punishment.

The majority in *Ingraham v. Wright* also justify the restricted scope of the Eighth Amendment based on court precedent, claiming that every Court decision involving protection of the Amendment has dealt with criminal punishment (*Ingraham v. Wright*, at 666). The fact that protecting citizens from “cruel and unusual punishment” involving criminal punishment is the primary purpose of the Eighth Amendment is not under attack. It makes perfect sense that all Court decisions involving the Amendment’s application have been concerned with the primary purpose of the Amendment. The fact that other arenas for protection have not been upheld by the

Court may be due to the fact that few have found their right against “cruel and unusual punishment” infringed except in the criminal realm. The dissenting justices in *Ingraham v. Wright* explained this reality, arguing that Eighth Amendment cases exclusively dealing with criminal punishment was because “We are fortunate that in our society punishments that are severe enough to raise a doubt as to their constitutional validity are ordinarily not imposed without first affording the accused the full panoply of procedural safeguards provided by the criminal process” (*Ingraham v. Wright*, at 686). This, and not the distinction between criminal and noncriminal punishment is the reason that every Eighth Amendment case has dealt with criminal punishment (*Ingraham v. Wright*, at 684).

The Supreme Court has held the Eighth Amendment must “draw its meaning from the evolving standards of decency that mark the progress of a maturing society” (*Trop v. Dulles*, at 101). The result of this interpretation is an ever changing meaning of the Eighth Amendment. While each Court decision upholding Eighth Amendment protection has in some manner involved criminal statutes or prosecution, more recent Court decisions have expanded on this category (Mortorano, 2014). The decision in *Trop v. Dulles*, for example, dealt with a passport application that was denied due to petitioners lost citizenship after having received a dishonorable discharge for desertion. The Court found that such a result of dishonorable discharge was unconstitutional under the Eighth Amendment (*Trop v. Dulles*). This case has been considered important due to its extension of the Eighth Amendment “beyond the confines of the penitentiary” (qtd. in Mortorano, 2014, p. 499). In *Estelle v. Gamble* the Supreme Court expanded the Eighth Amendment to include for the first time prisoner medical care, an issue that cannot be directly considered dealing with penal law and the punishment of the criminally convicted (Mortorano, 2014, p. 499). Thus, modern issues have begun to move the Court away

from the primary purpose of the Eighth Amendment to other segments of life and society, demonstrating the general language of the text in effect.

The fact that the United States Supreme Court restricted the scope of the Eighth Amendment is very interesting in another light. Throughout history the Court has tended to expand or at least leave ambiguous the scope of fundamental rights. Such a clear restriction of a right suggests there may have been a concealed motive in so doing. At the time, corporal punishment was a disciplinary method used far more frequently than today. The negative side effects were also unknown. The justices of the Court may have felt a need to protect what they felt was a longstanding American tradition. The fact that they chose to protect corporal punishment through restricting the scope of the Eighth Amendment suggests that this was the only option these justices had. In light of court precedent, as will be discussed later in this paper, the justices may have realized that were the scope of the Eighth Amendment to apply to children, corporal punishment would surely violate the protection of the Amendment. With a compelling argument made that the precedent set by *Ingraham v. Wright* should be overturned and the scope of the Eighth Amendment recognized today as inclusive of any “cruel and unusual punishment,” it will now be discussed whether the New York State law sanctioning parental corporal punishment of minors violates the Amendment despite a restricted scope.

As previously provided, the New York statute permitting corporal punishment states, “The use of physical force upon another person which would otherwise constitute an offense is justifiable and not criminal under any of the following circumstances: 1. A parent, guardian or other person entrusted with the care and supervision of a person under the age of twenty-one or an incompetent person, and a teacher or other person entrusted with the care and supervision of a person under the age of twenty-one for a special purpose, may use physical force, but not deadly

physical force, upon such person when and to the extent that he reasonably believes it necessary to maintain discipline or to promote the welfare of such person” (§ 35.10). The Supreme Court in *Ingraham v. Wright* found that the Eighth Amendment applied to the criminal process, and that the Eighth Amendment was created specifically to deal with “those entrusted with the criminal-law function of government” (*Ingraham v. Wright*, at 664). New York statute § 35.10 exists in the state Penal Code. As a criminal-law which applies to the criminal process, the law exists within the applicable scope of the Eighth Amendment. Anyone affected by this law is therefore subject to the protection of the Amendment.

The New York law excludes as an offense the use of physical force by a parent or legal guardian on a person under the age of twenty-one in the care of the adult as long as the physical force is seen as the adult to be necessary to “maintain discipline or to promote the welfare of such person” (§ 35.10). The ramifications of this law are twofold. First, the parent or legal guardian is able to use physical force without it constituting a criminal offense. The second ramification, however, is that in allowing for the parent to use physical force against the child, the state sanctions the physical punishment of a minor who has been found to have committed an offense through the reasoning of the parent. This law provides a parent or legal guardian the authority to determine what constitutes a criminal offense of the minor, the guilt of the minor, and the necessary punishment of the minor. The statute thus clearly sanctions physical punishment as an acceptable punishment for a minor who has been criminally convicted by the parent. Such a statute effects the criminal punishment of a minor and is within the scope of Eighth Amendment protection as determined by the Court in *Ingraham v. Wright*. This alone does not automatically call for the unconstitutionality of New York statute § 35.10, rather this conclusion simply permits for the Eighth Amendment to be an applicable protection. We must

now move to determine if parental corporal punishment of a minor violates the Eighth Amendment.

***Ingraham v. Wright* Eighth Amendment Scope Interpretation**

The United States Supreme Court in *Ingraham v. Wright* claimed that “In addressing the scope of the Eighth Amendment’s prohibition on cruel and unusual punishment, this Court has found it useful to refer to ‘traditional common-law concepts,’ and to the ‘attitudes which our society has traditionally taken’” (*Ingraham v. Wright*, at 659). From this writing, one would assume that the interpretation of what violates the Eighth Amendment depends in large part on the punishment that has traditionally been allowed by our society. The Supreme Court, predictably, then demonstrated later in the opinion that corporal punishment has been an accepted punishment that has not been considered “cruel or unusual.” A reading of this text might suggest that corporal punishment of children in the home would similarly not qualify as cruel and unusual punishment, however, let us examine the case cited where the “Court has found it useful” to analyze “traditional common-law concepts” and the “attitudes which our society has traditionally taken” (*Ingraham v. Wright*, at 659). The case that the Court referred to was *Powell v. Texas* in 1968.

The appellant in *Powell v. Texas* had been arrested and charged with public intoxication. The appellant claimed that the law stating “whoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars” violated the Eighth Amendment because the appellant was “afflicted with the disease of chronic alcoholism” and therefore the appellant had no control over his intoxication (*Powell v. Texas*, at 517). Thus, the case certainly involved Eighth Amendment claims; however, an analysis of the context from which the quotations were taken suggests that

the court did not simply use traditional precedent in interpreting the protection of the Eighth Amendment.

The argument of the appellant was supported by the 1962 Supreme Court decision in *Robinson v. California* which found that a law making it a crime to be addicted to narcotics was unconstitutional and in violation of the Eighth Amendment (*Powell v. Texas*, at 532). The main reason that the Court in *Powell* did not agree with the logic of the appellant was a distinction made between the two laws. The unconstitutional law made the addiction itself to be a crime, while the law under analysis in *Powell* made the action of intoxication a crime (*Powell v. Texas*, at 532). This was the primary reason for the Court's reasoning in *Powell*, not the traditional acceptance of intoxication as a crime.

In *Ingraham v. Wright* the Court implied that "traditional common-law concepts" (*Powell v. Texas*, at 517) had been used in the past to determine the proper scope of the Eighth Amendment, however, the meaning of this quotation changes when the surrounding context is included. The larger quotation reads, "Traditional common-law concepts of personal accountability and essential considerations of federalism lead us to disagree with appellant. We are unable to conclude, on the state of this record or on the current state of medical knowledge, that chronic alcoholics in general, and Leroy Powell in particular, suffer from such an irresistible compulsion to drink and to get drunk in public that they are utterly unable to control their performance of either or both of these acts and thus cannot be deterred at all from public intoxication" (*Powell v. Texas*, at 535). The case may involve the Eighth Amendment yet this quotation is a response to the debate between the appellant and defendant as to whether alcoholics can control their actions, whether they should be held personally accountable for their actions, and whether the law criminalizing public intoxication is able to create a deterrent against

intoxication for alcoholics. The Court considered, among other factors, the traditional common-law doctrine of personal accountability. This quotation was related to a much different question than the protection of the Eighth Amendment.

Similarly, the second quote from *Powell* that was used as evidence for a traditionalist look at the Eighth Amendment in *Ingraham* was taken out of context. The larger section reads, “The fact that a high percentage of American alcoholics conceal their drinking problems, not merely by avoiding public displays of intoxication but also by shunning all forms of treatment, is indicative that some powerful deterrent operates to inhibit the public revelation of the existence of alcoholism. Quite probably this deterrent effect can be largely attributed to the harsh moral attitude which our society has traditionally taken toward intoxication and the shame which we have associated with alcoholism” (*Powell v. Texas*, at 531). Here the Court was attempting to understand what caused alcoholics to conceal their problems, suggesting that the cause might be “the harsh moral attitude which our society has traditionally taken toward intoxication” (*Powell v. Texas*, at 535). Clearly the Court in *Ingraham* took these quotations out of context in order to defend the procedure it used for determining the scope of the Eighth Amendment. The fact that the Court could find no more relevant past Court statements that suggested the Eighth Amendment should be interpreted to protect only punishments that have not traditionally been imposed is very revealing. The Eighth Amendment meaning as used by other Supreme Court decisions will now be analyzed.

Evolving Eighth Amendment Interpretation

It was almost eighty years after the adoption of the Bill of Rights before the United States Supreme Court ruled on a case regarding “cruel and unusual punishment” (*Furman v. Georgia*, at 264). Early cases did little to determine a specific definition of what crimes

constituted “cruel and unusual punishment,” rather the Court tended to determine the scope of the clause by “looking backwards for examples by which to fix the meaning of the clause” (Weems v. United States, at 377). For example, the Court concluded in *Wilkerson v. Utah* in 1879 that punishments of torture such as emboweling alive, beheading, drawing and quartering, publicly dissecting, and burning alive, were all prohibited by the Eighth Amendment (Furman v. Georgia, at 264). Punishment that was “cruel and unusual” was found to consist of something more than death alone, the punishment had to involve “torture or a lingering death” and the clause was read to imply that something “inhuman and barbarous...more than the mere extinguishment of life” was necessary in order to be unconstitutional (qtd. Furman v. Georgia, at 265). During this period of Eighth Amendment interpretation, little more than torture or horrible atrocities were found to constitute “cruel and unusual punishment” since only those punishments that were considered “cruel and unusual” at the time the Bill of Rights was adopted were found unconstitutional (Furman v. Georgia, at 264).

This notion proved to be a challenge for practical applicability of the Eighth Amendment to ordinary American life due to the high torture threshold that a punishment must surpass for Americans in the founding period to have considered it “cruel and unusual.” The clause, as has been mentioned, was taken from the English law that intended on restricting the authority of English judges in the wake of atrocities committed upon English citizens. Early Supreme Court rulings appear to have done little more than reinforce that crimes of the horrible level committed by the English were also unconstitutional in the United States.

The argument has been made that the Framers wanted “cruel and unusual punishment” prohibited after seeing the potential usefulness of the Virginian Declaration of Rights, not the importance of the British law and what the British law specifically protected. The Court in

Weems v. United States in 1910 came to a similar conclusion. The Court in this decision noted that one delegate at the Pennsylvania Convention felt the Eighth Amendment was unnecessary because, while “The doctrine and practice of a declaration of rights have been borrowed from the conduct of the people of England on some remarkable occasions...the principles and maxims on which their government is constituted are widely different from those of ours” (*Weems v. United States*, at 372). The delegate, Mr. Wilson, was referring to the difference between the British monarchy, and the American democracy that would in turn prevent the legislatures from ever allowing “cruel and unusual punishment” in the kind that was seen by the British. This was surely a valid argument. Justice Story in his work on the Constitution came to the conclusion that the “cruel and unusual punishment” clause “would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious conduct” (*Weems v. United States*, at 371). For this reason the Court in *Weems v. United States* realized that had the original Amendment interpretation been sustained, it would have been unnecessary due to the inherent checks and balances in representative government and thus the Eighth Amendment “would have effectively been read out of the Bill of Rights” (*Furman v. Georgia*, at 265).

The Court in *Weems*, faced with this alternative, determined that the Founders “intended more than to register a fear of the forms of abuse that went out of practice with the Stuarts,” claiming that the Founders “jealousy of power had a saner justification than that” (*Weems v. United States*, at 372). The Framers must therefore have placed the clause in the Bill of Rights knowing that “With power in a legislature great, if not unlimited, to give criminal character to the actions of men, with power unlimited to fix terms of imprisonment with what accompaniments they might...that power might be tempted to cruelty” (*Weems v. United States*,

at 372). The Court in *Weems* determined that this was the danger from which the Founders hoped to prevent through the “cruel and unusual punishment” clause of the Eighth Amendment. Thus, the Court wrote that “This was the motive of the clause, and if we are to attribute an intelligent providence to its advocates we cannot think that it was intended to prohibit only practices like the Stuarts, or to prevent only an exact repetition of history” (*Weems v. United States*, at 373).

The Court in *Weems v. United States* forever changed the meaning of the Eighth Amendment so that, contrary to the interpretation used by the Court in *Ingraham* based on history and precedent, the Amendment would not be limited to traditional custom. The Court expressed this concept, writing, “Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are, to use the words of Chief Justice Marshall, ‘designed to approach immortality as nearly as human institutions can approach it.’ The future is their care and provision for events of good and bad tendencies of which no prophesy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be” (*Weems v. United States*, at 373). This principle applies to the Constitution in general, but specifically it applies to the Eighth Amendment “cruel and unusual” clause. Each United States Supreme Court decision following *Weems*, aside from *Ingraham*, has not limited punishments considered “cruel and unusual” to those considered so in the past, rather the Court has held the clause to hold an indefinite and evolving nature.

As mentioned previously, the Court in *Trop v. Dulles* in 1958 upheld this interpretation of the Eighth Amendment in *Weems*, stating that “the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society” (*Trop v. Dulles*, at 101). Aside from *Ingraham*, the Court seems hard pressed to write an opinion regarding the Eighth Amendment that does not include this quotation after *Trop v. Dulles*. The Court in *Trop* also acknowledged that the Amendment upholds a basic principle that is “nothing less than the dignity of man” and that the Amendment ensures punishment will be “exercised within the limits of civilized standards” (*Trop v. Dulles*, at 100).

In *Furman v. Georgia*, a 1972 case regarding the death penalty, Justice Brennan writing a plurality opinion reiterated the Eighth Amendment principle explained in *Trop*, writing that “The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings” and that a punishment was regarded as “cruel and unusual” if “it does not comport with human dignity” (*Furman v. Georgia*, at 270). Parental corporal punishment will now be analyzed in terms of “evolving standards of decency” and a modern understanding of the “intrinsic worth” of children (*Trop v. Dulles*, at 101) (*Furman v. Georgia*, at 270).

Historic Usage

One factor consistently used in the determination of what constitutes “cruel and unusual punishment” has been the “historic usage of the punishment” (*Furman v. Georgia*, at 278). There can be no denial that corporal punishment is a longstanding custom, however, the fact that corporal punishment has been used for centuries, dating back to the Babylonians, ancient Hebrews, ancient Greece, and the Roman Empire may be more of a weakness than strength in the custom’s defense (Edwards, 1996, p. 986). Corporal punishment is an ancient

practice with ties to ancient civilizations. The fact that corporal punishment still exists is not a testament to its effectiveness, it is a testament to the fact that those who believe in its effectiveness use arguments and “proof” developed in ancient civilizations which no longer complies with modern standards of human decency or modern science.

Corporal punishment shared its genesis in ancient culture with many other forms of punishment long cast aside as foolish and indecent by modern standards. As early as these ancient civilization, and as late as the 19th century in the United States, children were generally considered the property of their parents (Coleman, Dodge, & Cambell, 2010, p. 139). In ancient civilizations, as property of the parents, the parents had the right to sell, exchange, and kill their children (Edwards, 1996, p. 986).

This concept is far too similar to the practice of slavery throughout ancient civilization and, until the Civil War ended such a “peculiar institution,” within the United States. Slave owners during that time were able to beat their slaves legally. As slavery ended in the United States, so did the ability for slave owners to corporally punish their slaves, yet while children are no longer considered property, the cruelty of the ancient tradition continues legally within the home. Corporal punishment is a custom that lives from this cruel and different time. Society has advanced enormously since that period, yet corporal punishment lingers, maintaining a connection to that past from which no one would argue was reasonable. Society must cut the last ties to any thought of one person belonging as property to another.

Women shared a similar misfortune to children throughout ancient civilization. The concept of treating women as a separate species from men, without the same feelings and capacity for suffering possessed by men, became dominant in the middle ages where a man was permitted to “castigate his wife and beat her for correction” (History of Battered Women’s

Movement). Early American settlers based their law regarding women in English common-law which allowed men to beat their wives “for correctional purposes” (History of Battered Women’s Movement). Yet over time women began to gain greater rights as individuals. North Carolina in 1890 criminalized any form of domestic assault between spouses, and in 1894 the same was done in the Mississippi courts (History of Battered Women’s Movement). Children, however, made no such progress with their rights as human beings. Very similar arguments were made for the acceptability of spousal corporal punishment as parental corporal punishment, including the right to familial privacy, which no longer accepted as justification for spousal abuse, continues to play a role in the legality of parental corporal punishment.

The result of the historic treatment of children is that “a very large percentage of children born prior to the eighteenth century were what we would today term battered children, and received regular beatings, both at home and school” (Edwards, 1996, p. 987). Many in America have used corporal punishment due to passages in religious texts tolerating and even promoting the practice. Many Christians were taught to believe that “children were inherently evil and that beating was an effective method of driving the devil from them” (Edwards, 1996, p. 987). Such a concept developed the often quoted lesson from the Bible, “Spare the rod and spoil the child,” although this phrase cannot actually be found in the Bible itself (qtd. Edwards, 1996, p. 987). The Bible shares its origin with the many ancient civilizations that permitted corporal punishment, believing, as did those throughout the Colonial period that corporal punishment was a “desirable and necessary instrument of restraint upon sin and immorality,’ as well as having a regenerative effect on the child’s character” (Coleman, Dodge, & Cambell, 2010, p. 138). Thus, the Bible advocated for corporal punishment because it was believed that corporal punishment was beneficial for children. This has been the common belief throughout the history of

civilization; however, as will be discussed in greater depth, modern science has shown this to be far from accurate.

In light of the enormous disparity between accepted punishments of ancient civilizations through the Colonial era and 19th century America, it is odd that the Court in *Ingraham*, a 1977 case, cited William Blackstone, a Colonial era author on the law regarding corporal punishment. As one of the justifications for corporal punishment of students, the Court cited Blackstone's Commentaries, in which he wrote that force “necessary to answer the purposes for which [the teacher] is employed” was “justifiable or lawful” (*Ingraham v. Wright*, at 661). Blackstone has been considered a very credible commentator on the law throughout much of the early history of the United States, however, he wrote on the law at a time when it was believed that corporal punishment of children was beneficial to them. Blackstone may be credible for many areas of early American law, however, he cannot be considered at all relevant in what should constitute “cruel and unusual punishment” in contemporary society which views so many aspects of punishment differently from the period of his writing.

The Supreme Court as early as 1879 in the case of *Wilkerson v. Utah* supports the claim that Blackstone is an outdated reference when dealing with criminal punishment. Blackstone, as summarized by the Court, “admits that in very atrocious crimes other circumstances of terror, pain, or disgrace were sometimes superadded” to the penalty of death (*Wilkerson v. Utah*, at 135). Specific additions to the death penalty included the convicted for treason being dragged to the place of execution, or in cases of high treason the convicted was emboweled alive, beheaded, and quartered (*Wilkerson v. Utah*, at 135). Blackstone felt that such punishments were legal and allowed by the citizenry through “tacit consent,” yet the Court in *Wilkerson* disagreed, writing in reference to Blackstone that “it is safe to affirm that punishments

of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution” (*Wilkinson v. Utah*, at 136).

Corporal punishment of children has roots back to many ancient civilizations and has been transplanted into the U.S. through English common-law and religious teachings. There is no dispute that corporal punishment has been a historically accepted punishment, however, corporal punishment shares this history with a multitude of other punishments no longer considered remotely close to reasonable. Corporal punishment is a link to those punishments and one that violates the Eighth Amendment just as the others. In addition, Blackstone’s views and description of the legality of punishments are outdated and of little use when determining whether a punishment is “cruel and unusual” as the Court itself suggested in *Wilkinson v. Utah*. Much has changed since the Colonial period, and corporal punishment, while once common, no longer fits into “the evolving standards of decency that mark the progress of a maturing society” (*Trop v. Dulles*, at 101).

Corporal Punishment’s Acceptability by Contemporary Society

Justice Brennan of the U.S. Supreme Court, in *Furman v. Georgia*, wrote that a punishment “must not be unacceptable to contemporary society” due to the fact that “Rejection by society...is a strong indication that a severe punishment does not comport with human dignity” (*Furman v. Georgia*). In dealing with corporal punishment of children in schools, the Court in *Ingraham* noted that only Massachusetts and New Jersey had passed legislation barring corporal punishment in public schools (*Ingraham v. Wright*, at 663). At that time the Court wrote that it could “discern no trend toward its elimination,” in reference to corporal punishment, yet much has changed in contemporary society since 1977 (*Ingraham v. Wright*, at 661).

At this point in 2014 thirty-one states and the District of Columbia have made corporal punishment in public schools unlawful (United States of America). Iowa and New Jersey have prohibited corporal punishment of students in both public and private schools (United States of America). Many of the remaining nineteen states that allow for corporal punishment in their schools have left the decision for the school districts, resulting in many local districts within these states banning corporal punishment in schools, although no state legislation mandates this action. This certainly demonstrates a significant trend toward the elimination of corporal punishment in public schools. Corporal punishment of children has a similar effect whether the child is hit by a teacher or by a parent; therefore, the reduction in states that allow corporal punishment in schools demonstrates a general societal dislike of corporal punishment of children. Delaware became the first state to ban parental corporal punishment in 2012 (Clabough, 2012). The strong but largely unfounded fear that laws preventing parents from using physical violence on their children will result in greater governmental interference in family life is most likely the reason that more states have not passed similar legislation. Nevertheless, now that Delaware has enacted such a law, the idea will surely be considered more seriously in other states. Thus, there has been a great trend toward the elimination of legal corporal punishment of minors.

Moreover, the Court has taken greater steps since 1977 to acknowledge and protect the rights of children as they are being increasingly recognized as independent, vulnerable, and politically powerless people. For example, the Court has overturned previous harsh penalties that treated juvenile offenders of the law equally to adults, and has replaced those practices with punishments that afford children greater protection (Mortorano, 2014, p. 508). In *Roper v. Simmons* in 2005, the Court banned all laws that imposed the death penalty on juvenile

offenders, overturning previous Court precedent (Mortorano, 2014, p. 509). Mandatory imprisonment for life for minors regardless of the crime was also ruled to be “cruel and unusual punishment” in the 2012 decision *Miller v. Alabama* (Mortorano, 2014, p. 509). The Court in decisions like *New Jersey v. T.L.O.* in 1985 offered greater protection of children against searches and seizures in schools, and in 2011 the Court decision in *J.D.B. v. North Carolina* increased Fifth Amendment rights of children (Mortorano, 2014, p. 509). Thus, the trend of the Court when dealing with children has been to realize that children are more vulnerable and impulsive when committing crimes; therefore, the punishment cannot be as severe.

Justice Brennan in the plurality opinion in *Furman* also noted that a factor to consider in determining whether a punishment is “cruel and unusual” is the “existence of punishment in jurisdictions other than those before the Court” (*Furman v. Georgia*, at 278). While in 1977 not a single country prohibited parental corporal punishment, the first country to ban corporal punishment was Sweden in 1979 (States with Full Abolition). Since that time, thirty-five countries have joined Sweden so that by 2013 thirty-six prohibited by law any form of corporal punishment of minors (States with Full Abolition). Thus, the trend towards the abolition of parental corporal punishment is strong worldwide.

The United Nations Convention on the Rights of the Child (UNCRC) was adopted in 1989 (Convention on the Rights of the Child). Article 19 of the Convention reads, “States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.” (Convention on the Rights of the Child). The United Nations (U.N.) consists of almost every nation in the world. Of the

members of the U.N., only the United States and Somalia did not ratify the UNCRC, with 193 countries parties to the Convention (Shmueli, 2010, p. 306) (Mortorano, 2014, p. 508). Article 19 is a major international step in acknowledging the rights of children as independent people whom should not be subjected to physical or mental violence. The overwhelming international support of the UNCRC demonstrates that throughout the world, corporal punishment is no longer viewed as acceptable.

Proportionality of Corporal Punishment

In *Weems v. United States* when the Supreme Court overturned the historical interpretation of the Eighth Amendment in favor of a more evolving understanding, the Court found that punishments that were too severe for the crime committed could be considered “cruel and unusual.” The Court thus claimed twelve years of hard labor in a penal institution as a minimum sentence for falsifying public records was “cruel and unusual punishment” (*Weems v. United States*). The Court claimed that while other offenses such as the death penalty are in themselves more “cruel and unusual,” the punishment related to the crime was not justified. The Court wrote that “Such penalties for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to the offense” (*Weems v. United States*, at 367). The Court in 1976 affirmed this interpretation of the Eighth Amendment, writing in *Gregg v. Georgia* that “the punishment must not be grossly out of proportion to the severity of the crime” (*Gregg v. Georgia*, at 173). This interpretation further led the Court in *Robinson v. California* to find that a law criminalizing the addiction to narcotics to be “cruel and unusual punishment.” The Court demonstrated the point that a minor offense, or something not worthy of consideration as an

offense, could not be punished even minimally, stating “To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold” (Robinson v. California, at 667).

In light of this interpretation, we assess the proportionality of the offenses of children which have warranted corporal punishment by the parent. A study of parents who killed their children found that forty-one percent defended their actions by claiming that they were only trying to discipline the child (Edwards, 1996, p. 994). The offense of the children that warranted the beatings included incessant crying, soiled diapers, annoying behaviors, blocking the parent’s view of the television, not taking out the trash, and not eating dinner (Edwards, 1996, p. 994). While the parents studied took the action too far, the children’s behaviors that initiated a violent response by the parent are most likely typical for those who are corporally punished. One could easily argue that these offenses of the children are so minor that they deserve no punishment at all. In fact, children are young and can hardly be seriously blamed for many of these “offenses.” A child playing or wanting attention can hardly be blamed for standing in front of a TV, and a baby or toddler hurt or in need is genetically programmed to cry. This is not the fault of the child, and no deterrence can prevent this behavior. With the offenses established, let us now examine the effect of physical punishment.

When *Ingraham v. Wright* was decided, general knowledge of the physical repercussions of corporal punishment was known. The fact that for so minor an offense, a small child may be hit so that the child feels physical pain is an argument enough to suggest that the punishment is “cruel and unusual.” When the hitting results in bruising or continued pain hours after the punishment occurred the punishment is even more egregious, yet such arguments have not

worked on the Court in the past when dealing with children. At the time of the *Ingraham* decision the wealth of studies on the effects of corporal punishment were not available. These studies suggest that even mild corporal punishment resulting in minimal physical punishment can have serious repercussions on the long term mental health of the child. The Court in *Weems* wrote, “There could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation” (*Weems v. United States*, at 372). Thus, “severe mental pain may be inherent in the infliction of a particular punishment” (*Furman v. Georgia*, at 271). It is the mental pain that places even mild parental corporal punishment, traditionally considered reasonable, under the protection against the “cruel and unusual punishment” clause due to its lack of proportion to the offense.

While essentially no scientific studies have found any benefits to corporal punishment aside from higher levels of immediate compliance, many studies have found a strong correlation between corporal punishment and decreased mental health of the child (Gershoff, 2002, p. 539) (Gershoff & Bitensky, 2007, p. 238). Studies have consistently found that the frequency or severity of corporal punishment administered against children was correlated with higher levels of anxiety, depression, alcohol and drug use, and general psychological maladjustment among the children (Gershoff & Bitensky, 2007, p. 238). This correlation with worse mental health is believed to be caused by increased levels of cortisol, the bodily hormone responsible for increasing stress (Gershoff & Bitensky, 2007, p. 239). Impaired mental health does not end with childhood, but has been found to continue into adulthood, with greater depressive symptoms of adults who were hit as children (Gershoff & Bitensky, 2007, p. 239).

There is great concern among both sides in the corporal punishment debate as to the quality of the parent-child relationship. The fear that the relationship will be diminished if the

state is allowed to interfere with family life has been a concern for many who support the allowance of parental corporal punishment. However, research has shown that parents who corporally punish their children actually diminish the quality of their parent-child relationship (Gershoff & Bitensky, 2007, p. 239). The reason for this outcome is that children are “motivated to avoid painful experiences, and if they see their parents as sources of pain (as delivered via corporal punishment), they will attempt to avoid their parents, which in turn will erode feelings of trust and closeness between parent and child” (Gershoff & Bitensky, 2007, p. 239).

A major result of corporal punishment that has been shown not only to be correlated with corporal punishment, but which has been shown to be directly caused by corporal punishment, is the increased aggressiveness of children and adults who were corporally punished earlier in life. Research has found that people who were hit as children are more likely to hit a dating partner, to use verbal and physical aggression in attempting to solve problems with their spouse, and to corporally punish their own children (Gershoff & Bitensky, 2007, p. 239). This aggression is not limited to family members or significant others. Surveys have found that children who were hit are more likely to commit as juveniles violent crime, property crime, and other delinquent acts (Straus, 2001, p. 108). Adults who were corporally punished as children were found to be more likely to physically assault a non-family member (Straus, 2001, p. 110). Most of this increased aggression is explained by Gershoff in her 2002 meta-analysis of corporal punishment where she writes “When parents use physical means of controlling and punishing their children, they communicate to their children that aggression is normative, acceptable, and effective,” all beliefs that in turn promote the social learning of aggression (Gershoff, 2002, p. 555). Children who are corporally punished and in turn comply with the parent’s desires “learn that aggression is an

effective way to get others to behave as they want and will be disposed to imitate it” (Gershoff, 2002, p. 555).

Corporal punishment is intertwined with incidents of child abuse as well. Parents in the U.S. who abused their children have reported that as many as two thirds of abusive incidents began as an attempt “to change children’s behavior or to teach them a lesson” (Gershoff & Bitensky, 2007, p. 239). This is supported by an unpublished 1994 study that found forty-one percent of parents who killed their children were “only trying to discipline them” (Edwards, 1996, p. 994). In her 2002 meta-analysis, Gershoff found that in each of ten studies reviewed, a parent’s usage of corporal punishment increased the likelihood that the child would be injured (Gershoff & Bitensky, 2007, p. 241). Children who had been corporally punished were seven times more likely to receive more severe violence such as punching, kicking, or hitting with an object (Gershoff & Bitensky, 2007, p. 241). This evidence makes it impossible to conclude that corporal punishment can be considered as an entirely different punishment than child abuse, due to the high association between the two levels on a continuous line of physical violence.

A study with less outside concurrence also found that children who were corporally punished were linked to lower levels of occupational success and income (Straus, 2001, p. 144). Each of these negative side effects of corporal punishment accumulates so that allowing the action is no longer allowing just physical pain for small offenses. A law sanctioning corporal punishment allows a punishment which leads to much more. Corporal punishment leads to lifelong depression, anxiety, high levels of stress, greater risk of criminal offenses later in life, a less loving and trusting relationship with parents, and perhaps even less occupational and income success. The cumulative effect of this evidence makes corporal punishment far from proportional to the small crimes for which children are punished. *Ingraham v. Wright* was made without

knowledge of these side effects; therefore, a new decision overturning the past in light of new scientific knowledge is warranted.

Is Corporal Punishment Necessary?

In determining whether a punishment was “cruel and unusual” the Court in *Gregg v. Georgia* wrote that “the punishment must not involve the unnecessary and wanton infliction of pain” (*Gregg v. Georgia*, at 173). In order to determine whether a punishment is unnecessary, the effects of the punishment must be compared to the purpose by which the punishment is imposed. Parents use corporal punishment as a disciplinary method in order to “reduce undesirable child behavior in the present and to increase desirable child behavior in the future” (Gershoff & Bitensky, 2007, p. 233).

The effectiveness of corporal punishment on immediate behavior changes has shown mixed results depending on the study (Gershoff & Bitensky, 2007, p. 233). In the introduction to this paper, a case was cited involving the corporal punishment of a twelve year old boy named G.F. The boy was paddled thirty-six times by his father for leaving the house without permission (In Re: The Welfare of the Children of N.F. and S.F.). Nevertheless, after his punishment G.F. did not submit to his parent’s will and say in his room, instead he almost immediately engaged in the action for which he was punished and left his room (In Re: The Welfare of the Children of N.F. and S.F.). In this incident corporal punishment was not at all effective in achieving immediate compliance, and unlike historical belief that corporal punishment is the best and most effective means of discipline, it has been found to be no more effective than other punishments which carry less risk (Pollard, 2002, p. 449). Studies have shown that setting clear standards for what is expected, providing lots of love and affection, explaining to the child why certain behavior is not acceptable, and recognizing and rewarding good behavior are all effective

alternatives to corporal punishment (Straus, 2001, p. 150). If a simple “time out” or reasoning with the child is as effective as using physical violence that carries with it a risk of many negative side effects, corporal punishment can only be seen as “unnecessary and wanton infliction of pain” (Straus, 2001. P. 150) (Gregg v. Georgia, at 173).

While the effectiveness of corporal punishment in regards to immediate compliance is scientifically debatable, the effectiveness of corporal punishment in regards to long term behavior is not. Gershoff’s 2002 meta-analysis found that corporal punishment was associated with less moral internalization and long-term compliance (Gershoff & Bitensky, 2007, p. 234). Corporal punishment causes the victim to feel that socially acceptable behavior is only necessary when they are being watched. Corporal punishment has not been found to promote children’s independent choice to act in a proper manner solely because it is the right choice. Therefore, corporal punishment achieves none of the goals of parents who utilize it as a disciplinary method; rather corporal punishment in many ways inhibits the achievement of the goal. To use corporal punishment despite this evidence is “cruel and unusual.”

Conclusion

This paper has reviewed the United States Supreme Court interpretation of the Eighth Amendment as it evolved over time. Major Court rulings have been investigated to determine whether the Court’s interpretation of the Eighth Amendment “cruel and unusual punishment” clause prohibits parental corporal punishment. The interpretation of the clause’s meaning, which is based on evolving standards of decency, necessitates the examination of several factors regarding corporal punishment. The historical acceptance of the punishment, the contemporary acceptance including acceptance in other jurisdictions, the physical and mental pain suffered, the proportionality of the offense compared to the punishment, and the necessity of corporal

punishment in the achievement of its purpose have each been examined. This analysis of corporal punishment in light of contemporary scientific understandings of corporal punishment's effectiveness and side effects has resulted in a conclusion that parental corporal punishment, as permitted in the New York State Penal Code, is unconstitutional. Throughout the history of civilization children have had minimal legal protection and have been subjected to "cruel and unusual punishment." Yet as society matures and progresses it has increasingly devoted the protection of the rights of youth, as children are viewed as excessively vulnerable individuals in need of legal assistance in their proper care and upbringing. This developing principle has been accepted both in the United States and worldwide as seen in the United Nations Convention on the Rights of the Child. Yet in the face of progress corporal punishment is a link to a dark past where people owned people and only a portion of society was afforded the protection of the law.

While this thesis has focused on the Eighth Amendment specifically, corporal punishment may violate the Fifth and Fourteenth Amendment due process rights, as well as the Fourteenth Amendment Equal Protection clause. Further research could enhance the discussion around corporal punishment in regards to those amendments. A tradition as firmly entrenched as corporal punishment will not be defeated without overcoming significant opposition, yet this thesis demonstrates that both the law and science are tools rather than obstacles for reform. This thesis has laid the ground work for legal arguments in both the courtroom, and moral arguments in the legislature. The work now remains to advocate on behalf of children in these arenas and the public so that children can be free from state sanctioned "cruel and unusual punishment."

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