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# An Analytical Ode to Personhood: The Unconstitutionality of Corporal Punishment of Children Under the Thirteenth Amendment

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**AN ANALYTICAL ODE TO PERSONHOOD: THE  
UNCONSTITUTIONALITY OF CORPORAL  
PUNISHMENT OF CHILDREN UNDER THE  
THIRTEENTH AMENDMENT**

**Susan H. Bitensky\***

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“Children Are People Too.”

Peter Newell<sup>1</sup>

“If you prick us, do we not bleed? If you tickle us, do we not laugh? If you poison us, do we not die?”

William Shakespeare<sup>2</sup>

#### INTRODUCTION

It is not too late for modern constitutional law to catch up with antebellum abolitionists. On the perennially controversial subject of child discipline, they were early advocates for less primitive and stinging ways of teaching minors what it means to be a proper human. Indeed, “many abolitionists, loathing all forms of physical bondage and abuse of the powerless, also fought to end corporal punishment” of children.<sup>3</sup> The abolitionist camp, revered for

1. PETER NEWELL, CHILDREN ARE PEOPLE TOO: THE CASE AGAINST PHYSICAL PUNISHMENT (1989).

2. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 3, sc. 1.

3. Stephen Nissenbaum, *Lighting the Freedom Tree*, N.Y. TIMES, Dec. 25, 1996, at A27; see also MYRA C. GLENN, CAMPAIGNS AGAINST CORPORAL PUNISHMENT: PRISONERS, SAILORS, WOMEN, AND CHILDREN IN ANTEBELLUM AMERICA 39–40, 54, 57 (1984) (observing that opponents of slavery were often against corporal punishment of children as well); STEPHEN NISSENBAUM, THE BATTLE FOR CHRISTMAS 186–87 (1997) (noting that abolitionists generally abhorred corporal punishment); Sanderson Beck, *Abolitionists, Emerson, and*

its struggle against slavery, concurrently undertook the quest to liberate children from corporal punishment regardless of their race or whether they were owned or free.<sup>4</sup> To abolitionists' way of thinking, the two campaigns complemented each other. While the relationship of corporal punishment of children to slavery may not be immediately obvious to a contemporary American, it required no great leap of logic for abolitionists to see the connection. Just as they could not abide slave masters' endemic use of corporal punishment on African-American "property,"<sup>5</sup> less famously but just as surely, the abolitionists recoiled from adults' use of corporal punishment on children.<sup>6</sup> In both contexts, the cause of the revulsion was the same, i.e., infliction of physical violence on people who had no choice but to submit.

After the Civil War, the adoption of the Thirteenth Amendment<sup>7</sup> in 1865<sup>8</sup> signaled a huge victory for the abolitionists insofar as the Amendment's Section 1 put an end to slavery as a legal institution in this country: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."<sup>9</sup> The victory was made sweeter still by the potential for statutory reinforcement offered in the Amendment's Section 2 endowing "Congress . . . [with] power to enforce this article by appropriate legislation."<sup>10</sup>

The Amendment does not, of course, explicitly address the abolitionists' parallel aim of banning corporal punishment

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*Thoreau: Abolitionists and Garrison's Nonresistance*, <http://www.san.beck.org/GPJ16-Abolitionists.html#3> (last visited Oct. 22, 2012) (mentioning that William Lloyd Garrison, a leading antebellum abolitionist, supported elimination of corporal punishment of children); MARGARET HOPE BACON, *By Moral Force Alone: The Antislavery Women and Nonresistance*, in *THE ABOLITIONIST SISTERHOOD* 275, 292 (Jean Fagan Yellin & John C. Van Horne eds., 1994) (chronicling abolitionist Lucretia Mott's explanation of her position against all corporal punishment of children).

4. See Nissenbaum, *supra* note 3, at A27 (referring to children *en masse* as an object of the abolitionist crusade against legalized corporal punishment).

5. See *supra* note 3 and accompanying text.

6. See *supra* note 3 and accompanying text.

7. U.S. CONST. amend. XIII.

8. JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., *FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS* 218 (7th ed. 1994).

9. U.S. CONST. amend. XIII, § 1.

10. U.S. CONST. amend. XIII, § 2.

of children.<sup>11</sup> With the sunset of the abolitionist movement in 1870,<sup>12</sup> this issue mostly faded from civic consciousness<sup>13</sup> even as the practice of corporally punishing children persisted with the legal system's blessing.<sup>14</sup> Indeed, both the praxis and the law's approbation of it still endure, with some welcome, if fitful, modification. Current statutory terminology may vary, but so-called reasonable parental corporal punishment of children is legal in all fifty states;<sup>15</sup> and, "reasonable" corporal punishment of elementary and secondary schoolchildren remains legal under nineteen state laws<sup>16</sup> (though in the

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11. See *supra* notes 9 and 10.

12. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION: 1863-1877 448 (1988) (recounting that the American Anti-Slavery Society disbanded in 1870 upon adoption of the Fifteenth Amendment forbidding federal and state race-based denials of the right to vote).

13. Susan H. Bitensky, *Section 1983: Agent of Peace or Vehicle of Violence Against Children*, 54 OKLA. L. REV. 333, 335 (2001).

14. See, e.g., *Sheehan v. Sturges*, 2 A. 841 (Conn. 1885) (referencing the Encyclopedia of Education for the observation that there were numerous judicial decisions at that time favoring teachers' prerogative to use corporal punishment on students, and that American law accorded parents the right to "correct his [*sic*] child." *Id.* at 842); *State v. Gillett*, 9 N.W. 362 (Iowa 1881) (ruling that parents then had the legal power to administer corporal punishment to children within the family); *Patterson v. Nutter*, 7 A. 273 (Me. 1886) (acknowledging teachers' authority to administer corporal punishment to pupils); *Heritage v. Dodge*, 9 A. 722 (N.H. 1887) (referring to the right of teachers and parents to dispense corporal punishment to children); *Quinn v. Nolan*, 7 Ohio Dec. Reprint (Ohio Super. 1879) (same); *Morrow v. Wood*, 35 Wis. 59 (1874) (noting that teachers may corporally punish schoolchildren); cf. COLIN HEYWOOD, A HISTORY OF CHILDHOOD: CHILDREN AND CHILDHOOD IN THE WEST FROM MEDIEVAL TO MODERN TIMES 100 (2001) (reporting that, throughout the nineteenth century, three-quarters of all children were corporally punished and that both fathers and mothers routinely whipped their progeny during this era).

15. See WAYNE R. LAFAVE, CRIMINAL LAW § 10.3(a), at 536-37 (4th ed. 2003); see, e.g., ALA. CODE § 13A-3-24(1) (2009); ALASKA STAT. § 11.81.430(a)(1) (2009); ARIZ. REV. STAT. ANN. § 13-403(1) (2009); COLO. REV. STAT. § 18-1-703(1)(a) (2009); CONN. GEN. STAT. ANN. § 53a-18(1) (2009); IND. CODE ANN. § 31-34-1-15(1) (2009); LA. REV. STAT. ANN. § 14:18(4) (2009); ME. REV. STAT. ANN. tit. 17-A, § 106(1), (4) (2009); OR. REV. STAT. § 161.205(1) (2009); WIS. STAT. ANN. § 939.45(5)(b) (2009).

16. Because states employ disparate legal mechanisms to permit school corporal punishment, it is easier to be accurate by conversely listing those states that have banned such punishment. ALASKA ADMIN. CODE tit. 4, § 07.010(c) (2009); CAL. EDUC. CODE § 49001 (2009); CONN. GEN. STAT. ANN. § 53a-18(1), (6) (2009); DEL. CODE ANN. tit. 14, § 702 (2009); HAW. REV. STAT. § 302A-1141 (2009); 105 ILL. COMP. STAT. 5/24-24 (2009); IOWA CODE § 280.21 (2009); MD. CODE ANN., EDUC. § 7-306(a) (2009); MASS. GEN. LAWS ch. 71, § 37G (2009); MICH. COMP. LAWS § 380.1312(3)-(4) (2009); MINN. STAT. § 121A.58 (2009); MONT. CODE ANN. § 20-4-302 (3)-(4) (2007); NEB. REV. STAT. § 79-295 (2008); NEV. REV. STAT. § 392.4633 (2008); N.J. STAT. ANN. § 18A:6-1 (2009);

N.Y. COMP. CODES R. & REGS. tit. 8, § 19.5 (2009); N.D. CENT. CODE § 15.1-19-02 (2008); OHIO REV. CODE ANN. § 3319.41(A) (2011); OR. REV. STAT. § 339.250(12) (2009); 22 PA. CODE § 12.5 (2009); UTAH ADMIN. CODE r. 277-608-2(B) (2009); VT. STAT. ANN. tit. 16, § 1161a(b)-(c) (2007-2008); VA. CODE ANN. § 22.1-279.1 (2009); WASH. REV. CODE § 28A.150.300 (2009); W. VA. CODE § 18A-5-1(e)(2009); WIS. STAT. § 118.31 (2009). In addition, on April 6, 2011, the Governor of New Mexico signed a bill barring school corporal punishment in that state. See Milan Simonich, *NM Governor Signs Bill to Ban Paddling in Schools*, EL PASO TIMES, Apr. 6, 2011, [http://www.elpasotimes.com/news/ci\\_17783884?source=rss](http://www.elpasotimes.com/news/ci_17783884?source=rss).

Maine's legislation is rather oblique on school corporal punishment inasmuch as the prohibition on the punishment is by negative inference. ME. REV. STAT. ANN. tit. 20, § 4009 (2009). Subsection 1 of the statute grants teachers or other persons responsible for another person for "special or limited purposes" immunization from civil liability for "use of a reasonable degree of force against the person who creates a disturbance if the teacher or other person reasonably believes it is necessary to: A. Control the disturbing behavior; or B. Remove the person from the scene of the disturbance." The negative inference is that a teacher may use force, not to punish a student, but, rather, solely to handle a disturbance. This is a correct interpretation of the statute as underscored by a Maine Department of Education statement advising that school personnel "no longer have the unilateral right to use corporal punishment to discipline students." ME. DEP'T OF EDUC., SCH. HEALTH MANUAL: ABUSE AND NEGLECT OF CHILDREN 2 (2006), <http://www.maine.gov/education/sh/abuseneglect/abuse06.pdf>.

Rhode Island has no legislation forbidding corporal punishment of children in the schools. The state's Board of Regents for Elementary and Secondary Education has, however, promulgated regulations prohibiting the punishment in the public schools. R.I. BD. OF REGENTS FOR ELEMENTARY AND SECONDARY EDUC., PHYSICAL RESTRAINT REGULATIONS § 3.6 (2002), [http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CDMQFjAA&url=http%3A%2F%2Fwww.ride.ri.gov%2Fregents%2Fdocs%2FRegentsRegulations%2FPHYS%2520REST%2520REGS%2520FINAL.pdf&ei=T5RTUK6BLueRiALo1YA4&usq=AFQjCNH74OEqivqhABgHXKVa\\_RMcMCGm8g&sig2=MSVHWGq8QO7kInr2Uce6Tw](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CDMQFjAA&url=http%3A%2F%2Fwww.ride.ri.gov%2Fregents%2Fdocs%2FRegentsRegulations%2FPHYS%2520REST%2520REGS%2520FINAL.pdf&ei=T5RTUK6BLueRiALo1YA4&usq=AFQjCNH74OEqivqhABgHXKVa_RMcMCGm8g&sig2=MSVHWGq8QO7kInr2Uce6Tw).

South Dakota statutes on school corporal punishment are puzzling. One asserts, in part, that "[s]uperintendents, principals, supervisors, and teachers and their aids and assistants, have the authority, to use the physical force that is reasonable and necessary for supervisory control over students." S.D. CODIFIED LAWS § 13-32-2 (2009). Another provides that a teacher or other school official may employ moderate, reasonable, and necessary force to restrain or correct a child. S.D. CODIFIED LAWS § 22-18-5 (2009). Taken at face value, these enactments would not appear to place South Dakota in the antipaddling column. The old bromide that warns against judging a book by its cover applies in this instance to the contents as well. The South Dakota Deputy Attorney General and Counsel to the state's Department of Education has previously acknowledged that the language of these statutes could be construed either to allow or outlaw school corporal punishment. Telephone Interview with Craig Eichstadt, S.D. Deputy Attorney General and Counsel to the S.D. Dep't of Educ. (June 17, 2004). However, he related that whenever South Dakota school personnel have inquired as to his opinion about the legal status of school corporal punishment in that state, he has told them that the punishment is prohibited. *Id.* What has prompted him to do so is the legislative history of

latter jurisdictions many major metropolitan public school districts have exercised delegated authority to ban the practice anyway).<sup>17</sup>

Whether the corporal punishment of yore was meted out with a “birch” in the proverbial woodshed or whether it occurs today via a swift swat in the local supermarket, the punishment has always had the same essential characteristics. The definition of corporal punishment of children which most accurately captures these characteristics is: the use of physical force upon a child’s body with the intention of causing the child to experience bodily pain so as

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Section 13-32-2. The current statutory wording amends a former version which averred that school personnel had the ‘authority, to administer physical punishment on an insubordinate or disobedient student’ in order to maintain ‘supervisory control over the student.’ *Id.* The amendment notably deleted the phrase ‘physical punishment on an insubordinate or disobedient student,’ thereby implying that the physical force now permitted by the section may not be for punitive purposes. *Id.*

However, the blue ribbon for most enigmatic state vis-à-vis illegality of school corporal punishment goes to New Hampshire. Without a doubt, New Hampshire belongs in the abolitionist column, but the way it gets there is via a crazy quilt of policymaking. The state’s relevant statute is abstruse. See N.H. REV. STAT. ANN. § 627:6.II(a) (2011). It provides that “[a] teacher . . . is justified on the premises in using necessary force against any . . . minor, when the minor creates a disturbance, or refuses to leave the premises or *when it is necessary for the maintenance of discipline.*” *Id.* (emphasis added). A reasonable lawyer might well conclude from the syntax that the statute authorizes school corporal punishment. My research uncovered no New Hampshire clarifying rules or regulations. Finally, and in some desperation, I had one of my research assistants call every single public school district in order to ascertain whether, as a policy matter, the individual schools or districts forbid corporal punishment of their students. The answer is that there is no public school corporal punishment of children in New Hampshire; it is prohibited by separate policy decisions across the state. Salam Elia, *New Hampshire Calls July, 2011*, at 1–148 (setting forth a log of Ms. Elia’s telephone conversations with officials and employees in New Hampshire public schools and school district offices so as to cover the entire state and reflecting that school corporal punishment is not allowed in any of the state’s public elementary and secondary schools) (on file with author).

Incidentally, the District of Columbia also prohibits school corporal punishment. D.C. MUN. REG. 5-E2403.2 (2002), *available at* <http://www.dcregs.dc.gov/Gateway/FinalAdoptionHome.aspx?RuleVersionID=307604> (follow “5-E2403 Corporal Punishment,” then “View Text”).

17. For example, school districts which have prohibited corporal punishment of their students, that are located in states still permitting the punishment, include: Miami-Dade, Houston, Memphis, Austin, Fort Worth, Atlanta, San Antonio, Denver, Tuscon, and Dallas. *Discipline at School (NCACPS)*, CTR. FOR EFFECTIVE DISCIPLINE, <http://www.stophitting.com/index.php?page=100largest> (last visited Oct. 23, 2012).

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to correct or punish the child's behavior.<sup>18</sup> Any other circumstances that may attend a particular instance of corporally punishing a child, even if momentous to the actors involved, are superfluous as a definitional matter.

There are two important caveats to this definition. By its very terms, the definition excludes physically restraining children to prevent them from imminently physically injuring themselves or others or from imminently damaging property. Physical restraint for these purposes is neither correction nor punishment; it is prevention.<sup>19</sup>

The other caveat does not flow from the definition's language, but, rather, is dictated by author's fiat in order to appropriately limit the scope of this Article. Specifically, the above-described definition of corporal punishment of children must be understood to exclude presently prosecutable physical child abuse. There is admittedly a sense in which this exclusion is arbitrary because corporal punishment of children and prosecutable physical child abuse may be thought of as occupying discrete points on a single continuum of interpersonal violence.<sup>20</sup> However, physical child abuse typically is deemed more severe regarding the force or somatic damage inflicted, or is deemed to result from an abuser's having a distinctive mental state beyond an intent

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18. SUSAN H. BITENSKY, CORPORAL PUNISHMENT OF CHILDREN: A HUMAN RIGHTS VIOLATION 2 (2006) [hereinafter BITENSKY, CORPORAL PUNISHMENT]; 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 U.S. Public Policy*, 13 PSYCHOL. PUB. POL'Y & L. 231, 232 (2007).

19. Susan H. Bitensky, *The Poverty of Precedent for School Corporal Punishment's Constitutionality Under the Eighth Amendment*, 77 U. CIN. L. REV. 1327, 1333 (2009).

20. See U.N. Secretary-General, *Report of the Independent Expert for the United Nations Study on Violence Against Children*, ¶8, U.N. Doc. A/61/299 (Aug. 29, 2006), available at [http://www.unicef.org/violencestudy/reports/SG\\_violencestudy\\_en.pdf](http://www.unicef.org/violencestudy/reports/SG_violencestudy_en.pdf) (defining violence in two ways: (1) "all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse" (quoting from the Convention on the Rights of the Child, art. 19, ¶1, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/RES/44/25 (Nov. 20, 1989)); and, (2) "the intentional use of physical force or power, threatened or actual, against oneself, another person, or a group or community, that either results or has a high likelihood of resulting in injury, death, psychological harm, maldevelopment or deprivation" (quoting from the WORLD HEALTH ORG., WORLD REPORT ON VIOLENCE AND HEALTH 5 (Etienne G. Krug et al. eds., 2002))).

merely to correct or punish behavior.<sup>21</sup> Also, all American jurisdictions outlaw the various forms of physically abusing a child,<sup>22</sup> while only some states outlaw corporally punishing a child some of the time.<sup>23</sup> These differences affect the substance of the constitutional arguments against each phenomenon under the Thirteenth Amendment, making separate analytical treatment preferable. The legal academy, moreover, has already taken up the issue of prosecutable physical child abuse as a Thirteenth Amendment violation,<sup>24</sup> making its further consideration along those lines old news.

In any event, the continuing legality in the United States of so much corporal punishment of children has for some time conflicted with accumulating scientific evidence that the punishment is deleterious to children's well-being<sup>25</sup> and with deepening moral qualms.<sup>26</sup> These contributions from science and ethics are principally contained in academic literature,<sup>27</sup> and are not widely known to the average policymaker or the man in the street.<sup>28</sup> Ignorance, taken in tandem with many Americans' religious or other traditions of disciplining children by the rod,<sup>29</sup> may account for the lack of legal reform

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21. H.D. Warren, *Criminal Liability for Excessive or Improper Punishment Inflicted on Child by Parent, Teacher, or One in Loco Parentis*, 89 A.L.R.2d 396, § 2 (2009).

22. The crime of physically abusing a child may be denominated differently by different states, but all states criminalize certain aspects of adult physical aggression against children. ROGER J.R. LEVESQUE, *CHILD MALTREATMENT AND THE LAW: RETURNING TO FIRST PRINCIPLES* 75 (2008); see Doriane Lambelet Coleman et al., *Where and How to Draw the Line Between Reasonable Corporal Punishment and Abuse*, 73 LAW & CONTEMP. PROBS. 107, 114 (2010) (asserting that "child-abuse definitions typically appear" in state penal codes).

23. See *supra* note 16 and accompanying text.

24. E.g., Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359, 1360 (1992).

25. See BITENSKY, *CORPORAL PUNISHMENT*, *supra* note 18, at 8–11.

26. See *id.*

27. See *id.* at 24.

28. Generally speaking, in the United States, scientific studies of and philosophical tracts on corporal punishment of children are not widely read beyond those members of the scholarly disciplines that produced them. See generally Cornelia Dean, *Scientific Savvy? In U.S., Not Much*, N.Y. TIMES, Aug. 30, 2005, <http://www.nytimes.com/2005/08/30/science/30profile.html> (reporting political scientist's findings that most Americans are illiterate in the sciences); MARTIN L. GROSS, *THE CONSPIRACY OF IGNORANCE: THE FAILURE OF AMERICAN PUBLIC SCHOOLS* 230–31 (1999) (discussing that even public school administrators are not offered courses on philosophy in graduate school).

29. PHILIP J. GREVEN, *SPARE THE CHILD: THE RELIGIOUS ROOTS OF*

regarding parental corporal punishment. Even so, an intuition must be afloat that something is wrong about this form of punishment. Otherwise, how is one to explain the fact that in 1977 only three states had outlawed school corporal punishment,<sup>30</sup> but that now thirty-one states have done so?<sup>31</sup> How is one to explain why most states currently bar this discipline in foster homes?<sup>32</sup> And what else is one to make of polls showing that the more educated parents are, the less they approve of physically chastising children?<sup>33</sup>

There is, in short, a peculiar dissonance in twenty-first-century America on the issue of corporal punishment of children. We appear betwixt and between. On the one hand,

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PUNISHMENT AND THE PSYCHOLOGICAL IMPACT OF PHYSICAL ABUSE 5–6, 74–75, 93 (1991); IRWIN A. HYMAN, THE CASE AGAINST SPANKING: HOW TO DISCIPLINE YOUR CHILD WITHOUT HITTING 30, 38, 56–57, 204–05 (1997).

30. In *Ingraham v. Wright*, the Supreme Court asserted that as of 1977, only two states, New Jersey and Massachusetts, had prohibited school corporal punishment. 430 U.S. 651, 663 (1977). The Court evidently overlooked the fact that by that year, Maine had done the same. ME. REV. STAT. ANN. tit. 17-A, § 106 cmt 1975 (1975).

31. See *Global Initiative to End All Corporate Punishment of Children, Global Progress, United States of America: Current Legality of Corporate Punishment: Schools*, at <http://www.endcorporalpunishment.org/pages.frame.html> (last visited Feb. 2, 2013).

32. BITENSKY, CORPORAL PUNISHMENT, *supra* note 18, at 288; see, e.g., ALA. ADMIN. CODE r. 660-5-29.04(2)(1)(iii) (2008); ARIZ. ADMIN. CODE R6-5-5909(E)(4)(e) (2008); CAL. ADMIN. CODE tit. 22, § 84072(c)(15) (2009); CONN. AGENCIES REGS. § 17a-145-151(c) (2009); GA. COMP. R. & REGS. 290-9-2.-07(8)(c)(3)(ix) (2009); ILL. ADMIN. CODE tit. 89, 402.21(c) (2009); IOWA ADMIN. CODE 441-114.20(237).(2) (2009); KAN. ADMIN. REGS. 28-4-815(b)(1)(B) (2009); MD. HUM. RES. 07.05.02.09(C)(10)(a) (2009); 110 MASS. CODE REGS. 7.111(3) (2009); MICH. ADMIN. CODE R. 400.1913(3)(a) (2009); MINN. R. 2960.3080(8)(A)(1) (2009); MO. CODE REGS. ANN. tit. 13, § 35-60.050(5)(A) (2009); NEB. ADMIN. R. & REGS. tit. 390, ch. 11, § 002.01E (2009); N.H. CODE ADMIN. R. HE-C 4002.25(e)(2) (2009); N.J. ADMIN. CODE tit. 10, § 122C-3.1(a)(2)(iv) (2009); N.C. ADMIN. CODE tit. 10A, r. 70E.1101(a)(11) (2009); N.D. ADMIN. CODE § 33-03-24.1-01(1) (2009); OKLA. ADMIN. CODE 377:10-7-3(d)(13)(A) (2009); OR. ADMIN. r. 414-205-0085(2)(a) (2009); OR. ADMIN. r. 413-200-0358(1) (2009); 55 PA. CODE § 6500.33(a) (2009); TEX. ADMIN. CODE tit. 40, § 749.1953 (2009); UTAH ADMIN. r. 501-12-13(2) (2009); 22 VA. ADMIN. CODE § 40-130-270(C)(4)(b)(7) (2009); WASH. ADMIN. CODE § 170-296-0390(2) (2009); W. VA. CODE R. § 78-3-14.4.a.1 (2009); WISC. ADMIN. CODES DCF § 202.08(7)(b) (2009).

33. See *ABC News Poll: Spanking Children*, ABC NEWS (Nov. 8, 2002), <http://www.google.com/url?sa=t&ret=j&q=&esrc=s&source=web&cd=2&ved=0CkQFjAB&url=http%3A%2F%2Fabcnews.go.com%2Fimages%2FPollingUnit%2F903a1Spanking.pdf&ei=kK1TUNuTCMmXigLjnoG4Aw&usq=AFQjCNEvUGiIW-ETyKSIPjPyIoas1YGS1w&sig2=Np0hHo50S8TOkubHTXXTqA> (finding that thirty-eight percent of parents with college degrees spank their children while fifty-five percent of less educated parents do so).

the law is moving on an incremental and slowly escalating trajectory of forbidding the punishment in settings beyond the family hearth;<sup>34</sup> the movement in this direction is, wittingly or not, increasingly consistent with the expanding knowledge-base about the negative impacts of corporal punishment on its young recipients.<sup>35</sup> On the other hand, state laws appear unbudgeable in their uniform commitment to allowing parental corporal punishment;<sup>36</sup> and, this legislative lassitude, or perhaps obstinacy, runs entirely counter to the overwhelming weight of expert opinion condemning the punishment.<sup>37</sup>

Waiting for lawmakers to harmonize the dissonance on a state-by-state basis is not an optimal solution. Such a piecemeal, haphazard approach would probably require a very long time before all children enjoyed complete legal protection from corporal punishment across the country. In the meantime, the situation would continue to put children at risk, if they happened to reside in states resistant to this sort of change.<sup>38</sup> From the vantage point of the reform minded, then, it would be highly desirable if there was some paramount body of federal law prohibiting corporal punishment of children and trumping contrary state law.<sup>39</sup> This is where the Thirteenth Amendment comes in.

The Amendment is an ideal constitutional home for such a prohibition. That much will be made clear by the conventional legal analysis, which is the pith and substance of this Article.<sup>40</sup> But, it is worth remarking that the Amendment's unique suitability for this protective role is also

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34. See BITENSKY, CORPORAL PUNISHMENT, *supra* note 18, at 289–90 (summarizing that, except with respect to parental corporal punishment, the trend in the United States is toward outlawing corporal punishment of children).

35. See generally *supra* text accompanying note 27.

36. See *supra* note 15 and accompanying text.

37. See *supra* text accompanying note 27.

38. See generally *supra* note 15 and accompanying text.

39. As previously pointed out, there currently exist state laws, which, if they remain unchanged, would conflict with a new body of federal law outlawing all corporal punishment of children. See generally statutes cited *supra* note 15 and accompanying text. In the normal course, such federal law should take precedence over conflicting state law, under the preemption doctrine flowing from the Constitution's Supremacy Clause. U.S. CONST. art. VI, cl. 2. See 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 12.1, at 269, § 12.4, at 292–94 (4th ed. 2007).

40. See *infra* Part I.

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shaped by an America still seamed with the residue of nineteenth-century prejudice against Blacks. One manifestation of these die-hard biases emerges in the racially skewed frequency with which corporal punishment is administered. Corporal punishment has been a favored disciplinary tactic in African-American families, predicated on the myth of its effectiveness in keeping children out of trouble in tough neighborhoods.<sup>41</sup> Perversely, the myth has roots in the oppression of slaves through lash and whip—a legacy that may have been internalized and passed on to slaves’ descendants.<sup>42</sup> In addition, Black children are recipients of an inordinate amount of school corporal punishment. Federal statistics show that, for the 2006–2007 academic year, Black students comprised 17.1% of the national student population but received 35.6% of school paddlings.<sup>43</sup> This means that Black students were corporally

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41. See JANICE E. HALE-BENSON, *BLACK CHILDREN: THEIR ROOTS, CULTURE, AND LEARNING STYLES* 16, 125, 133, 147 (rev. ed. 1986) (reporting that research shows “that people . . . of the African diaspora tend to ‘whip’ their children more than Europeans,” and that African American culture has a proclivity toward using corporal punishment on children); JOYCE A. LADNER & THERESA FOY DIGERONIMO, *LAUNCHING OUR BLACK CHILDREN FOR SUCCESS: A GUIDE FOR PARENTS OF KIDS FROM THREE TO EIGHTEEN* 90–91 (2003) (observing that African American families have a culture of relying upon corporal punishment of children); C. André Christie-Mizell et al., *Child Depressive Symptoms, Spanking, and Emotional Support: Differences Between African American and European American Youth*, 57 *FAM. REL.* 335, 335 (2008) (mentioning that African American parents are more likely than European Americans to spank their children); Jennifer E. Lansford & Kenneth A. Dodge, *Cultural Norms for Adult Corporal Punishment of Children and Societal Rates of Endorsement and Use of Violence*, 8 *PARENTING: SCI. & PRAC.* 257, 258 (2008) (stating that corporal punishment of children is relatively normative within African American culture).

42. See JAMES P. COMER & ALVIN F. POUSSAINT, *RAISING BLACK CHILDREN: TWO LEADING PSYCHIATRISTS CONFRONT THE EDUCATIONAL, SOCIAL, AND EMOTIONAL PROBLEMS FACING BLACK CHILDREN* 53 (1992) (commenting that historically, many Black parents felt that they had to resort to “severe punishment for even minor disobedience” of their progeny in order to protect the children from the harms which flow from living in harsh social conditions); LADNER & DIGERONIMO, *supra* note 41, at 90–91 (positing that the African American culture of using corporal punishment to discipline children stems from the history of corporal punishment of slaves); MARGUERITE A. WRIGHT, *I’M CHOCOLATE, YOU’RE VANILLA: RAISING HEALTHY BLACK AND BIRACIAL CHILDREN IN A RACE-CONSCIOUS WORLD* 130 (1998) (tracing the modern African American preference for corporal punishment of children, as a disciplinary tool, to the use of corporal punishment on slaves).

43. Office of Civil Rights, U.S. Department of Education, 2006 Civil Rights Data Collection, Projected Values for the Nation, 2006 National and State

punished at a rate that is almost twice their numbers in school, a form of racial discrimination writ large.<sup>44</sup> Like the prevalence of corporal punishment of children in Black families, double doses of school paddling are probably another atavism of slavery; most of the states that currently permit school corporal punishment were also slave states before the Civil War.<sup>45</sup>

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Projections, [http://ocrdata.ed.gov/Projections\\_2006.aspx](http://ocrdata.ed.gov/Projections_2006.aspx) (click on “National Total.”) (last visited May 9, 2011); *More Than 200,000 Kids Spanked at School*, CNN (Aug. 20, 2008), [http://articles.cnn.com/2008-08-20/us/corporal.punishment\\_1\\_corporal-punishment-students-children-spanked-us-schools?\\_s=PM:US](http://articles.cnn.com/2008-08-20/us/corporal.punishment_1_corporal-punishment-students-children-spanked-us-schools?_s=PM:US). This is the most recent federal data on corporal punishment of students.

It is interesting to note that there are more up-to-date federal statistics on racial disparities among students who are disciplined by expulsion and suspension. See Office for Civil Rights, U.S. Dep’t of Educ., *Civil Rights Data Collection* (March 2012), available at <http://www2.ed.gov/about/offices/list/ocr/docs/crdc-2012-data-summary.pdf> (reporting that although African-American students represent eighteen percent of the student population used in the study sample, they constituted thirty-five percent of students suspended once, forty-six percent of those suspended more than once, and thirty-nine percent of those expelled).

44. See Paul Finkelman, *Affirmative Action for the Master Class: The Creation of the Proslavery Constitution*, 32 AKRON L. REV. 423, 470 (1999) (referring to modern race discrimination as the legacy of slavery); cf. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 442–43 (1968) (noting that “when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery”); HOWARD ZINN, *A PEOPLE’S HISTORY OF THE UNITED STATES 1492–PRESENT* 435 (rev. and updated ed. 1995) (highlighting the memory and “living presence” of slavery as “part of the daily lives of blacks in generation after generation”).

45. There were fifteen slave states, including the “semi-slave states” of Maryland and Delaware. HENRY CHASE, *THE NORTH AND THE SOUTH: A STATISTICAL VIEW OF THE CONDITION OF THE FREE AND SLAVE STATE*, at v, 7 (2005). The other thirteen slave states were Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, South Carolina, Tennessee, Texas, and Virginia. *Id.* at 7. State laws expressly allowing use of corporal punishment in public elementary and secondary schools include Arkansas, Florida, Georgia, Kentucky, Louisiana, Missouri, North Carolina, South Carolina, and Tennessee; and state laws that are silent on the issue, presumably indicating tolerance of the practice, include Alabama and Mississippi. *Discipline and the Law: State Laws*, THE CTR FOR EFFECTIVE DISCIPLINE, <http://www.stophitting.com/index.php?page=legalinformation#granting> (Jul. 2009). Thus, of the fifteen former slave states, twelve allow school corporal punishment out of the total of nineteen states that presently do so. I would like to thank Professor Deana Pollard Sacks for alerting me to this alignment. Interview with Deana Pollard Sacks, Professor of Law, Texas Southern University Thurgood Marshall School of Law, in Dallas, Tex. (June 2, 2011).

These statistics, it should be emphasized, are not offered to suggest giving only Black children a refuge from corporal punishment under the Thirteenth Amendment. Such exclusivity would be unfair to children of other races and would undoubtedly raise equal protection problems.<sup>46</sup> The statistics instead are marshaled to demonstrate that, as presently practiced, corporal punishment of children falls disproportionately on small black and brown bodies in an ugly throwback to slavery's heyday; thus, in deconstitutionalizing corporal punishment of all minors, the Thirteenth Amendment would coincidentally but importantly contribute to ameliorating a legacy of racism that intrudes upon children's lives in particular.

Part I of this Article advances the argument that the Amendment's first section should be interpreted to implicitly prohibit all corporal punishment of all children in the United States, regardless of the punishment's relative mildness or severity, the identity of the punisher or of the child victim, or the venue where the punishment is meted out. The argument turns, in large measure, on making the case that corporal punishment reduces the child, at least for the duration of the punishment, to a condition extraordinarily similar to the conditions suffered by antebellum slaves, such similarity being a constitutional marker of enslavement.<sup>47</sup> This part also explores opportunities for practical application of an implied prohibition, such as by relying upon the popular assimilation of the prohibition's pedagogical message or by seeking prospective injunctive intervention or retrospective

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46. The equal protection principle arises from two clauses of the Constitution. The Fourteenth Amendment's Equal Protection Clause enunciates: "[N]or [shall any state] deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The Fifth Amendment's Due Process Clause has been interpreted to implicitly interpose the same protection as against the federal government. *Bolling v. Sharpe*, 347 U.S. 497, 498–500 (1954). The express words of that Amendment's Due Process Clause are that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. If states or the federal government were to enact statutes banning solely de jure corporal punishment of Black children in the public schools, then the statutes would be subject to strict scrutiny in the face of an equal protection challenge; the rationale for applying strict scrutiny would be that the statutes discriminate on the basis of race, a suspect class. *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999); *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

47. See *infra* Part I.A.

judicial redress vis-à-vis violations of the prohibition.

Part II of the Article contends, concomitantly or alternatively, that Congress is empowered under the Amendment's second section to legislate a ban on corporal punishment of children. This contention is supported by either one of two theories. First, inasmuch as Part I establishes that corporal punishment of children is a permutation of unconstitutional slavery, there is warrant for Congress to enact a statute against the punishment just as it could against slavery.<sup>48</sup> The second theory is that, because there is historical data chronicling that corporal punishment was an ordinary part of the way slave masters treated slaves, the punishment is a badge and incident of slavery within Congress' reach.<sup>49</sup> This part furthermore sets forth compelling policy reasons for Congress to enact this type of abolitionist (in both senses of the word) statute as a priority.

## I. THESIS UNDER SECTION 1 OF THE THIRTEENTH AMENDMENT

### A. *Section 1's Prohibition of Slavery Should be Interpreted to Implicitly Prohibit Corporal Punishment of Children*

#### 1. *Slavery's Definition and Dramatis Personae*

The Thirteenth Amendment's first section explicitly bars slavery and involuntary servitude.<sup>50</sup> Since a central thesis of this Article is that corporal punishment of children is closely akin to slavery and consequently violates Section 1's bar on the latter, a threshold question interposes as to what slavery actually is under the Amendment.

##### a. *The Precedent-Based Definition*

There is a dearth of U.S. Supreme Court rulings or even dicta defining the term "slavery" under Section 1 of the Thirteenth Amendment.<sup>51</sup> The Court's few ruminations on

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48. See *infra* Part II.A.

49. See *infra* Part II.A.

50. See U.S. CONST. amend. XIII, § 1.

51. There are, by my count, only four cases in which the Supreme Court made a fresh stab each time at defining slavery. See *infra* notes 55, 56, 59 and accompanying text; cf. Marco Masoni, Student Research, *The Green Badge of Slavery*, 2 GEO J. ON FIGHTING POVERTY 97, 104 (1994) (noting that it is still hard to reach a consensus on the meaning of "slavery" under the Thirteenth

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the subject during the nineteenth century were, at best, vague and impressionistic.<sup>52</sup> The majority opinion in the *Civil Rights Cases*<sup>53</sup> is paradigmatic. There, the Court trumpeted Section 1's abolition of slavery as an epic breakthrough "establish[ing] universal freedom."<sup>54</sup> What may be more salient than any other aspect of this contribution is its emotional vibrance. The statement, in spite of its brevity, appears freighted with judicial aspirations to imbue the Amendment's interdiction with a humanizing elasticity and capaciousness. The phraseology, also reiterated in some late twentieth-century Supreme Court decisions,<sup>55</sup> has evidently continued to resonate with an extended succession of Justices.

Of course, the equation of slavery's prohibition to "universal freedom" is maddeningly opaque if one is bent on chasing down slavery's constitutive components. Perhaps the closest the Court ever came during this early period to specifying some of those components was, ironically, in *Plessy v. Ferguson*,<sup>56</sup> which acclaimed the now unconstitutional

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Amendment); Benjamin P. Quest, Comment, *Process Theory and Emerging Thirteenth Amendment Jurisprudence: The Case of Agricultural Guestworkers*, 41 U.S.F. L. REV. 233, 236 (2006) (averring that "it is far from clear" what "slavery" means).

52. See *infra* notes 53–55 and accompanying text.

53. The Civil Rights Cases, 109 U.S. 3 (1883).

54. *Id.* at 20.

55. *City of Memphis v. Greene*, 451 U.S. 100, 125 (1981); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968).

56. *Plessy v. Ferguson*, 163 U.S. 537, 542 (1896). *Plessy* is no longer good law, but the way in which that happened is subject to some dispute. Occasionally, commentators have assumed that *Plessy* was overruled by *Brown v. Board of Education*, 347 U.S. 483 (1954). *E.g.*, Sharon K. Russo, *Vouchers for Religious Schools: The Death of Public Education?*, 13 S. CAL. INTERDISC. L.J. 49, 49 (2003). From a technical perspective, *Brown* did not go that far. Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 66 (2000); Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1914 n.74 (2004). Under the Equal Protection Clause of the Fourteenth Amendment, *Brown* did repudiate *Plessy*'s separate-but-equal doctrine, but only insofar as it applied to de jure racial segregation of students in public elementary and secondary schools. *Plessy* was instead overruled, post-*Brown* and sub silentio, in a series of Supreme Court decisions invalidating under the Clause various racially "separate-but-equal," governmentally imposed arrangements in other contexts. William W. Van Alstyne, *Discrimination in State University Housing Programs—Policy and Constitutional Consideration*, 13 STAN. L. REV. 60, 62 n.9 (1960); Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 323 n.136 (1986).

separate-but-equal doctrine.<sup>57</sup> In *Plessy*, the Court catalogued four constitutive components of slavery or involuntary servitude: bondage, ownership of a human being as chattel, control of another person's labor, and deprivation of a person's right to dispose of his or her own property, services, or self.<sup>58</sup> However, inasmuch as the Court neglected to specify which components belonged to which of the two concepts or whether all of the components belonged to both concepts (i.e. slavery or involuntary servitude), this, the Court's first attempt at reductionist analysis, was stillborn and has been of little use.

It was not until 1988 in *United States v. Kozminski*<sup>59</sup> that the Supreme Court finally pinned down one indicator of what slavery is.<sup>60</sup> The case arose out of charges of perpetrating involuntary servitude, brought against the Kozminskis under two federal statutes.<sup>61</sup> Because the meaning of "involuntary servitude" under the statutes depended on the terminology's meaning under the Thirteenth Amendment, the Court ended up focusing on an interpretation of the latter.<sup>62</sup>

The Court's rendering of "involuntary servitude," from an analytical standpoint, is straightforward. The Justices were guided by original intent.<sup>63</sup> They deduced that, in forbidding involuntary servitude, the Amendment's framers must have intended to ban compulsory labor where the compulsion is achieved by use of physical coercion.<sup>64</sup> Employing other

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57. See *Plessy*, 163 U.S. at 542. See *supra* note 56 with respect to the undoing of *Plessy*'s separate-but-equal doctrine.

58. *Plessy*, 163 U.S. at 542.

59. *U.S. v. Kozminski*, 487 U.S. 931 (1988).

60. See *infra* text accompanying note 75.

61. *Kozminski*, 487 U.S. at 934.

62. *Id.* at 941, 944–45. As mentioned in the text above, the Kozminskis were alleged to have committed involuntary servitude in contravention of two federal statutes. The Court found itself in the position of construing the phrase "involuntary servitude" of Section 1 of the Thirteenth Amendment due to certain peculiarities in those statutes. One statute did no more than criminalize violations of unspecified federal constitutional rights, thereby necessitating that the *Kozminski* Court elucidate the right embraced by "involuntary servitude" in the Amendment. The other statute expressly criminalized "involuntary servitude;" but, because the provision resulted from congressional intent to criminalize the same conduct proscribed by that phrase in the Thirteenth Amendment, the Court was again faced with interpreting the latter. *Id.*

63. *Id.* at 942.

64. *Id.*

heuristic methodologies, the Court also held that such compulsion could be achieved by legal coercion or even by the threat of physical or legal coercion.<sup>65</sup> The Court thus, in one fell swoop, introduced compulsory labor and physical or legal coercion or threat of either one, as constitutive elements of involuntary servitude under the Amendment.<sup>66</sup>

Of these types of coercion, only physical coercion is capable of analogy to corporal punishment of children. Both are acts inflicting physical force upon another person to exact his or her compliance with the force-wielding party's demands. Neither legal coercion nor the threat of physical or legal coercion share with corporal punishment of children such a preeminently defining feature beyond the generality of coerciveness—a generality so broad as to be of negligible analytical interest here. It is therefore only *Kozminski's* reference to physical coercion that is pertinent to this Article. All of which is to explain why the ensuing discussion, in an effort to avoid verbal and ideational clutter, often dispenses with mentioning the other three types of coercion expressive of involuntary servitude.

The *Kozminski* majority opinion, unpacked this far, contains no mention of slavery. This makes sense since the merits of the *Kozminski* suit were contingent on whether the respondents had committed involuntary servitude,<sup>67</sup> and since the Justices were invoking evidence of original intent directed at parsing that phrase. The majority opinion goes on, however, to shore up the parsing with an etiological search for the provenance, beyond originalism, of physical coercion as a constitutive element of involuntary servitude.<sup>68</sup> This manner of proceeding is, it happens, fortuitous for purposes of arguing that corporal punishment of children is congruent with enslavement and therefore within the Constitution's proscription of slavery. Indeed, it is that etiological endeavor which caused the *Kozminski* Court inexorably to back its way into construing the Amendment's indictment of slavery.<sup>69</sup>

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65. *Id.* at 942–44.

66. *See id.* at 934.

67. *Id.* at 942.

68. *See id.* at 938–39; *see infra* text accompanying notes 70–7.

69. *Kozminski*, 487 U.S. at 942.

The Court commenced rearward maneuvers with the statement that the “primary purpose of the [Thirteenth] Amendment was to abolish the institution of African slavery as it had existed in the United States at the time of the Civil War,”<sup>70</sup> though the Court carefully averred the Amendment was not limited to that purpose.<sup>71</sup> The Court pursued this caveat by desecrating two additional purposes of the Amendment implicitly arising from its prohibition on involuntary servitude. The first additional purpose is that of interdicting “those forms of *compulsory labor akin to African slavery*”<sup>72</sup> and the second additional purpose is that of interdicting “*conditions ‘akin to African slavery.’*”<sup>73</sup>

It is the Court’s deduction from these additional purposes that shines an epiphanic light on slavery’s crux and core. The Court expounded that “from the general intent [of the Amendment’s ban on involuntary servitude] to prohibit conditions ‘akin to African slavery,’ . . . we readily can deduce an intent to prohibit compulsion through physical coercion.”<sup>74</sup> While left unsaid, an obvious and ineluctable inference from that proposition is that African slavery itself must have involved physical coercion as a constant; otherwise, conditions akin to slavery could not involve such coercion.

*Kozminski*’s holding yields the definitional nugget that slavery, whatever else it may be, must entail the use of physical coercion.<sup>75</sup> The definition is part and parcel of the

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70. *Id.*

71. *Id.*

72. *Id.* (emphasis added) (quoting *Butler v. Perry*, 240 U.S. 328, 332 (1916)).

73. *Id.* (emphasis added) (quoting *Butler*, 240 U.S. at 332); see Seth F. Kreimer, *Rejecting “Uncontrolled Authority Over the Body”: The Decencies of Civilized Conduct, The Past and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 423, 425 n.8 (2007) (quoting the passage in *Kozminski*, 487 U.S. at 942, in which “compulsory labor” is deleted).

In the interest of thoroughness, it should be mentioned that the Court confronted an epic impediment to asserting the second implied purpose (of interdicting conditions like African slavery) since there was no precedent to support it. While *Kozminski* quoted verbatim from *Butler*, 240 U.S. at 332, to give valid backing for the first implied purpose, it invoked *Butler* in aid of the second purpose as well, though *Butler* is devoid of any reference to “conditions” akin to African slavery. See *id. passim*.

74. *Kozminski*, 487 U.S. at 942 (citation omitted).

75. *Id.* at 953. Other commentators, without providing a supporting analysis, have nonetheless opined that *Kozminski* makes physical coercion an inherent component of slavery. See, e.g., Amar & Widawsky, *supra* note 24, at 1369, 1379–80 (quoting and referring to those passages from *Kozminski* making physical coercion key to slavery and involuntary servitude); cf. Kurt Mundorff,

holding because, as shown above, the case's resolution pivoted on the meaning of "involuntary servitude," which, in turn, relied on the meaning of "slavery;" and, the Court abstemiously defined elements of "slavery" only insofar as was pertinent to such resolution.<sup>76</sup> Though no fanfare attended the demiurgic moment, it was thus that *Kozminski* created the sole precedent-based definition of "slavery" under Section 1.

The contours of *Kozminski's* holding go a long way to explain a rendering of "slavery" that is as spare as it is seminal. The Court did not even pause in the rendering long enough to meditate upon slavery's other possible dimensions—especially that of one person holding title to another.<sup>77</sup> The Court's omission in this regard is somewhat jarring since conventional wisdom is mostly preoccupied with the technicality of ownership as slavery's sine qua non.<sup>78</sup> The Court's disinterest in title, and focus instead on physical coercion, while surely a function of supporting the holding on involuntary servitude, may also have been a sage and farseeing move. For, the Court's reticence has avoided the danger of straightjacketing the Section 1 definition of slavery in ways that could unduly constrict its ongoing relevance. The *Kozminski* Court confessed as much when it articulated a willingness, in an appropriate suit, to hold that slavery exists in a factual situation where there is no outright ownership involved.<sup>79</sup>

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Note, *Children as Chattel: Invoking the Thirteenth Amendment to Reform Child Welfare*, 1 CARDOZO PUB. L. POL'Y & ETHICS J. 131, 166 (2003) (observing that the *Kozminski* "physical or legal coercion" standard governs slavery and involuntary servitude).

76. See *supra* notes 62–75 and accompanying text.

77. *Kozminski*, 487 U.S. *passim*.

78. See *Slavery Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/slavery> (last visited Oct. 24, 2012) (stating that "SLAVERY emphasizes the idea of complete ownership and control by a master: *to be sold into slavery*"); *Slavery*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/548305/slavery> (last visited Oct. 24, 2012) (explaining that "slavery" is a "condition in which one human being was owned by another"). I refer to a dictionary and encyclopedia for definitions of "slavery" as sources which lay persons would most likely consult. Thus, these are the sources that would be instrumental in helping to engender conventional wisdom.

79. See, e.g., *Kozminski*, 487 U.S. at 942 (averring that Section 1 of the Thirteenth Amendment bars conditions akin to antebellum slavery); Kathleen A. McKee, *Modern-Day Slavery: Framing Effective Solutions for an Age-Old Problem*, 55 CATH. U. L. REV. 141, 152 n.73 (2005) (describing the Thirteenth

The resistance to straightjacketing “slavery” has a plaguey downside, though. Due to its skimpiness, the *Kozminski* definition leaves the impression that it could be merely one part of an unfinished judicial work in progress. If so, that raises the question of how one should employ the definition when engaging in legal analysis under Section 1. The options are to refrain from such analysis altogether or to work with the definition thus far provided. The former approach would cut short the prohibition’s doctrinal development and any further application by the courts. Inasmuch as an ossified, if not moribund, Thirteenth Amendment would be outside the constitutional or moral pale, jurists must make do with the *Kozminski* definition as is.

Yet, whether the precedent-based definition of slavery is partial or complete, and though it is of Spartan temper, this is one of those instances where less is also more. The Justices hit upon a definition that is doctrinally sound because it is based on the reality of slave life. That is, the *Kozminski* definition encapsulates the most essential attribute of slavery as it existed in the American South, i.e., master-on-slave coercive physical violence.<sup>80</sup> The fact is that it was *de rigueur* for antebellum slaveholders and their henchmen to physically coerce slaves, with the endorsement of state law.<sup>81</sup> Among

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Amendment as prohibiting not only slavery, but also “systems akin thereto, in which one person possesses virtually unlimited authority over another” (quoting Howard Devon Hamilton, *The Legislative and Judicial History of the Thirteenth Amendment*, 10 NAT’L B.J. 7, 7 (1952)); Neal Kumar Katyal, Note, *Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution*, 103 YALE L.J. 791, 792, 796, 806–13 (1993); Alexander Tsesis, *A Civil Rights Approach: Achieving Revolutionary Abolitionism Through the Thirteenth Amendment*, 39 U.C. DAVIS L. REV. 1773, 1845–46 (2006) (asserting that the Thirteenth Amendment forbids “full-blown slavery as well as conduct depriving individuals of the fundamental rights that catalyzed the American Revolution”).

80. See *supra* text accompanying note 74. But see PETER KOLCHIN, *AMERICAN SLAVERY 1619–1877* 5 (1993) (arguing that the type of slavery which materialized in the “European-derived” world during the sixteenth and seventeenth centuries was “preeminently a system of labor”).

81. See Everette Swinney, *Suppressing the Ku Klux Klan: The Enforcement of the Reconstruction Amendments 1870–1877*, in *AMERICAN LEGAL AND CONSTITUTIONAL HISTORY: A GARLAND SERIES OF OUTSTANDING DISSERTATIONS* 36–37 (Harold Hyman & Stuart Bruchey eds., 1987); FONER, *supra* note 12, at 78; HENRY LOUIS GATES, JR., *CLASSIC SLAVE NARRATIVES* 497, 520 (1987); cf. JAMES OLIVER HORTON & LOIS E. HORTON, *SLAVERY AND THE MAKING OF AMERICA* 11 (2005) (contributing that “[s]lavery was a coercive system sustained by the mobilization of the entire society, and its maintenance

the violent techniques in their disciplinary repertoire, slaveholders exhibited a pronounced partiality to hitting, whipping, and flogging.<sup>82</sup> It was no aberration that *Dred Scott v. Sandford*,<sup>83</sup> infamously holding in 1856 that slaves' descendants were property,<sup>84</sup> arose from a White man's ferocious whipping of Dred Scott and his wife and daughters, an African-American family.<sup>85</sup> So routine and unrelenting was the legalized violence that, upon emancipation, former slaves were heard to conceptualize their freedom as "abolition of punishment by the lash."<sup>86</sup>

As the whipping of Dred Scott's daughters underscores, children were not spared the white man's lash by reason of their minority. It appears that masters not only saw physical coercion as the go-to expedient for "breaking in" children to slavery's demands, but also as a general nostrum for the annoyances and mischief posed by rambunctious youth, whether enslaved or not.<sup>87</sup> A sometime denizen of Georgia, the Reverend Horace Moulton bore witness to the regularity

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rested on the use of unimaginable violence and the constant threat of violence"). For additional descriptions of the pervasive flogging of antebellum slaves, see JOHN W. BLASSINGAME, *THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH* 251 (rev. and enlarged ed. 1979); FREDERICK DOUGLASS, *LIFE AND TIMES OF FREDERICK DOUGLASS* 52, 121 (Collier Books, reprinted from the rev. ed. 1962) (1892).

82. See FONER, *supra* note 12, at 78; Swinney, *supra* note 81, at 37.

83. 60 U.S. 393 (1856), *superseded by constitutional amendments*, U.S. CONST. amends. XIII, § 1, XIV, § 1 (the Citizenship Clause).

84. See *Dred Scott*, 60 U.S. at 411, 426–27, 454.

85. See generally Barbara Bennett Woodhouse, *Dred Scott's Daughters: Nineteenth Century Urban Girls at the Intersection of Race and Patriarchy*, 48 BUFF. L. REV. 669, 686 (2000).

86. FONER, *supra* note 12, at 78.

87. See, e.g., 146 CONG. REC. 106th Cong., 2d Sess., at E2106 (Nov. 14, 2000) (averring that whipping slaves, including children, was omnipresent in the South); BELINDA HURMENCE, *SLAVERY TIME, WHEN I WAS CHILLUN* 9 (1997) (setting forth slave Fannie Moore's recollection of a childhood beating dispensed by her master); WILMA KING, *STOLEN CHILDHOOD: SLAVE YOUTH IN NINETEENTH-CENTURY AMERICA* 20, 29, 215, 217 (Darlene Hine Clark et al. eds., 2d. ed. 2011) (recounting various episodes of slave masters whipping slave children); Orville Vernon Burton, *Edgefield, South Carolina: Home to Dave the Potter*, in *I MADE THIS JAR . . . THE LIFE AND WORKS OF THE ENSLAVED AFRICAN-AMERICAN POTTER, DAVE* 39, 46 (Jill Beute Koverman ed., 1998) (remarking upon slave masters' standard practice of whipping slave children); Calvin Schermerhorn, *Left Behind but Getting Ahead: Antebellum Slavery's Orphans in the Chesapeake, 1820–60*, in *CHILDREN IN SLAVERY THROUGH THE AGES* 204, 208–09 (Gwyn Campbell et al. eds., 2009) (providing a slave child's description of being flogged).

of the phenomenon in 1839, observing that slave “[c]hildren are whipped unmercifully for the smallest offences.”<sup>88</sup>

The other side of the coin was that, while slaves writhed, cowered, or mentally shook their fists at the unceasing assaults, many slaveholders and their progeny became conditioned to thrashing slaves. As the Kentucky slave Lewis Clarke acidly described it, “from the time [slaveholders’ White children] are born till they die, they live by whipping and abusing the slave.”<sup>89</sup> It is telling that, even once the Confederacy was defeated, White corporal punishment of Blacks in the South still remained a “habit so inveterate with a great many persons as to render, on the least provocation, the impulse to whip a negro almost irresistible.”<sup>90</sup>

The substantive richness of *Kozminski’s* definition of slavery, however, is not only a historical truth; it is what constitutionally *should be*. It must be kept in mind that *Kozminski’s* definition was devised within the context of a related legal history, i.e., the Court’s early musings on slavery as freedom’s antithesis.<sup>91</sup> There is no reason why these musings, partaking as they do of the ardor that gained formal expression in the Thirteenth Amendment’s interdiction,<sup>92</sup> should now be ignored. To the contrary, they are a reminder of the whys and wherefores of the Amendment that should likewise animate *Kozminski’s* formulation with a continuing sense of liberated human possibility.

In sum, the Supreme Court has defined the “slavery” prohibited by Section 1 as the use of physical force by one person on another<sup>93</sup>—a prohibition that rightly should be infused with the Amendment’s expansive spirit. This is the sole definition with full precedential weight. It is therefore the only definition of “slavery” appropriate for use in constitutional analysis.

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88. Rev. Horace Moulton, *Narrative and Testimony of Rev. Horace Moulton, in INTERESTING MEMOIRS AND DOCUMENTS RELATING TO AMERICAN SLAVERY, AND THE GLORIOUS STRUGGLE NOW MAKING FOR COMPLETE EMANCIPATION* 123, 133 (1846) [hereinafter *AMERICAN SLAVERY*].

89. Lewis Clarke, *Questions and Answers, in AMERICAN SLAVERY, supra* note 88, at 79, 94.

90. 1 Carl Schurz, *Report on the Condition of the South, in SPEECHES, CORRESPONDENCE AND POLITICAL PAPERS OF CARL SCHURZ* 279, 316 (Frederic Bancroft ed., 1913).

91. *U.S. v. Kozminski*, 487 U.S. 931, 944 (1988).

92. *See generally supra* notes 3–9 and accompanying text.

93. *See supra* note 75 and accompanying text.

b. *Endogenous Attributes of the Precedent-Based Definition*

The *Kozminski* definition of slavery as one person's use of physical coercion against another automatically declares the presence of at least two other connate secondary attributes. Given that disposition of the *Kozminski* case depended only on interpreting "involuntary servitude," the Court had no need to and did not mention slavery's secondary attributes.<sup>94</sup> Nonetheless, the definition would collapse without them.<sup>95</sup>

The first of these attributes is that the coercing party must be enabled, by law or otherwise, to engage in the physical coercion. It is elementary logic that unless such empowerment exists, no physical coercion can exist either. The second attribute is that the exercise of physical coercion causes, immediately and immanently, the coerced party to undergo "domination, degradation and subservience, in which human beings are treated as chattel, not persons."<sup>96</sup> There is abundant evidence from antebellum history supporting this proposition. The annals show that domination and degradation were ever these slaves' lot—or they were no slaves.<sup>97</sup> American slave narratives are filled to overflowing with despairing accounts of this erosion of dignity and self.<sup>98</sup>

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94. See *Kozminski*, 487 U.S. *passim*.

95. See *infra* text accompanying note 101.

96. Amar & Widawsky, *supra* note 24, at 1365; see *Hodges v. United States*, 203 U.S. 1, 8 (1906) (referring to a Webster's dictionary definition of "slavery" as "the state of entire subjection of one person to the will of another"), *overruled in part* by *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441 n.78 (1968); Shima Baradaran-Robison, Notes & Comments, *Tipping the Balance in Favor of Justice: Due Process and the Thirteenth and Nineteenth Amendments in Child Removal from Battered Mothers*, *BYU L. REV.* 227, 247–48 (2003) (noting that degradation, subjugation, and domination are evils suffered by the enslaved).

97. See DAVID BRION DAVIS, *INHUMAN BONDAGE: THE RISE AND FALL OF SLAVERY IN THE NEW WORLD* 179 (2006) (noting the dehumanization of American slaves); WILLIAM LEE MILLER, *ARGUING ABOUT SLAVERY: THE GREAT BATTLE IN THE UNITED STATES CONGRESS* 12 (1996) (referring to southern masters' subordination of and disdain toward slaves); ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY* 38, 95 (1982) (depicting slaves as virtual nonbeings due to the "social death" precipitated by enslavement).

98. E.g., Frederick Douglass, *Narrative of the Life of Frederick Douglass, an American Slave* (1845), reprinted in *NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE & INCIDENTS IN THE LIFE OF A SLAVE GIRL* 1, 28 (2000) (telling of the dehumanizing character of slavery and its "soul-killing" effects); Harriet Jacobs (writing under the pen name of Linda Brent), *Incidents in the Life of a Slave Girl*, in *THE CLASSIC SLAVE NARRATIVES* 437, 498 (Henry

While the immanence of these two secondary attributes in the *Kozminski* formulation of slavery as physical coercion may be of interest in and of itself, the analysis yielding them is provided in furtherance of this Article's agenda of fleshing out the most complete definition of slavery that is still precedent-based. Predicated on *Kozminski's* particularized formulation and combined with the foregoing distillation of its immanent secondary attributes, a simple syllogism reveals the coalescing of that complete definition, as follows:

(i) *Kozminski* defines slavery as one person's use of physical coercion on another;<sup>99</sup>

(ii) That definition of slavery is part of *Kozminski's* holding;<sup>100</sup> and

(iii) Two endogenous secondary attributes of that definition consist of empowerment to physically coerce as well as domination and degradation of the coerced person;<sup>101</sup>

(iv) Therefore, the secondary attributes are part of *Kozminski's* holding and possess its precedential value.

The syllogistic conclusion makes it disingenuous to rely exclusively on *Kozminski's* bare-bones definition of slavery. Indeed, faithfulness to *Kozminski*, invested as it is with earlier Court aspirations for Section 1's fulfillment, demands inclusion of the definition's endogenous components. Consequently, from hereon, Part I of this Article will use the expanded precedent-based definition of "slavery" under Section 1, i.e., "slavery" is a person's empowerment to use, as well as the use of, physical coercion on another person who is thereby dominated and degraded.

### c. *Dramatis Personae*

The Thirteenth Amendment's ban safeguards all people from slavery, regardless of race<sup>102</sup> or age.<sup>103</sup> With respect to

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Louis Gates, Jr., ed., 1987) (bemoaning the degradation of slave life); Rev. Thomas H. Jones, *Experience of Rev. Thomas H. Jones*, in NORTH CAROLINA SLAVE NARRATIVES: THE LIVES OF MOSES ROPER, LUNSFORD LANE, MOSES GRANDY, & THOMAS H. JONES 185, 233 (William L. Andrews et al. eds., 2003) (chronicling the slave's degradation).

99. See *supra* note 75 and accompanying text.

100. See *supra* notes 75–76 and accompanying text.

101. See *supra* note 96 and accompanying text.

102. The Civil Rights Cases, 109 U.S. 3, 24 (1883); Amar & Widawsky, *supra* note 24, at 1359; Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 1 (1995); David P. Tedhams, *The Reincarnation of*

would-be enslavers, the ban applies to both government and the private sector.<sup>104</sup> The ban is also indifferent to a perpetrator's intent.<sup>105</sup> For example, the ban applies regardless of whether a perpetrator enslaves for profit or not.<sup>106</sup> In short, all are protected and all are barred by the Section 1 prohibition.

## 2. *Comparing Corporal Punishment of Children to Slavery*

If physical coercion is as integral to corporal punishment as it is to slavery, then the punishment would share the essential attribute of slavery under the *Kozminski* definition. This circumstance would convincingly contribute to categorizing the punishment as closely akin to slavery, thereby bringing the former within Section 1's prohibition.<sup>107</sup> It is therefore necessary to determine whether corporal punishment of children too always involves physical coercion.

### a. *The Punishment Fits the Definition of Slavery*

It will be recalled that corporal punishment of children is the use of physical force upon a child's body with the intention of causing the child to experience bodily pain so as to correct or punish the child's behavior.<sup>108</sup> Consequently, by definition, corporal punishment of children always involves

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"Jim Crow:" *A Thirteenth Amendment Analysis of Colorado's Amendment 2*, 4 TEMP. POL. & CIV. RTS. L. REV. 133, 139 (1994).

103. Amar & Widawsky, *supra* note 24, at 1359–60; see *Doe v. Johnson*, No. 92C7661, 1993 U.S. Dist. LEXIS 3284, at \*8 (N.D. Ill. March 11, 1993) (suggesting that the child complainant might have been better off making her case under the Thirteenth Amendment); cf. STEVEN E. WOODWORTH & KENNETH J. WINKLE, *ATLAS OF THE CIVIL WAR* 144 (2004) (averring that the Thirteenth Amendment freed "all" of the slaves).

104. Amar & Widawsky, *supra* note 24, at 1364; William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1328–29 (2007).

105. Amar & Widawsky, *supra* note 24, at 1359; Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480, 506 (1990); see *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 390 n.17 (1982) (leaving open the question of whether there is any intent requirement under the Thirteenth Amendment); Carter, *supra* note 104, at 1329 (positing that the Court has left the issue unresolved as to whether purposeful discrimination is required to show a Thirteenth Amendment violation).

106. Amar & Widawsky, *supra* note 24, at 1359.

107. See *supra* notes 73, 75–79 and accompanying text.

108. BITENSKY, *CORPORAL PUNISHMENT*, *supra* note 18, at 2.

coercion. The punishment is not inflicted for its own sake or for no reason at all. That way would be sheer madness or viciousness. The punishment is instead imposed towards achieving a saner goal, i.e., coercing a child into compliance with adult wishes. The adult administers the punishment as a goad to induce the child's cessation of bad behavior or to deter the misbehavior's onset or resumption.<sup>109</sup>

It is also beyond cavil that the "physical force," referred to in the definition of "corporal punishment of children," is not only coercive but also an act of physical violence. A basic conceptual premise of physical chastisement is that its coercive power stems from bodily pain caused by the instrumentality of physical violence.<sup>110</sup> If the punisher was to physically touch the child's body so as to produce a sensation less acute than pain, the touching would be a tap, a pat, a tickle, a caress, a hug, or an accidental grazing, and would lose its capacity for coercing and punishing; rather, touching at these levels of intensity would convey a quite different message of playfulness, approval, affection, or, at worst, carelessness. But, lest there be the slightest doubt, other unmistakable manifestations of corporal punishment's intrinsic physical violence exist.

One manifestation is that corporal punishment of children neatly fulfills the elements of assault and battery, a crime of physical violence. Assault and battery (different states use one or the other term to designate the same crime) may be correctly described as an "unlawful application of force to the person of another" resulting in "either a bodily injury" or, in some states, a mere "offensive touching."<sup>111</sup> Under the approach exemplified by the Model Penal Code, in order to constitute criminal assault, the attack must cause "bodily injury,"<sup>112</sup> defined as, among other things, "physical pain, illness or any impairment of physical condition."<sup>113</sup> Even a "temporarily painful blow" to another will be a battery "though afterward there is no wound or bruise or even pain to

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109. *Id.*

110. *See id.*

111. WAYNE R. LAFAVE, CRIMINAL LAW §16.2, at 815–16 (4th ed. 2003); *see* Miguel Angel Méndez, *A Sisyphian Task: The Common Law Approach to Mens Rea*, 28 U.C. DAVIS L. REV. 407, 411–12 (1994).

112. MODEL PENAL CODE § 211.1 (1997); LAFAVE, *supra* note 111, §16.2, at 816 n.6.

113. MODEL PENAL CODE § 210.0 (1997).

show for it.”<sup>114</sup> The perpetrator must also have the mental state of intending to cause bodily pain or injury to another person.<sup>115</sup>

Corporal punishment of children is characterized by each of the above-described elements. Corporal punishment of children is, at a minimum, a temporarily painful blow intended to cause somatic pain.<sup>116</sup> Thus, the one-for-one concordance of the legally prescribed elements of criminal assault and battery with the definitionally prescribed elements of corporal punishment of children is authoritative evidence that the punishment must be an act of physical violence. State legislation erecting “reasonable” parental corporal punishment of children as a defense to assault or related charges<sup>117</sup> is a tacit admission of that conclusion.

Further corroboration that corporal punishment of children is a form of physical violence comes from the international community in the form of the 2006 “Report of the Independent Expert for the United Nations Study on Violence Against Children.”<sup>118</sup> The study defines “violence” against children as “the intentional use of physical force or power, threatened or actual, against a child, by an individual or group, that either results in or has a high likelihood of resulting in actual or potential harm to the child’s health, survival, development or dignity.”<sup>119</sup> The study explicitly subsumes within this formulation all corporal punishment of children.<sup>120</sup>

The upshot is that, when all is said and compared, a perfect parity emerges between the use of physical coercion in corporally punishing children and the use of physical coercion in slavery. Of course, Section 1 of the Thirteenth Amendment demands no exact correspondence between slavery and any other interpersonal dynamic in order for the latter to fit

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114. LAFAVE, *supra* note 111, §16.2, at 816.

115. *See id.*

116. *See* BITENSKY, CORPORAL PUNISHMENT, *supra* note 18, at 2.

117. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-403(1) (2011); COLO. REV. STAT. ANN. § 18-1-703(1)(a) (West 2011); CONN. GEN. STAT. ANN. § 53a-18(1) (West 2011); NEB. REV. STAT. ANN. § 28-1413(1)(a) (LexisNexis 2010); N.Y. PENAL LAW § 35.10(1) (McKinney 2011); S.D. CODIFIED LAWS § 22-18-5 (2011).

118. U.N. Secretary-General, *supra* note 20.

119. *Id.* ¶8, at 6 (citing the definition in WORLD HEALTH ORG., WORLD REPORT ON VIOLENCE AND HEALTH 5 (Etienne G. Krug et al. eds., 2002)).

120. *Id.* ¶¶26, 50.

within the former as a sufficiently slavely relationship.<sup>121</sup> In exceeding Section 1's demands, this total congruence attests to a certainty that corporal punishment of children is closely akin to slavery. And, that attestation alone makes corporal punishment of children a violation of the constitutional prohibition on slavery.

If this heterodox conclusion appears farfetched even after orthodox analysis demonstrates its validity, further evidence is available to win over the stubbornly incredulous. Confirmation can be had, for example, from the fact that corporal punishment of children immanently and inevitably has the same two secondary attributes as slavery. It will be recalled that slavery and corporal punishment of children share the identical primary constitutive attribute of use of physical coercion.<sup>122</sup> It will be also recalled that slavery's use of physical coercion logically presupposes empowerment of the slave master to physically coerce the slave—the empowerment being a secondary endogenous attribute of slavery.<sup>123</sup> Likewise, using corporal punishment logically necessitates empowerment of an adult to physically coerce the child. Otherwise, the punishment would be an impossibility. Hence, both slavery and corporal punishment of children totally correspond with respect to possession of this secondary attribute.

This Article also previously established via antebellum history that use of physical coercion by slave master against slave inevitably induced slaves to experience domination and degradation—the other secondary endogenous attribute.<sup>124</sup> But, does corporal punishment dominate and degrade children? And, if so, does the punishment do this dirty work in a way that closely parallels the conditions causing slaves to suffer a diminution of self? In attempting to respond to these questions, it is helpful to take a cue from a groundbreaking law review article by Professor Akhil Reed Amar and Daniel Widawsky who have created a powerful argument that prosecutable physical child abuse puts children in a slavely condition in violation of Section 1 of the Thirteenth

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121. See *supra* notes 70–76, 96–101 and accompanying text.

122. See BITENSKY, CORPORAL PUNISHMENT, *supra* note 18, *passim*.

123. See *supra* Part I.A.1.b.

124. See *supra* note 96 and accompanying text.

Amendment.<sup>125</sup> The authors opine that “[l]ike an antebellum slave, an abused child is subject to near total domination and degradation by another person, and is treated more as a possession than as a person.”<sup>126</sup> Physical child abuse leads to this domination and degradation, the article explains, because the abuse cannot “plausibly [be] for the benefit of the child” and “utterly disregard[s]” the child’s interests.<sup>127</sup>

Amar and Widawsky take for granted that physical child abuse cannot be and is not ever good for children. It is just as true that corporal punishment is never good for children though no timeworn bromide elevates that fact to conventional wisdom. However, contemporary scientific evidence and growing philosophical scruples about the punishment verify the validity of this assertion. They show that, not only does corporal punishment not benefit children in any meaningful way,<sup>128</sup> but this type of punishment utterly disregards children’s interests by putting their well-being at risk, sometimes seriously and permanently.<sup>129</sup>

A 2002 meta-analytic review inaugurated a seismic shift in the debate over corporal punishment of children.<sup>130</sup> Until then, each side in the controversy had been trapped in a rarefied game of cerebral ping-pong: “[no] sooner [were] scientific studies published that convict[ed] corporal punishment of potentially doing long lasting harm to children than” the opposite side would reply with newer scientific studies “exonerat[ing] the practice, and so on, back and forth and back and forth.”<sup>131</sup> The meta-analytic review put, if not an end to, then at least an enormous damper upon the controversy for the reason that such a review is more reliable than the results of any single or even a few correlational or longitudinal studies,<sup>132</sup> and this particular meta-analytic review cast the weight of authority decidedly in the

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125. Amar & Widawsky, *supra* note 24, *passim*.

126. *Id.* at 1364.

127. *Id.* at 1377.

128. See Elizabeth Thompson Gershoff, Corporal Punishment of Parents and Associated Child Behaviors and Experiences: A Meta-Analytic and Theoretical Review, 128 *Psychol. Bull.* 539 *passim* (2002); see *infra* notes 135–75.

129. See *id.*

130. See *id.*

131. BITENSKY, CORPORAL PUNISHMENT, *supra* note 18, at 8.

132. See *id.* at 10–11, 14–17.

antispanking camp.<sup>133</sup> Subsequent scientific studies, on the whole, have continued to confirm and build upon the review's findings.<sup>134</sup>

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133. See Gershoff, *supra* note 128, *passim*.

134. See, e.g., Tracie O. Afifi et al., *Physical Punishment, Childhood Abuse and Psychiatric Disorders*, 30 CHILD ABUSE & NEGLECT 1093, 1094, 1099 (2006); George G. Bear et al., *Children's Reasoning About Aggression: Differences Between Japan and the United States and Implications for School Discipline*, 35 SCH. PSYCHOL. REV. 62, 63–64 (2006); Heather L. Bender et al., *Use of Harsh Physical Discipline and Developmental Outcomes in Adolescence*, 19 DEV. & PSYCHOPATHOLOGY 227, 238–41 (2007) (ascertaining that parental corporal punishment is correlated with children's ensuing deteriorating mental health); Sarah E. Fine et al., *Anger Perception, Caregivers' Use of Physical Discipline, and Aggression in Children at Risk*, 13 SOC. DEV. 213, 224 (2004); Elizabeth T. Gershoff et al., *Parent Discipline Practices in Six Countries: Frequency of Use, Associations with Child Behaviors, and Moderation by Cultural Normativeness*, 81 CHILD. DEV. 480, 484, 486–93 (2010) (determining that, in an international sample, mothers' use of corporal punishment, expressing disappointment, and yelling were significantly related to increased child aggressiveness; that giving a time out, using corporal punishment, expressing disappointment, and shaming were significantly related to increased child anxiety symptoms; but, that mothers' use of reasoning or getting the child to apologize did not predict behavior problems in the children); Scott D. Gest et al., *Shared Book Reading and Children's Language Comprehension Skills: The Moderating Role of Parental Discipline Practices*, 19 EARLY CHILDHOOD RES. Q. 319, 332 (2004); Joseph 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, 111, 115–18 (2005) (finding an association between corporal punishment and subsequent alcohol and drug use in the children who had been hit); Prahbjot Malhi & Munni Ray, *Prevalence and Correlates of Corporal Punishment Among Adolescents*, 46 STUDIA PSYCHOLOGIA 219, 224–25 (2004) (discovering that adolescents whose parents had corporally punished them had lower overall adjustment); Catherine A. Taylor et al., *Mothers' Spanking of 3-Year-Old Children and Subsequent Risk of Children's Aggressive Behavior*, 125 PEDIATRICS 1057, 1063 (2010) (concluding that parental corporal punishment of children increases the risk for higher levels of child aggression). *But see* Robert E. Larzelere et al., *Do Nonphysical Punishments Reduce Antisocial Behavior More Than Spanking? A Comparison Using the Strongest Previous Causal Evidence Against Spanking*, 10 BMC PEDIATRICS 1 (2010), available at <http://www.biomedcentral.com/1471-2431/10/10> (finding that spanking, grounding, and psychotherapy each equally appear to increase children's antisocial behavior, and that deprivation of privileges and sending children to their rooms each partially appears to have the same effect, but contending that these appearances are due to residual confounding such that child effects on parents are mistaken for increased child antisocial behavior).

It should be noted that the Larzelere study, cited immediately above in this footnote as contrary authority, suffers from serious credibility problems. The study is published in an "open access" journal that does minimal peer review and that is excluded from the ISI Journal Citation Database, an omission indicating that the journal is neither well-established nor scientifically reputable. E-mail from Elizabeth T. Gershoff, Associate Professor, School of

The meta-analytic review determined that parental corporal punishment is associated with the following negative outcomes for the chastised children: decreased moral internalization, increased child aggression, increased child delinquent and antisocial conduct, decreased quality of the parent-child relationship, decreased child mental health, and increased risk of undergoing classic physical child abuse, and upon reaching adulthood, increased adult aggression, increased adult criminal and antisocial behavior, decreased adult mental health, and increased risk of abusing one's own child or spouse.<sup>135</sup>

There unfortunately is a scarcity of studies directly dealing with corporal punishment of children in nonfamilial settings such as schools.<sup>136</sup> The few studies that do

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Human Ecology, The University of Texas at Austin, to author (Feb. 25, 2010, 04:38 PM) [hereinafter Gershoff E-mail] (on file with author).

The substance of the Larzelere study does not fare much better in terms of credibility. For example, Larzelere relied in this work upon the National Longitudinal Study of Youth which has been used in many papers to document the link between corporal punishment and children's externalized behaviors over time; yet, the Larzelere study does not even cite two such papers in which their author employed a more rigorous method of examining longitudinal impacts of corporal punishment and found long-term negative impacts of the punishment, after controlling for children's initial behavior. *Id.* (The two articles overlooked by the Larzelere study are: Andrew Grogan-Kaylor, *Corporal Punishment and the Growth Trajectory of Children's Antisocial Behavior*, 10 CHILD MALTREATMENT 283 (2005), and Andrew Grogan-Kaylor, *The Effect of Corporal Punishment on Antisocial Behavior in Children*, 28 SOC. WORK RES. 153 (2004)).

Besides the defect of incomplete research, the Larzelere study also stumbles by using faulty logic. The central purpose of the study is to support the proposition that early childhood spanking is no worse than early childhood grounding and psychotherapy, with respect to increasing child antisocial behavior over time. Larzelere et al., *supra*. To that end, Larzelere and company proposed that what has given rise to findings of increased child antisocial behavior is not the punishment or therapy, but, rather, the circumstance that the children were more antisocial to begin with. *See id.* The logical weakness of this argument stems from the fact that the Larzelere study controlled for any effect the child had from the start on provoking more discipline. Gershoff E-mail, *supra*. So, the Larzelere study does not measure anything of interest regarding corporal punishment's outcomes for children.

135. Gershoff, *supra* note 128, at 544.

136. *See, e.g.*, Norma D. Feshback & Seymour Feshback, *Aggression in the Schools: Toward Reducing Ethnic Conflict and Enhancing Ethnic Understanding*, in VIOLENCE AGAINST CHILDREN IN THE FAMILY AND THE COMMUNITY 269, 274 (Penelope K. Trickett & Cynthia J. Schellenbach eds., 1998); Stephen S. Owen, *The Relationship Between Social Capital and Corporal Punishment in Schools: A Theoretical Inquiry*, 37 YOUTH & SOC'Y 85, 88 (2005); Melissa J. Spencer, *Corporal Punishment and Ridicule—Residual Psychological*

concentrate on school paddling are, however, quite as damning as the studies on parental use of the punishment.<sup>137</sup> The lacuna is also bridged to some degree by the studies on parental corporal punishment since their results can fairly be extrapolated to the school context.<sup>138</sup>

It should be underscored that all of this data proves only that corporal punishment of children is *correlated* with the identified adverse impacts; the data do not show that such punishment causes these impacts.<sup>139</sup> The significance of such correlational data, then, is that some children who are corporally punished will be negatively affected by it and that other children will emerge from the experience relatively unscathed. There is no reliable predictor as to which children

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Effects in Early Adulthood: Implications for Counselors 13 (May 1999) (unpublished Ph.D. dissertation, Texas Tech. University).

137. For social science studies reporting on indirect testing for the effects of school corporal punishment on children, see J. Csorba et al., *Family-and School-Related Stresses in Depressed Hungarian Children*, 16 EUR PSYCHIATRY 18, 25 (2001) (determining that an association exists between school corporal punishment and later child depression); Maria R. Czumbil & Irwin A. Hyman, *What Happens When Corporal Punishment Is Legal?*, 12 J. INTERPERSONAL VIOLENCE 309, 312 (1997) (relying upon newspaper reports of school corporal punishment to deduce that abusiveness of such punishment increases with the frequency of its use); Daniel J. Flannery et al., *Violence Exposure, Psychological Trauma, and Suicide Risk in a Community Sample of Dangerously Violent Adolescents*, 40 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 435, 440 (2001) (publishing results of a correlational study of children subjected to violence “in the home, neighborhood, and school”); Soc’y for Adolescent Med., *Corporal Punishment in Schools: Position Paper of the Society for Adolescent Medicine*, 32 J. ADOLESCENT HEALTH 385, 388 (2003) (reporting on studies showing that school corporal punishment creates an educational environment which is “unproductive” and “nullifying” and which has negative psychological impacts on pupils); cf. 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, 809 (1999) (presenting the results of a cross-sectional study of corporal punishment of children dispensed by “any adult”).

138. E-mail from Elizabeth Gershoff, Assistant Professor, School of Social Work, University of Michigan, to author (Sept. 1, 2004) (on file with author).

139. For an extended discussion about the fact that most relevant social science studies show only correlative rather than causative relationships between corporal punishment of children and the behavior of and psychological outcomes for those children, see BITENSKY, CORPORAL PUNISHMENT, *supra* note 18, at 10 n.55, 11 n.59. Indeed, scientists purposefully shun causative studies of spanking children because of ethical concerns about subjecting children to physical pain when there is no established benefit from doing so. E-mail from Joan Durrant, Associate Professor, Head of Family Studies, University of Manitoba, to author (Oct. 9, 2002) (on file with author).

will be which.<sup>140</sup> Corporal punishment thus effectively puts every child at risk.

All in all, science is a constructive rebuke to any further use of corporal punishment on children. But, there are other indicia of the punishment's detrimental impacts as well. Anecdotal reporting reveals that corporal punishment may, not surprisingly, cause physical injuries. Abrasions and hematomas are commonplace.<sup>141</sup> More serious bodily injuries occur, too, e.g., whiplash,<sup>142</sup> sciatic nerve damage,<sup>143</sup> fracture of the sacrum,<sup>144</sup> and hemorrhaging.<sup>145</sup>

Ethical concerns also have often entered the discourse about corporal punishment of children. The charge has been leveled that corporal punishment of children is immoral because it is the intentional gratuitous infliction of pain on children's bodies.<sup>146</sup> According to the definition of corporal punishment of children used here, this type of discipline must be intentional and must inflict pain on children's bodies in order for the discipline to be corporal punishment.<sup>147</sup> The punishment is gratuitous inasmuch as there are nonviolent, more effective tactics available for disciplining children.<sup>148</sup> A

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140. See BITENSKY, CORPORAL PUNISHMENT, *supra* note 18, at 9; Bitensky, *supra* note 19, at 1400; *cf.* Gershoff, *supra* note 128, at 609 (concluding that corporal punishment should have strong and *consistently* positive effects on children for psychologists to recommend it, but that the punishment does not remotely meet this standard).

141. See, e.g., *Ingraham v. Wright*, 430 U.S. 651, 657 (1977) (adverting to the fact that school paddling of one of the petitioners caused a hematoma); *P.B. v. Koch*, 96 F.3d 1298, 1299–1300, 1304 (9th Cir. 1996) (ruling that a high school principal violated students' substantive due process rights in using corporal punishment on them so as to produce bruising, among other harms); MICHAEL J. MARSHALL, WHY SPANKING DOESN'T WORK: STOPPING THIS BAD HABIT AND GETTING THE UPPER HAND ON EFFECTIVE DISCIPLINE 26 (2002) (relating that pediatricians are alarmed at the number of injuries which result from parentally inflicted corporal punishment).

142. Soc'y for Adolescent Med., *supra* note 137, at 389.

143. Spencer, *supra* note 136, at 47.

144. *Id.*

145. *Id.*

146. See BITENSKY, CORPORAL PUNISHMENT, *supra* note 18, at 2–5; HYMAN, *supra* note 29, at 39–40 (commenting that because corporal punishment is the gratuitous infliction of bodily pain on children, it is abusive in nature).

147. See BITENSKY, CORPORAL PUNISHMENT, *supra* note 18, at 2–3.

148. For authors and organizations identifying nonviolent alternatives to corporal punishment of children, see KATHARINE C. KERSEY, DON'T TAKE IT OUT ON YOUR KIDS! A PARENT'S GUIDE TO POSITIVE DISCIPLINE 49–72 (rev. ed. 1994); WILLIAM SEARS & MARTHA SEARS, THE DISCIPLINE BOOK: EVERYTHING YOU NEED TO KNOW TO HAVE A BETTER-BEHAVED CHILD—FROM BIRTH TO AGE

longstanding inventory of nonviolent disciplinary tactics includes, but is not limited to, deprivation of privileges,<sup>149</sup> reasoning,<sup>150</sup> letting the child suffer the natural consequences, within reason, of his or her naughtiness,<sup>151</sup> grounding,<sup>152</sup> asking the child to suggest a fitting and reasonable nonviolent punishment,<sup>153</sup> negotiation and compromise, etc.<sup>154</sup> These tactics are user friendly; they can easily be applied by any adult supervising children in any venue. Schools additionally may resort to such tactics as in-school suspension,<sup>155</sup> parent pickup,<sup>156</sup> Saturday schooling,<sup>157</sup> restitution,<sup>158</sup> detention, etc.,<sup>159</sup> less austere measures include providing a character education curriculum,<sup>160</sup> enlisting the assistance of school psychologists and counselors,<sup>161</sup> contracting with students for better conduct,<sup>162</sup> and engaging in peer mediation.<sup>163</sup>

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TEN 161–81 (1995); CAROLYN WEBSTER-STRATTON & MARTIN HERBERT, TROUBLED FAMILIES—PROBLEM CHILDREN: WORKING WITH PARENTS: A COLLABORATIVE PROCESS 285 (1994); *Discipline at School (NCACPS): School Corporal Punishment Alternatives*, CTR. FOR EFFECTIVE DISCIPLINE, <http://www.stophitting.com/index.php?page=alternatives> (last visited Oct. 25, 2012) [hereinafter CTR. FOR EFFECTIVE DISCIPLINE, *Alternatives*].

149. See SEARS & SEARS, *supra* note 148, at 181; STRATTON-WEBSTER & HERBERT, *supra* note 148, at 285.

150. See COMER & POUSSAINT, *supra* note 42, at 50; SEARS & SEARS, *supra* note 148, at 162–63.

151. See KERSEY, *supra* note 147, at 63–64; JANE NELSON ET AL., POSITIVE DISCIPLINE A–Z: 1001 SOLUTIONS TO EVERYDAY PARENTING PROBLEMS 189–90 (1993); WEBSTER-STRATTON & HERBERT, *supra* note 148, at 285.

152. See THOMAS W. PHELAN, 1-2-3 MAGIC 39 (4th ed. 2010).

153. See MELVIN L. SILBERMAN & SUSAN A. WHEELAN, HOW TO DISCIPLINE WITHOUT FEELING GUILTY: ASSERTIVE RELATIONSHIPS WITH CHILDREN 112 (1980).

154. See SEARS & SEARS, *supra* note 148, at 178–81; SILBERMAN & WHEELAN, *supra* note 153, at 106–10.

155. CTR. FOR EFFECTIVE DISCIPLINE, *Alternatives*, *supra* note 148.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*; see generally IRWIN A. HYMAN ET AL., SCHOOL DISCIPLINE AND SCHOOL VIOLENCE: THE TEACHER VARIANCE APPROACH 18, 47–48 (1997); Bear et al., *supra* note 134, at 64.

161. CTR. FOR EFFECTIVE DISCIPLINE, *Alternatives*, *supra* note 148.

162. See CHARLES H. WOLFGANG, SOLVING DISCIPLINE AND CLASSROOM MANAGEMENT PROBLEMS: METHODS AND MODELS FOR TODAY'S TEACHERS 196 (5th ed. 2001).

163. CTR. FOR EFFECTIVE DISCIPLINE, *Alternatives*, *supra* note 148.

The existence of so many nonviolent options means that, even if corporal punishment was a benefit as well as a detriment to children, there still would be no intelligent justification for using a punishment producing any detriment. The fact is, though, that corporal punishment's impacts are wholly in the negative column—except for one arguably positive effect. The 2002 meta-analytic review demonstrates that corporal punishment tends to cause the child's immediate cessation of his or her misbehavior.<sup>164</sup> From the vantage point of the frustrated adult who is trying to control an unruly or defiant child, achieving prompt child compliance should appear a godsend. The catch is that, upon further examination, this quick fix turns out to be no fix at all. The cessation is ephemeral, and teaches the child nothing of lasting import.<sup>165</sup> Indeed, corporal punishment has been shown to actually impede moral internalization, or the development of conscience, a chief aim of child discipline.<sup>166</sup>

The point of the foregoing digression into disciplinary alternatives is this: corporal punishment of children is gratuitous because it is unnecessary to achieving its supposed end and never can achieve that end. No caring, responsible adult, who is made aware of corporal punishment's effects, would desire to subject a child to the needless pain and suffering such punishment brings. Moreover, this already major ethical concern is magnified many times over when corporal punishment's adverse outcomes for children, in addition to inducing somatic pain, are thrown into the mix.

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164. See Gershoff, *supra* note 128, at 544; see Carolyn Hilarski, *Corporal Punishment: Another Form of School Violence*, in *KIDS AND VIOLENCE: THE INVISIBLE SCHOOL EXPERIENCE* 59, 71 (Catherine N. Dulmus & Karen M. Sowers eds., 2004).

165. Irwin A. Hyman et al., *Paddling and Pro-Paddling Polemics: Refuting Nineteenth Century Pedagogy*, 31 *J.L. & EDUC.* 74, 79 (2002); Irwin A. Hyman, *Using Research to Change Public Policy: Reflections on 20 Years of Effort to Eliminate Corporal Punishment in Schools*, 98 *PEDIATRICS* 818, 820 (1996); see PENELOPE LEACH, *YOUR GROWING CHILD: FROM BABYHOOD THROUGH ADOLESCENCE* 224 (1998) (noting that children never can remember why they were smacked).

166. Gershoff, *supra* note 128, at 544; see Soc'y for Adolescent Med., *supra* note 137, at 388 (suggesting that school corporal punishment merely teaches students to avoid getting caught with their 'hands in the cookie jar'); cf. Bear et al., *supra* note 134, at 63 (commenting that punitive discipline of schoolchildren tends to encourage a "hedonistic perspective" to moral reasoning).

Another qualm of conscience is that corporal punishment of children, to the extent the punishment is legal, is profoundly unfair.<sup>167</sup> The unfairness stems from the fact that children may be subjected to legalized physical violence against which adults are protected by law.<sup>168</sup> As previously discussed, if corporal punishment was not denominated as such, the punishment would meet all of the elements of a criminal assault and battery.<sup>169</sup> The existence of laws criminalizing assault and battery manifests a society's moral judgment that hitting people is not acceptable as a behavior modification or dispute resolution technique among adults.<sup>170</sup> There appears to be no reason why the moral judgment undergirding these laws should change simply because the victim of the assault and battery is a minor in the custody or under the supervision of the adult punisher. To the contrary, under those circumstances, there is even greater cause to abstain from physical force since children are usually smaller, weaker, and more vulnerable and dependent than the average adult;<sup>171</sup> they are, furthermore, still developing physically, intellectually, and psychologically,<sup>172</sup> and corporal

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167. BITENSKY, CORPORAL PUNISHMENT, *supra* note 18, at 5–7; NEWELL, *supra* note 1, at 12; Benjamin Shmueli, *What Has Feminism Got to Do with Children's Rights? A Case Study of a Ban on Corporal Punishment*, 22 WIS. WOMEN'S L.J. 177, 218 (2007) (proposing that it may be concordant with feminism to regard corporal punishment of children as inconsistent with principles of equality).

168. BITENSKY, CORPORAL PUNISHMENT, *supra* note 18, at 5.

169. *See supra* note 111 and accompanying text.

170. For articles on the expressive function of the criminal law in general, see Elaine M. Chiu, *Culture in our Midst*, 17 U. FLA. J.L. & PUB. POL'Y 231, 233 (2006); Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409, 1439 (2001); Richard E. Myers II, *Responding to the Time-Based Failures of the Criminal Law Through a Criminal Sunset Amendment*, 49 B.C. L. REV. 1327, 1335–36 (2008).

171. *See* BITENSKY, CORPORAL PUNISHMENT, *supra* note 18, at 5 (noting children's relative vulnerability and reliance upon adults); Susan H. Bitensky, *Spare the Rod, Embrace our Humanity: Toward a New Legal Regime Prohibiting Corporal Punishment of Children*, 31 U. MICH. J.L. REFORM 353, 435–36 (1998) (describing children as having "less than average adult abilities" and as being more vulnerable than the average adult).

172. AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, *YOUR CHILD: EMOTIONAL, BEHAVIORAL, AND COGNITIVE DEVELOPMENT FROM BIRTH THROUGH PREADOLESCENCE passim* (David B. Pruitt ed., 1998); PATRICIA D. FOSARELLI, *ASAP: AGES, STAGES, AND PHASES: FROM INFANCY TO ADOLESCENCE: INTEGRATING PHYSICAL, SOCIAL, EMOTIONAL, INTELLECTUAL, AND SPIRITUAL DEVELOPMENT passim* (2006).

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punishment may distort these processes.<sup>173</sup> It also exacerbates the inequity immeasurably that the punishment has no redeeming disciplinary value and that nonviolent modes of disciplining children are at the ready.<sup>174</sup>

If a practice objectively holds many dangers for a cohort of people and no real benefits, then continued use of that practice objectively debases the cohort and denotes the latter's consummate subjugation, whatever subjective thoughts the victimizers or the victims may cling to. The bleak and unavoidable message is that the welfare of the victims really cannot matter very much and, hence, that the victims themselves cannot matter very much. Scientific studies and philosophical insights about corporal punishment of children leave no doubt anymore that the punishment "utterly disregard[s]" children's interests to the same degree as prosecutable physical child abuse.<sup>175</sup> Since corporal punishment causes the child to suffer domination and degradation just as much as physical coercion caused the same suffering in slaves, the second endogenous attribute of slavery is an endogenous attribute of corporal punishment of children as well.

In the end, it comes down to this. Corporal punishment of children fits the primary attribute of slavery as defined by *Kozminski*. That dovetailing alone warrants classifying the punishment as a form of slavery forbidden by Section 1. The supplementary analysis demonstrating that corporal punishment of children shares both of slavery's secondary endogenic attributes makes the correspondence tighter still, and confirms these practices' constitutional equivalency. There is no out; if slavery is barred by Section 1, then so is corporal punishment of children.

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173. See *supra* note 135 and accompanying text; cf. U.N. Econ. & Soc. Council, Rep. of the Special Rapporteur, Submitted to Commission on Human Rights, Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. E/CN.4/1996/35, 52d Sess., para. 10 (1996), available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/691b21854d334918802566aa005d5209?Opendocument> (opining, with respect to torture and ill-treatment of children, that "children are necessarily more vulnerable to the effects of torture and, because they are in the critical stages of physical and psychological development, may suffer graver consequences than similarly ill-treated adults").

174. See *supra* note 148 and accompanying text.

175. Amar & Widawsky, *supra* note 24, at 1377.

*b. Even Punishment Within the Family is Not Exempt from Section 1's Ban on Slavery*

There is something counterintuitive and deeply disquieting about an analytical pairing of parental corporal punishment with parents treating their children as no better than slaves. Although it is speculation, the origin of the unease may be that, because spanking juveniles has been an ingrained and pervasive way of disciplining them in this country,<sup>176</sup> the parenting role has, in some people's minds and perhaps subconsciously, become synonymous with reliance on such punishment. These adults might fearfully conclude that an attack on corporal punishment of children must also be an attack on parenting—an attack subverting, sub rosa, the parent-child bond and family values.<sup>177</sup>

Feelings of hostility or resistance to the constitutional equivalency, to the extent they materialize, may be partially actuated by that which is vital to and healthy about the human condition. It goes without saying that the parent-child relationship is absolutely essential to the perpetuation and flourishing of the species; the relationship is furthermore often a source of joy and affirmation for all concerned. In order to secure these payoffs, parents must hold a position of responsibility and authority vis-à-vis their offspring.<sup>178</sup> There are, however, lines that parents may not cross even in relation to their own children. These are the lines that American society has drawn to demarcate productive or at least benign parenting from the more toxic variety.<sup>179</sup> Not all parenting enjoys equal status before the law; inimical child

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176. MARSHALL, *supra* note 141, at 179 JOHN ROSEMOND, TO SPANK OR NOT TO SPANK: A PARENTS' HANDBOOK 7–8 (1994); ELIZABETH T. GERSHOFF, REPORT ON PHYSICAL PUNISHMENT IN THE UNITED STATES: WHAT RESEARCH TELLS US ABOUT ITS EFFECTS ON CHILDREN 11 (2008), *available at* [http://www.phoenixchildrens.com/PDFs/principles\\_and\\_practices-of\\_effective\\_discipline.pdf](http://www.phoenixchildrens.com/PDFs/principles_and_practices-of_effective_discipline.pdf) (reporting that corporal punishment of children in the United States goes back to at least the early seventeenth century, though there has been a decline in adults' approval of the punishment over the past few decades).

177. *See, e.g.*, ROSEMOND, *supra* note 176, at 1–14 (attributing to the “antspanking movement” the demonization of parents and parental authority).

178. *See* AM. ACAD. OF PEDIATRICS, CARING FOR YOUR BABY AND YOUNG CHILD: BIRTH TO AGE 5, at 242 (Steven B. Shelov et al. eds., 5th ed. 2009); FOSTER CLINE & JIM FAY, PARENTING TEENS WITH LOVE AND LOGIC: PREPARING ADOLESCENTS FOR RESPONSIBLE ADULTHOOD 90 (updated and expanded ed. 2006); SEARS & SEARS, *supra* note 148, at 4.

179. *See supra* notes 21–22 and accompanying text.

rearing practices graced by custom have been known to fall by the wayside in the wake of legislative reform or evolving judicial interpretations delegitimizing them.<sup>180</sup> These practices remain out of legal bounds though some of them may continue to evoke nostalgia and yearning for their return.<sup>181</sup> Jurists, trained to differentiate emotional preferences from facts and law,<sup>182</sup> are particularly well-equipped to struggle against retrospective romanticization of unlovely realities. Jurists are enabled, where many others are not, to expose harmful traditional prejudices as ill-advised or anachronistic and to move society toward fact-based progress through legal reform.

The Thirteenth Amendment analysis presented here raises the possibility of that fact-based progress by shifting the constitutional line which adults, including parents, should no longer be allowed to cross in relation to minors. And, while the analysis unreservedly insists that adult use of corporal punishment on children reproduces a slave master-slave relationship for at least the duration of each instance of the punishment, there is no ulterior agenda to slyly impugn custodial or other aspects of the parent-child relationship. Indeed, since corporal punishment is associated with deterioration in the quality of parent-child interactions,<sup>183</sup> banning the punishment should actually improve those interactions and strengthen family life.

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180. For example, in 1961, Dr. C. Henry Kempe introduced with considerable fanfare the “battered-child syndrome,” i.e., “a clinical condition in young children who have received serious physical abuse, generally from a parent or a foster parent” in a well-educated and financially stable family. LEROY ASHBY, *ENDANGERED CHILDREN: DEPENDENCY, NEGLECT, AND ABUSE IN AMERICAN HISTORY* 134 (1997). This led to the passage of laws requiring physicians to report suspected cases of child abuse, thereby decreasing the relative privacy and immunity that had been enjoyed by middle- and upper-class parents vis-à-vis child abuse. *Id.* Another example is the passage of laws in the United States making school compulsory for children within certain age ranges. See Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 823 (1985) (stating that all states had compulsory education laws by 1918). Compulsory education laws interfered with some parents’ reliance on child labor. See STEVEN MINTZ, *HUCK’S RAFT: A HISTORY OF AMERICAN CHILDHOOD* 152–53, 182 (2004).

181. Cf. MINTZ, *supra* note 180, at 75, 275–76 (noting successive generations’ episodic nostalgia for the childhoods of yesteryear).

182. See KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 116 (1960); Sallyanne Payton, *Is Thinking Like a Lawyer Enough?*, 18 U. MICH. J.L. REFORM 233, 236 (1985).

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

The fact is that Section 1 has long governed within as well as outside of the family. Concisely put, Section 1 prohibits a person from enslaving his or her relatives as well as anyone else.<sup>184</sup> There is a wealth of evidence to this effect. As Amar and Widawsky aptly remark, “[t]he history of the [Thirteenth] Amendment makes clear that slavery was understood as intimately connected with issues of family servitude.”<sup>185</sup> Not only did antebellum slavery frequently result in an informal polygamy between the slave master and his “harem” of female slaves,<sup>186</sup> but the arrangement also produced “a large number of mulatto offspring who were treated as slaves by their biological fathers.”<sup>187</sup> Amar and Widawsky thus conclude that “the relationship between master and slave in many cases was quite literally a relationship between biological father and child.”<sup>188</sup>

This awkward fact of life was not lost on the Congressmen who debated the passage of the Thirteenth Amendment. Both supporters and opponents of the Amendment were aware that ending slavery would effectively

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184. Amar & Widawsky, *supra* note 24, at 1359, 1373–75; see Nicholson v. Williams, 203 F. Supp. 2d 153, 248 (E.D.N.Y. 2002) (musing that the Thirteenth Amendment could be construed to cover children who are forcibly and unnecessarily removed from the custody of their mothers and placed in foster care); MICHAEL VORENBERG, *FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT* 248 & n.108 (2001) (claiming that the Thirteenth Amendment should protect abused mothers, neglected children, and “all other victims of relations reminiscent of slavery”); Mundorff, *supra* note 75, at 140–42, 145, 187 (arguing that the child welfare system, in unnecessarily removing many children from their families, replicates slavery); *cf.* The Civil Rights Cases, 109 U.S. 3, 20 (1883) (equating the Thirteenth Amendment’s abolition of slavery with “establish[ing] universal freedom”); *In re Turner*, 1 Abb. U.S. 84, 24 F. Cas. 337, 339–40 (C.C.D. Md. 1867) (No. 14,247) (holding that the apprenticeship of a Black child, with the evident consent of her mother, in conditions unequal to those enjoyed by white apprentices, constituted involuntary servitude under the Thirteenth Amendment).

185. Amar & Widawsky, *supra* note 24, at 1366.

186. FRANKLIN & MOSS, *supra* note 8, at 139–40; Amar & Widawsky, *supra* note 24, at 1366; Camille A. Nelson, *American Husbandry: Legal Norms Impacting the Production of (Re)productivity*, 19 YALE J.L. & FEMINISM 1, 18, 25 (2007); Katyal, *supra* note 79, at 797–98.

187. Amar & Widawsky, *supra* note 24, at 1367; Lisa Haberman, *The Seduction of Power: An Analogy of Incest and Antebellum Slavery*, 13 HASTINGS WOMEN’S L.J. 307, 314 (2002); see A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967, 2006 (1989) (stating that the mulatto children of Black female slaves were generally classified as slaves).

188. Amar & Widawsky, *supra* note 24, at 1367.

involve the government in reordering highly intimate relationships.<sup>189</sup> Yet, the Amendment's adoption was ultimately not antifamily. Rather, it led to the salvation of Blacks' family ties which otherwise might well have been sundered on the auction block.<sup>190</sup>

Evidently disregarding or overlooking this history catapulting the Amendment into the family circle, the Supreme Court generalized in *Robertson v. Baldwin*<sup>191</sup> that the Amendment was not meant to apply to the "exceptional" case of "the right of parents and guardians to the custody of their minor children or wards."<sup>192</sup> Some scholars have reacted to the Court's remark with apparent misgivings that it could be extended to preclude application of the Amendment to parent-child relationships.<sup>193</sup> While no pronouncement of the Court, however casually made, should be given short shrift, consternation over this statement is uncalled for. The statement is acknowledged by legal scholars to be a dictum.<sup>194</sup> The *Robertson* Court held that federal enactments

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189. *E.g.*, CONG. GLOBE, 38TH CONG., 2D SESS. 151 (1865) (Congressman Rogers in opposition to the Thirteenth Amendment); CONG. GLOBE, 38TH CONG., 2D SESS. 193 (1865) (Congressman Kasson in support of the Thirteenth Amendment); CONG. GLOBE, 38TH CONG., 1ST SESS. 1483 (1864) (Congressman Powell in opposition to the Thirteenth Amendment); CONG. GLOBE, 38TH CONG., 1ST SESS. 1439 (1864) (Congressman Harlan in support of the Thirteenth Amendment); CONG. GLOBE, 38TH CONG., 1ST SESS. 2941 (1864) (Congressman Wood in opposition to the Thirteenth Amendment); see Amar & Widawsky, *supra* note 24, at 1367–68; Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CALIF. L. REV. 171, 177–78 (1951).

190. Amar & Widawsky, *supra* note 24, at 1373; see Alexander Tsesis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 B.C. L. REV. 307, 373–75 (2004).

191. *Robertson v. Baldwin*, 165 U.S. 275 (1897).

192. The *Robertson* Court's language on this score was as follows:

It is clear . . . that the [Thirteenth] amendment was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptional, such as military and naval enlistments, or to disturb the right of parents and guardians to the *custody* of their minor children or wards.

*Id.* at 282 (emphasis added).

193. See, *e.g.*, Amar & Widawsky, *supra* note 24, at 1373–74 (suggesting that the *Robertson* opinion intimates "that family relations are generally not within the scope of the Thirteenth Amendment"); Frank Cracchiolo, *Robertson v. Baldwin and the Emancipation of Children*, 14 J. CONTEMP. LEGAL ISSUES 437, 442 (2004).

194. Amar & Widawsky, *supra* note 24, at 1373–74; Sally F. Goldfarb, "No Civilized System of Justice": *The Fate of the Violence Against Women Act*, 102 W. VA. L. REV. 499, 529 n.253 (2000); Mundorff, *supra* note 75, at 144.

authorizing the forcible return of deserting seamen to their vessels did not, in principle, unconstitutionally conflict with the Thirteenth Amendment's prohibition on involuntary servitude,<sup>195</sup> but that the enactments were unconstitutional insofar as they conferred authority upon justices of the peace to do the apprehending and returning.<sup>196</sup> The Court's musings about child custody are not related to these holdings, and are without precedential effect.

But, even if the *Robertson* dictum was part of the holding, that circumstance would not nullify or undermine the instant Thirteenth Amendment argument against parental corporal punishment of children. It bears repeating that the constitutional arguments proffered in this Article are not intended to implicate the parent-child relationship other than in connection with the use of corporal punishment.<sup>197</sup> This Article is *not* proposing, implicitly or explicitly, loss of custody as a remedy for parental corporal punishment of children. Instead, this Article advocates recognition of an implied ban on the punishment under the Amendment's Section 1 proscription of slavery,<sup>198</sup> hypothesizes about opportunities under Section 1 for damages and other relief (not involving custody),<sup>199</sup> and considers the exercise of congressional power under Section 2 to legislate towards these ends (again, not so as to involve custody).<sup>200</sup>

The essential narrative under the Thirteenth Amendment is that its prohibitions have regulated families for well over a century, without undermining parental authority or the family. Understanding the prohibition on slavery to contain an implicit prohibition on corporal punishment of children can, if the science is to be credited, only work to transform the Amendment into an

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195. *Robertson*, 165 U.S. at 287–88.

196. *Id.* at 280.

197. *See supra* Part I.A.2.

198. *See supra* Part I.A.

199. *See infra* Part I.B.

200. *See infra* Part. II.A. A postscript may be in order before leaving this part of the Article. With the exception of Amar and Widawsky, legal scholars have strangely either provided their own perspicacious definitions of slavery or they have used the word “slavery” without addressing its interior definitional components. *See, e.g.*, Tsesis, *supra* note 190, *passim*. Though it would be speculation to say so, these latter two approaches may stem from the paucity of precedent on what “slavery” means and from the term’s seeming self-evident meaning arising from Americans’ repeated exposure to Civil War history.

instrumentality for affirmatively valuing and reinforcing the parent-child relationship<sup>201</sup> and, therefore, family integrity.

*B. Implementation of Section 1's Implied Prohibition on Corporal Punishment of Children*

If the Supreme Court was some day to recognize the existence, in the Thirteenth Amendment's express prohibition on slavery, of an implicit prohibition on corporal punishment of children, the issue would be sure to arise as to whether this doctrinal development would have any real-world consequences. This Article contends that its theoretical innovation may have at least two practical manifestations. First, the Court's recognition of the doctrine should have a pedagogical function<sup>202</sup> impacting adults and children over time.<sup>203</sup> Second, the Court's recognition should make some litigation viable against violators of the Amendment's implicit prohibition even in the absence of a congressional enforcement statute.<sup>204</sup> Because this Article's primary focus is doctrinal, the instant discussion is an aperçu. Its purpose is to highlight that a constitutional ban on corporal punishment does not have to be a paper tiger, and should be capable of at least some preventative or remedial implementation.

*1. Preventing Corporal Punishment of Children: The Pedagogical Function of Section 1's Implied Prohibition on the Punishment*

There is a sense in which law is pedagogy. Law is promulgated to be known;<sup>205</sup> it could neither restrain nor mandate behavior if the contents were kept secret. By

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201. See *supra* note 135; see *infra* notes 342–43 and accompanying text.

202. It should be clarified that what I call law's "pedagogical function," many legal scholars have dubbed law's "expressive function." *E.g.*, Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 *passim* (1996). I prefer my nomenclature as a nearer approach to the legal dynamic I wish to convey in this Article.

203. See *infra* Part I.B.1.

204. See *infra* Part I.B.2.

205. Hegel declared that law is not law unless it is known. GEORGE HEGEL, *HEGEL'S PHILOSOPHY OF RIGHT* 135 (T.M. Knox trans., Oxford Univ. Press, 1967); see GARY L. MCDOWELL, *THE LANGUAGE OF LAW AND THE FOUNDATIONS OF AMERICAN CONSTITUTIONALISM* 397 (2010) (remarking that both Locke and Hobbes were of the view that law must be known and understood in order to be law).

knowing the law, citizens not only react to the particular rule obedience expected of them on pain of suffering some governmentally imposed unpleasantness; they also simultaneously receive and are otherwise influenced by the government's official message on a matter.<sup>206</sup> This message may have an especially strong pedagogical influence, even without active enforcement or significant penalties, because it carries the imprimatur of the state. And, the state, until it is overthrown, collapses, or is on the verge of one of those calamities, is the voice of sovereignty and therefore of unique legitimacy.<sup>207</sup> Indeed, law may be the nonpareil of bully pulpits.

What happens to law's messages once promulgation initiates their dissemination? There is much conjecture about how the law's lessons are learned.<sup>208</sup> In my judgment, the most persuasive conceit is that each person tends to gradually internalize law's most relevant communiqués. It is as if a state-to-person ideational osmosis occurs. When enough people have individually absorbed law's important messages, the great mass of altered consciousnesses qualitatively metamorphoses, i.e., the individually absorbed messages

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206. See ARISTOTLE, *Nicomachean Ethics*, in THE BASIC WORKS OF ARISTOTLE 952, 1105 (Richard McKeon ed., 1941); PLATO, *Laws VII*, in THE COLLECTED DIALOGUES OF PLATO, INCLUDING THE LETTERS 1418–19, 1502 (Edith Hamilton & Huntington Cairns eds., 5th prt. 1969) (A.E. Taylor trans., 1934); Paul Brest, *The Thirty-First Cleveland-Marshall Fund Lecture: Constitutional Citizenship*, 34 CLEV. ST. L. REV. 175, 179 (1986); Anne Norton, *Transubstantiation: The Dialectic of Constitutional Authority*, 55 U. CHI. L. REV. 458, 459, 469 (1988); Sunstein, *supra* note 202, at 2024–30. *But see* Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1461–1500 (2000) (arguing against any expressive purposes of law).

207. See Karol Soltan, *Delegation to Courts and Legitimacy*, 65 MD. L. REV. 115, 123 (2006); *cf.* David A. Strauss, *Reply: Legitimacy and Obedience*, 118 HARV. L. REV. 1854, 1855 (2005) (describing Professor Richard Fallon's definition of "sociological legitimacy" as the circumstance where government action "is generally accepted by the population as morally binding in some way").

208. See, e.g., Dhammika Dharmapala & Richard H. McAdams, *The Condorcet Jury Theorem and the Expressive Function of Law: A Theory of Informative Law*, 5 AM. L. & ECON. REV. 1, 1–3 (2003) (summarizing a range of scholarly theories, including the authors' own, on how law fulfills an expressive role); Alex Geisinger, *A Belief Change Theory of Expressive Law*, 88 IOWA L. REV. 35, 44–72 (2002) (surveying scholarly theories, including his own, on the expressive processes of law); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1955–62 (2002) (canvassing scholarly theories on the workings of human rights treaties' expressive operation).

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become societal norms of what constitutes acceptable behavior.<sup>209</sup>

However, some laws are more equal than others when it comes to catalyzing societal norm creation. Without implying that this didactic power is always proportional to the prestige attached to a law, in the United States the federal Constitution probably has the most pedagogical muscle among the nation's domestic laws. Aside from the fact that, legally, the Constitution is *the* supreme law of the land,<sup>210</sup> Americans are also generally inclined to revere it<sup>211</sup> as a veritable secular Bible.<sup>212</sup>

If corporal punishment of children was within the Thirteenth Amendment's interdiction of slavery, the ban on the punishment resulting therefrom would, ipso facto, acquire preeminent pedagogical value. Constitutional embrace of the ban would accelerate both the depth and pervasiveness of the norm-creation process against the punishment,<sup>213</sup> beyond the likely rate of notional change that might be initiated by less

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209. For roughly analogous conceptions of internalization of legal norms (though each conception involves distinct mechanics), see Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585, 597–607 (1998) (proposing three phases of internalization: aligning law with ethics, depending on people's respect for the law, and looking to self-motivated improvements to inspire individuals to engage in civic-minded conduct); Alex Geisinger, *A Group Identity Theory of Social Norms and Its Implications*, 78 TUL. L. REV. 605, 631–39 (2004) (postulating group identity as a component in the individual's absorption of legal norms); and Norton, *supra* note 206, at 463–64 (describing the dialectical relationship between the Constitution and man's inward being).

210. The Constitution is the paramount law in the United States. The Supremacy Clause provides that, along with federal law and treaties, the Constitution is “the supreme Law of the Land.” U.S. CONST. art. VI, cl. 2. The last phrase of the Clause (“any Thing in the Constitution or Laws of any state to the Contrary notwithstanding”) further indicates that, as between the aforesaid supreme laws and conflicting State laws, the former must prevail. *Id.* However, the Court has also held that the Constitution preempts other federal law repugnant to the Constitution, *Marbury v. Madison*, 5 U.S. 137, 176–80 (1803), and that the Constitution trumps conflicting treaties. *See Reid v. Covert*, 354 U.S. 1, 16 (1957) (plurality decision) (holding that an executive agreement between the United States and another country cannot be valid if it runs afoul of the Constitution).

211. ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* 55 (1987); Beau Breslin, *Is There a Paradox in Amending a Sacred Text?*, 69 MD. L. REV. 66, 71 (2009).

212. THOMAS PAINE, *The Rights of Man*, in THOMAS PAINE READER 208, 287 (Michael Foot & Isaac Kramnick eds., 1987) (1791–92) (referring to the Constitution as “the political bible of the state”).

213. *See supra* notes 208–09 and accompanying text.

cherished laws or by other means of publicity and education.

Once attitudinal shifts are underway, actual use of corporal punishment on children should start to slow as well.<sup>214</sup> The preventative effect of the constitutional ban would become increasingly evident as a palpable societal phenomenon. Adults would no longer be prone to hit children inasmuch as social pressure to refrain would be omnipresent and overpowering.<sup>215</sup> Ultimately, refraining could become second nature: it is possible that, in the far future, it may not even occur to adults to use corporal punishment on children.<sup>216</sup>

The pedagogical dynamics of law, even beyond the deterrence stemming from penalties, are not mere wishful thinking. Law's overt didactic effects have been repeatedly observed.<sup>217</sup> For example, as of this writing, thirty-three countries have enacted or adjudicated absolute bans on all corporal punishment of children.<sup>218</sup> In these jurisdictions, the

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214. See *infra* notes 217, 222 and accompanying text.

215. See *supra* note 209 and accompanying text.

216. It is admittedly speculation to assert, as the text above does, that in the "far future" it will not even cross adults' minds to hit children for disciplinary reasons. But, speculation may be creditable or not.

I contend, based on extrapolation from shared historical experience, that my assertion about corporal punishment of children is within the realm of creditable speculation. A short thought experiment from American history explains why. The Nineteenth Amendment, adopted in 1920, protects American citizens from denial or abridgment of the right to vote "on account of sex." U.S. CONST. amend. XIX; Michael C. Dorf, *The Aspirational Constitution*, 77 GEO. WASH. L. REV. 1631, 1645 (2009). Consider whether it would ever occur to a twenty-first-century government official to deny women the opportunity to vote in American elections. See Dorf, *supra*, at 1633 (opining that the Nineteenth Amendment "was so successful that it has arguably become unnecessary").

217. There is a nascent, but growing, literature empirically verifying law's norm-creating impacts. See, e.g., Patricia Funk, *Is There an Expressive Function of Law? An Empirical Analysis of Voting Laws with Symbolic Fines*, 9 AM. L. & ECON. REV. 135, 135, 146–56 (2007) (determining that Swiss voting-duty laws positively affect voting behavior even though fines for violation verge on de minimis). For anecdotal evidence of these impacts, see Geisinger, *supra* note 208, at 64, 68–69 (reporting the expressive effects of seatbelt laws, car seats for children, and helmet laws for motorbike riders). But see Matthew A. Christiansen, *A Great Schism: Social Norms and Marijuana Prohibition*, 4 HARV. L. & POL'Y REV. 229, 239–40 (2010) (stating that the expressive function of laws prohibiting marijuana has not succeeded in altering public acceptance of marijuana use).

218. *States with Full Abolition*, GLOBAL INITIATIVE TO END ALL CORPORAL PUNISHMENT OF CHILDREN, <http://www.endcorporalpunishment.org/pages/frame.html> (last visited Oct. 26, 2012) [hereinafter GLOBAL INITIATIVE, *States*] (follow "Global progress," then "States with full abolition") (relating that the

bans are usually ensconced in national civil codes, though prosecution for violating the bans is usually also a possibility under each jurisdiction's penal code.<sup>219</sup> Prosecution is extremely rare, however, with respect to parental corporal punishment that falls short of traditional physical child abuse.<sup>220</sup> The abolitionist countries have instead opted to rely upon the pedagogical impacts of these antispanking legal regimes.<sup>221</sup> To the extent studies or other assessments have been undertaken to evaluate such impacts, they preponderantly show that the laws have generated both attitudes against and a lower rate of incidence of corporal punishment of children.<sup>222</sup>

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following countries have banned all corporal punishment of children: Republic of Congo (2010), Albania (2010), Togo (2007), Republic of Moldova (2008), Spain (2007), Portugal (2007), Netherlands (2007), Luxembourg (2008), Costa Rica (2008), Venezuela (2007), New Zealand (2007), Poland (2010), Uruguay (2007), South Sudan (2011), Greece (2006), Hungary (2005), Kenya (2010), Tunisia (2010), Liechtenstein (2008), Romania (2004), Ukraine (2004), Iceland (2003), Germany (2000), Israel (2000), Bulgaria (2000), Croatia (1999), Latvia (1998), Denmark (1997), Cyprus (1994), Austria (1989), Norway (1987), Finland (1983), and Sweden (1979)).

219. See GLOBAL INITIATIVE, *States*, *supra* note 218; BITENSKY, CORPORAL PUNISHMENT, *supra* note 18, *passim*.

220. See *Legislative Measures to Prohibit Corporal Punishment*, GLOBAL INITIATIVE TO END ALL CORPORAL PUNISHMENT OF CHILDREN, <http://www.endcorporalpunishment.org/pages/frame.html> (last visited Oct. 26, 2012) [hereinafter GLOBAL INITIATIVE, *Legislative Measures*] (follow "Reform," then "Legislative measures to prohibit corporal punishment"); BITENSKY, CORPORAL PUNISHMENT, *supra* note 18, at 156, 175, 182–83, 192–93, 210.

221. See BITENSKY, CORPORAL PUNISHMENT, *supra* note 18, at 156, 172, 183, 192.

222. See, e.g., KAI-D. BUSSMANN, CLAUDIA ERTHAL & ANDREAS SCHROTH, THE EFFECT OF BANNING CORPORAL PUNISHMENT IN EUROPE: A FIVE-NATION COMPARISON 20–21 (2009), available at <http://www.endcorporalpunishment.org/pages/pdfs/reports/Bussman%20%20Europe%20%20nation%20report%202009.pdf> (concluding that prohibiting corporal punishment of children by law leads to less use of physical punishment in childrearing, as indicated by trends in Sweden, Germany, and Austria); Enrique Gracia & Juan Herrero, *Is It Considered Violence? The Acceptability of Physical Punishment of Children in Europe*, 70 J. MARRIAGE & FAM. 210, 214–16 (2008) (finding that, within those European Union countries that had banned corporal punishment of children, the bans were "significantly associated with lower levels of acceptability of physical punishment of children"); Joan E. Durrant, *Legal Reform and Attitudes Toward Physical Punishment in Sweden*, 11 INT'L J. CHILD. RTS. 147, 148–52, 161 (2003) (ascertaining that Sweden's ban on corporal punishment of children has helped to shift popular attitudes toward disapproval of the punishment); Tom Sullivan, *In 30 Years Without Spanking, Are Swedish Children Better Behaved?*, THE CHRISTIAN SCIENCE MONITOR (Oct. 5, 2009), <http://www.csmonitor.com/World/Europe/2009/1005/p06s10-woeu.html> (reporting that, "according to official figures, just 10 percent of Swedish children are spanked

That the punishment is entrenched in the United States<sup>223</sup> should not undermine the long-term pedagogical effectiveness of a Thirteenth Amendment ban on it. Some of the thirty-three countries that have instituted national bans on corporal punishment of children did so in cultures that were steeped in child rearing via the rod.<sup>224</sup> In any event, if addictive habits are vulnerable to law's pedagogy, then nonaddictive corporal punishment should be too. Cigarette smoking was once fashionable and widespread in the United States,<sup>225</sup> it is also exceedingly addictive.<sup>226</sup> Antismoking ordinances' pedagogical force nevertheless appears to have helped discourage many people from lighting up.<sup>227</sup>

2. *Preventing or Redressing Corporal Punishment of Children: Possible Bases for a Cause of Action Against Violators of Section 1's Implied Prohibition on the Punishment*

The *Civil Rights Cases* posited early on that Section 1 of the Thirteenth Amendment is self-executing.<sup>228</sup> That characterization has been understood to mean, at a minimum, that Section 1 can be asserted in court as a defense without the aid of ancillary enforcement legislation.<sup>229</sup>

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. . . by their parents today [in 2009],” but that “[m]ore than 90 percent of Swedish children were smacked prior to the ban”).

223. See *supra* note 15 and accompanying text.

224. See, e.g., BITENSKY, CORPORAL PUNISHMENT, *supra* note 18, at 154 (conveying that Sweden had a history of harsh physical punishment of children when the 1979 ban on corporal punishment of children was legislated); GLOBAL INITIATIVE, *Legislative Measures*, *supra* note 220 (click on “Implementation of prohibition in the home and other settings”) (chronicling the history of Maori reliance on physical punishment of their children up to and after enactment of New Zealand's ban on the punishment).

225. *Cigarette Consumption, United States, 1900–2007*, INFOPLEASE (2007), <http://www.infoplease.com/ipa/A0908700.html> (taking data from *Tobacco Outlook Report*, Econ. Research Serv., U.S. Dep't of Agric.).

226. *Cigarettes and Other Tobacco Products*, NIDA, NAT'L INSTS. OF HEALTH (Aug. 2010), <http://www.drugabuse.gov/publications/drugfacts/cigarettes-other-tobacco-products>.

227. Dan M. Kahan, *Gentle Nudges [sic] vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 628 (2000).

228. The Civil Rights Cases, 109 U.S. 3, 20 (1883).

229. 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 925 n.1 (3d ed. 2000) (averring that “[e]ach of the Civil War Amendments . . . is ‘self-executing’ in at least the minimal sense that it may be invoked defensively, to oppose the application of a rule of law adverse to a party in a lawsuit on the ground that the rule of law . . . violates the constitutional provision in question”).

Whether the proposition also signifies that, sans legislation, Section 1 tacitly authorizes a cause of action for legal or equitable redress of Section 1 violations is another matter. The Supreme Court has never purposefully or explicitly taken a position on this, and the federal circuits are at loggerheads on how to resolve the dilemma; the question therefore remains unsettled.<sup>230</sup>

The lack of judicial resolution has engendered perplexity among legal scholars as to the potency of a self-executing Section 1. Professor Laurence Tribe has opined that “[i]t seems doubtful” that the *Civil Rights Cases* provide enough of a legal basis for Section 1 to be self-executing in the “more aggressive sense—that it supplies its own sword as well as serving as a shield.”<sup>231</sup> However, a persevering band of skeptics, seeing the glint of a sword in Section 1, maintain that the provision should or even must be read as affirmatively self-executing, at least in some contexts.<sup>232</sup>

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230. Carter, *supra* note 104, at 1314 n.6; cf. Hila Keren, “We Insist! Freedom Now”: Does Contract Doctrine Have Anything Constitutional to Say?, 11 MICH. J. RACE & L. 133, 144–45 (2005) (observing that “the ability of a private person to bring a cause of action that is based directly and independently on the [Thirteenth] Amendment has not been established”); see also McKee, *supra* note 79, at 178 (asserting that “[t]here is no consensus among the judicial circuits that a private cause of action exists under the Thirteenth Amendment”); Vanessa B.M. Vergara, Comment, *Abusive Mail-Order Bride Marriage and the Thirteenth Amendment*, 94 NW. U. L. REV. 1547, 1577 n.194 (2000) (same).

231. 1 TRIBE, *supra* note 229, at 925 n.1; see also Lauren Kares, Note, *The Unlucky Thirteenth: A Constitutional Amendment in Search of a Doctrine*, 80 CORNELL L. REV. 372, 380 (1995); cf. Lea VanderVelde, *The Thirteenth Amendment of our Aspirations*, 38 U. TOL. L. REV. 855, 857 (2007) (declaring that “[a]lthough the drafters may have intended the [Thirteenth] Amendment as self-executing, 140 years of history indicates that this expectation was naïve” (footnote omitted)).

232. See, e.g., Larry J. Pittman, *Physician-Assisted Suicide in the Dark Ward: The Intersection of the Thirteenth Amendment and Health Care Treatments Having Disproportionate Impacts on Disfavored Groups*, 28 SETON HALL L. REV. 774, 852–56 (1998) (arguing that a “direct” cause of action should flow from Section 1 for damages to remediate racial discrimination constituting badges and incidents of slavery); Tsesis, *supra* note 190, at 344 n.199 (stating that constriction of Section 1’s scope so as to exclude independent causes of action is not a necessary outcome); Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973, 980 n.30 (2002) (opining that “some remedy is available” against private actors violating Section 1); Jeffrey E. Zinsmeister, Comment, *In Rem Actions Under U.S. Admiralty Jurisdiction as an Effective Means of Obtaining Thirteenth Amendment Relief to Combat Modern Slavery*, 93 CALIF. L. REV. 1249, 1260, 1281–83 (2005) (contending that an independent in rem private right of action should exist under the Thirteenth Amendment for relief in admiralty courts against the

Professor Larry Pittman summons two Supreme Court precedents as ballast for upgrading Section 1 to this more aggressive posture,<sup>233</sup> i.e., *Palmer v. Thompson*<sup>234</sup> and *City of Memphis v. Greene*.<sup>235</sup> He points out that in both cases plaintiffs stated a cause of action directly under Section 1, and that in both the Court decided the Section 1 causes on the merits.<sup>236</sup> In *Palmer*, the Court, apparently assuming that a Thirteenth Amendment cause of action was properly brought, rejected plaintiffs' contention that a city's closure of its public swimming pools, in lieu of operating them on a desegregated basis, constituted a violation of the Amendment.<sup>237</sup> In *Greene*, the Court again proceeded as if plaintiffs had properly brought a cause of action under Section 1, and held that a city's blocking off one end of a two-lane street traversing a white residential community did not pose a violation of the Amendment. In neither case did the Court specifically acknowledge that Section 1 is affirmatively self-executing,<sup>238</sup> but the Justices' actions could be taken to 'speak louder' than their silences.

Some Thirteenth Amendment mavens occasionally appear to lose patience with a schema that would deny Section 1 an endogenous cause of action for its own judicial enforcement.<sup>239</sup> Their exasperation may be symptomatic of an acute intuition as to which side of the self-executing debate is most idoneous—Section 1 as shield only or as both shield and sword. Long-term unenforceability may, after all, reduce a constitutional provision to a casualty of desuetude.<sup>240</sup> Chief

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modern slave trade).

233. Pittman, *supra* note 232, at 853 & n.298.

234. *Palmer v. Thompson*, 403 U.S. 217 (1971).

235. *City of Memphis v. Greene*, 451 U.S. 100 (1981).

236. Pittman, *supra* note 232, at 853.

237. *Palmer*, 403 U.S. at 226–27.

238. *See Green*, 451 U.S. at 128–29. For some additional cases enforcing federal constitutional provisions without referencing a statutory cause of action, see *Brown v. Board of Education*, 349 U.S. 294 (1955), and *Ex parte Young*, 209 U.S. 123 (1908).

239. *See Pittman*, *supra* note 232, at 860 (concluding that “[t]o maximize the Thirteenth Amendment’s utility in achieving the free exercise of all Americans’ natural rights to ‘life, liberty, and the pursuit of happiness,’ including the opportunities to work, learn, live, and otherwise share in the liberties and benefits which white Americans freely partake, courts should recognize explicitly a direct claim under the Thirteenth Amendment” (citation omitted)).

240. *Cf. Susan Bandes, Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 290–92, (1995) (questioning why the judiciary should not

Justice John Marshall warned long ago that “we must never forget that it is a *constitution* we are expounding.”<sup>241</sup> Presumably it would be just such an ill-advised “forgetting” to allow parts of the nation’s founding document to sink into oblivion for all practical purposes.

The hermeneutic admonition is poignantly relevant to the self-execution issue when cojoined with the Chief Justice’s political critique of rights without remedies: “The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.”<sup>242</sup> Though he articulated these overarching insights in decisions unconnected to Section 1 or the self-execution of constitutional rights, it is hard to perceive why fundamental principles of this ilk should not govern the Thirteenth Amendment as well. And, if they do, what does that signify for the Section 1 conundrum of sword versus shield?

In response, *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*<sup>243</sup> gives a tepid vote for the sword. The *Bivens* Court held that, in light of the applicability of general federal question jurisdiction, petitioner had stated a cause of action under the Fourth Amendment for damages where federal agents, acting under color of their authority, had made a warrantless entry into and search of his apartment and had arrested him on narcotics charges, all without probable cause.<sup>244</sup> *Bivens*, it should be noted, exhibits a puzzling conflation of causes of action with remedies.<sup>245</sup> That is, at the time *Bivens* was handed down, federal courts had long been adjudicating upon the presumption that the general federal question statute<sup>246</sup> alone invested them with the power to order injunctive relief for constitutional wrongs,

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be able to enforce the Constitution on its own when the Constitution is a prime protection of individuals against encroachments by government).

241. *McCulloch v. State*, 17 U.S. 316, 407 (1819).

242. *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

243. *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

244. *Id.* at 389–90, 397.

245. Bandes, *supra* note 240, at 301–02; Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1542–43 (1972).

246. The general federal question statute provides: “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331 (2011).

though that statute is mute on types of remedy.<sup>247</sup>

If this was all there was to *Bivens*, it would appear that the way had been cleared for victims to state a cause of action seeking damages (or, as before *Bivens*, equitable intervention) for federal governmental actors' unconstitutional corporal punishment of children.<sup>248</sup> *Bivens* actions, however, are subject to formidable defenses;<sup>249</sup> worse still for corporal punishment plaintiffs, *Bivens* contains internally-imposed constraints on its broader applicability.<sup>250</sup> And, the decision has spawned cases more enamored of expanding the constraints on, than of perpetuating *Bivens*' empowerment of, the judiciary.<sup>251</sup>

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247. Bandes, *supra* note 240, at 301; Marsha S. Berzon, *Securing Fragile Foundations: Affirmative Constitutional Adjudication in Federal Courts*, 84 N.Y.U. L. REV. 681, 711–12 (2009).

248. *Cf.* Amar & Widawsky, *supra* note 24, at 1380 (specifying *Bivens* as a basis for stating a Thirteenth Amendment cause of action to redress physical child abuse).

249. *See* Perry M. Rosen, *The Bivens Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L. REV. 337, 348–57 (1989) (discussing the qualified immunity defense as ubiquitously raised in *Bivens* actions); John E. Nordin II, *The Constitutional Liability of Federal Employees: Bivens Claims*, 41 FED. B. NEWS & J. 342, 345–46 (1994) (summarizing principles of the qualified immunity defense to *Bivens* actions).

250. *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971) (qualifying the holding with such caveats as that the “present case involves no special factors counseling hesitation in the absence of affirmative action by Congress,” and that “[w]e are not dealing with a question of ‘federal fiscal policy’”); Bandes, *supra* note 240, at 337–38; Pittman, *supra* note 232, at 855; Rosen, *supra* note 249, at 359, 369.

251. *See* Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After Wilkie v. Robbins*, 2007 CATO SUP. CT. REV. 23, 63–72 (2006/2007).

An example of subsequent cases radically reining in *Bivens* is *Wilkie v. Robbins*, 551 U.S. 537, 549–54 (2007), in which the Court held that whether a *Bivens* action may be maintained requires courts to first determine whether any alternative process exists for protecting plaintiff's interest such that the alternative constitutes “a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages.” *Id.* at 550. In *Wilkie*, the Court concluded that the “the forums of defense and redress open to [respondent] Robbins are . . . an assemblage of state and federal, administrative and judicial benches applying regulations, statutes and common law rules.” *Id.* at 554. The Court ruled that the presence of this “assemblage,” under the facts of the case, was not dispositive concerning whether a *Bivens* cause of action was justified. *Id.* *See* John F. Preis, *Alternative State Remedies in Constitutional Torts*, 40 CONN. L. REV. 723, 725–26 (2008) (analyzing *Wilkie* as standing for the proposition that plaintiffs may not successfully state *Bivens* causes of action if state law provides a means of recourse).

*Wilkie* is troubling as precedent because the victims of constitutional torts are often apt to find state law alternatives for redress to be inherently

It is beyond the scope of this Article to delve into the variety and intricacy of such defenses and limitations other than to remark their existence. Suffice it to say that they exist and that they could make *Bivens* problematic authority for litigating against federal officials for their unconstitutional corporal punishment of children when damages are sought. This thicket of complications may, moreover, be made still more impassable for plaintiffs by the fact that the Court has never ruled on whether *Bivens* will support a cause of action for Thirteenth Amendment violations.<sup>252</sup>

*Bivens* actions, of course, may only be brought against defendants who are *federal* employees. But, what if corporal punishment of children, in violation of the Thirteenth Amendment, is carried out by a *state* employee or by a person acting on behalf of the state? This is a much more likely scenario since public school teachers and administrators are usually employees of a state government or of its subdivisions.<sup>253</sup> To state a cause of action against one of these defendants for paddling their young charges, plaintiffs could find that Section 1983<sup>254</sup> is a tenable substitute for *Bivens*.

Section 1983 provides, in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper

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inadequate though the inadequacy may not necessarily be perceived or, if perceived, deemed significant by the Court.

252. See Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 822–24 (2010) (tracing the extent of the Supreme Court's application of *Bivens* to the various Amendments, exclusive of the Thirteenth Amendment); Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 FORDHAM L. REV. 981, 983, 986–87 (2002) (criticizing the unenforceability of Thirteenth Amendment protections and urging that *Bivens* should apply to make the Amendment directly enforceable in court).

253. *Are Teachers Considered Government Employees?*, ASK.COM, <http://www.ask.com/web?q=Are+Teachers+Considered+Government+Employees%3F&o=1567&l=sem&qsrc=3053> (last visited Oct. 26, 2012).

254. 42 U.S.C. § 1983 (2011).

proceeding for redress . . . .<sup>255</sup>

The statute, on its face, allows a cause of action only against persons who, in contravening the Constitution or other federal laws, act “under color of state law.”<sup>256</sup> There is more to this phraseology than meets the eye. Judicial interpretation has established four fact patterns where a person is said to act under color of state law. They are: (1) when the challenged acts are committed by a person who is a state’s designated agent or officer, and, in performing the act, the person does not act in a private capacity;<sup>257</sup> (2) when the person, in committing the challenged conduct, exercises powers and functions typically exercised by state government;<sup>258</sup> (3) when the person is coerced or appreciably encouraged by the state to engage in the challenged conduct so as to fairly appear to act on behalf of the state;<sup>259</sup> and, (4) when there is a nexus between the person’s challenged conduct and the state, close enough for the conduct to be considered that of the state.<sup>260</sup>

Though the multiplicity of fact patterns indicates that it can be no exotic thing for a person to act under color of state law, it is still rather more the case that the fact patterns end up shrinking the pool of potential defendants for Section 1983 litigation. Consider that, if an adult corporally punished a child in defiance of a Section 1 ban on the punishment, the victim would not have a cause of action under Section 1983 against the adult if the latter was a private person doing the punishing in his or her private capacity, was a federal official administering the punishment in a private or federal governmental capacity, or was even a state or municipal employee<sup>261</sup> punishing the child so as not to fit any of the four

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255. *Id.*

256. *Id.*

257. See Richard B. Gallagher et al., *Post-Civil War Federal Civil Rights Acts: Civil Provisions: Statute Creating Right of Action for Deprivation of Federal Rights Under Color of State Law (42 U.S.C. § 1983): Action “Under Color of” State Law, Custom, or Usage: In General*, 15 AM. JUR. 2d CIVIL RIGHTS § 72 (2011).

258. *Id.*

259. *Id.*

260. *Id.*

261. It should be noted that while municipalities and their employees are considered “persons” as per Section 1983, it is forbidden to use Section 1983 in an attempt to hold a municipality liable under the doctrine of respondeat superior. Richard Frankel, *Regulating Privatized Government Through § 1983*,

fact patterns.

Furthermore, once a legally acceptable person is named as defendant, other obstacles may still foreclose a favorable judgment for the Section 1983 plaintiff. From among a stockpile of circumventive legal devices, the enterprising defendant may raise counteracting doctrines immanent to Section 1983 law,<sup>262</sup> or he or she may seek cover behind sovereign immunity<sup>263</sup> and other independent defenses.<sup>264</sup>

While *Bivens* and Section 1983 actions are bristling with such limitations on litigious victims of constitutional torts,<sup>265</sup> these actions do still and all, provide some real avenues for obtaining judicial redress.<sup>266</sup> However, as previously

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76 U. CHI. L. REV. 1449, 1459–62 (2009).

262. See Jacob E. Meyer, “Drive-By Jurisdictional Rulings”: *The Procedural Nature of Comprehensive-Remedial-Scheme Preclusion in § 1983 Claims*, 42 COLUM. J.L. & SOC. PROBS. 415, 422 (2009) (enumerating several limitations on Section 1983 actions springing from the body of law developed in interpreting the statute, including, for instance, that if a claimant asserted violation of a federal statute containing a comprehensive remedial scheme, then a Section 1983 action seeking redress would be foreclosed).

263. Ivan E. Bodensteiner, *Congress Needs to Repair the Court’s Damage to § 1983*, 16 TEX. J. C.L. & C.R. 29, 34, 38 (2010); Meyer, *supra* note 262, at 421; Martin A. Schwartz, *Supreme Court § 1983 Decisions—October 2008 Term*, 45 TULSA L. REV. 231, 231, 261 (2009).

264. See Meyer, *supra* note 262, at 421 (enumerating defenses to Section 1983 actions, including “issue and claim preclusion” and “statutory requirements such as the Prison Litigation Reform Act’s exhaustion requirement”).

265. See *supra* notes 262–64 and accompanying text.

266. The Amar/Widawsky article conceives of *Bivens* and Section 1983 as vehicles for procuring redress on a grand scale for acts of physical child abuse that have been deconstitutionalized under the Thirteenth Amendment. Amar & Widawsky, *supra* note 24, at 1379–82. Specifically, the article proposes using the statute not only to sue governmental officers who physically abuse children, but of also deploying it to state a cause of action against officers when they fail, by inaction, to prevent the abuse perpetrated by private actors. The article elaborates that

the absence of a state action requirement in the Thirteenth Amendment means not only that certain *private* action is banned, but also that certain state *inaction* is prohibited. The two points are closely linked: precisely because the [Thirteenth] Amendment imposes a legal duty on private [slave]masters, it simultaneously requires the state to enforce that legal duty.

*Id.* at 1381; see Katyal, *supra* note 186, at 796 (arguing that under the Thirteenth Amendment the government is bound to eliminate forced prostitution).

There is no reason why this analysis should not equally apply to corporal punishment of children once the punishment is deconstitutionalized under the Thirteenth Amendment.

mentioned, the incipient plaintiff may find that neither *Bivens* nor Section 1983 is an option if the tortfeasor is a person in the private sector and acting in a purely private capacity. This easily could be the predicament for children who are corporally punished, in violation of Section 1 of the Thirteenth Amendment, by a parent or other family relative, babysitter, nanny, etc. If the Court was to recognize the protection of children from the punishment under Section 1, would our legal system leave them in the lurch to “enjoy” a constitutional right without a remedy?

The answer is mixed. Plaintiffs might well be able to rest a cause of action on appropriate state common law. In fact, an action should lie on this ground regardless of whether the defendant is a private individual, or a state, local, or federal governmental actor.<sup>267</sup> To illustrate, a child aggrieved by unconstitutional corporal punishment at the hands of one of these types of perpetrators, could plausibly bring a cause of action in trespass or wrongful imprisonment for retrospective damages, if state law provided the opportunity.<sup>268</sup> If state law did not so provide and if the perpetrator could not be sued under *Bivens* or Section 1983, it would be down the rabbit hole for plaintiff—unenforceable rights in tow.

But, even if the opportunity for state common law redress exists and even if the child victim of unconstitutional corporal punishment obtains a judgment awarding such redress, the award may well be strikingly deficient as compared to the grant of relief in a *Bivens* or Section 1983 action. One reason for the deficit is that suits founded on state common law would only incidentally address harms associated with slavery or with its inferred subset of corporal punishment of children.<sup>269</sup> The problem arises from the expressive gravitas of the Constitution and especially of the Thirteenth Amendment as perhaps the document’s most sublime homage

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267. See Amar & Widawsky, *supra* note 24, at 1380 (listing some of the state common law remedies that historically were available to enslaved persons against their masters and that could be sought by victims of physical child abuse through litigation).

268. See *id.* at 80–82.

269. Azmy, *supra* note 252, at 1035–36; cf. James J. Park, *The Constitutional Tort Action as Individual Remedy*, 38 HARV. C.R.-C.L. L. REV. 393, 442 (2003) (arguing that state common law redress for constitutional torts is insufficient to create “norms that regulate the government’s discretion to inflict harm on individuals”).

to human freedom and dignity.<sup>270</sup> No matter how generous or accommodating, state common law remedies cannot convey the full extent of that constitutional ethos.<sup>271</sup> A second reason for reservations about state common law disposition of corporal punishment infringements of the Amendment is that this approach may undermine one of the Amendment's central missions, i.e., "to create a federal liberty interest independent of state law protection."<sup>272</sup>

Considered in overview, then, a variegated though patchy framework emerges for stating causes of action against those who would flout a Thirteenth Amendment prohibition on corporal punishment of children. Given the many complications and contingencies involved in mounting such cases, it would be a fool's errand to try to predict the viability or success of adjudicating Thirteenth Amendment objections to corporal punishment of children after (or, if) the Court recognizes the punishment as akin to slavery. The many obstacles to this type of litigation are in need of some serious and unstinting dismantling. Indeed, "[r]emember the Thirteenth" was penned with no little apprehensiveness for its future robustness<sup>273</sup>—a robustness that depends upon continuing to extend the Amendment's protections to society's most vulnerable members.

### 3. *A Preference for Preventing Parental Corporal Punishment Through a Legal Prohibition's Pedagogical Function*

As a general matter, when it comes to the scourging of children's bodies, averting the maltreatment altogether should be a priority. The specter of civil or criminal liability can and should function preventatively through a deterrent impact.<sup>274</sup> However, the parent as corporal punisher raises unique considerations that may counsel against litigation.

Adversarial court proceedings pitting children against parents, with the former as real parties in interest<sup>275</sup> in civil

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270. See Azmy, *supra* note 252, at 1035–36.

271. *Id.*

272. *Id.* at 1036.

273. Akhil Reed Amar, *Remember the Thirteenth*, 10 CONST. COMMENT. 403, 403, 408 (1993).

274. See *supra* note 217 and accompanying text.

275. Typically, when a child desires to sue his or her parents, any person with an interest in the child's welfare may serve as "next friend" or guardian ad

suits or as witnesses in civil or criminal suits, may have unintended negative consequences for the parent-child relationship.<sup>276</sup> Moreover, the prospect of assuming such roles could dissuade children from seeking the intercession of the legal system in the first place.<sup>277</sup> On the other side of the generational divide, these sorts of suits could cause some parents, paradoxically, to become less receptive to internalizing and owning the ban's message.<sup>278</sup> Consequently, as between the two approaches for implementing a Section 1 ban on corporal punishment of children, this Article favors relying upon the preventative pedagogical force of the ban in relation to potential parental violators.

## II. THESIS UNDER SECTION 2 OF THE THIRTEENTH AMENDMENT

### A. *Section 2 Should be Interpreted as Empowering Congress to Enact a Ban on Corporal Punishment of Children*

It will be recalled that Section 2 of the Thirteenth Amendment vests Congress with the power to enforce the Amendment by enacting legislation.<sup>279</sup> Congress is authorized to exercise its Section 2 authority on behalf of any racial<sup>280</sup> or age group,<sup>281</sup> and against both governmental and

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litem vis-à-vis the litigation. Howard A. Davidson, *The Child's Right to Be Heard and Represented in Judicial Proceedings*, 18 PEPP. L. REV. 255, 258 (1991).

276. Dean M. Herman, *A Statutory Proposal to Prohibit the Infliction of Violence upon Children*, 19 FAM. L.Q. 1, 18–21, 44 (1985); see Bitensky, *supra* note 171, at 447 (suggesting that a child's civil suit against his or her parent puts the former in an adversarial role that may not be emotionally viable for the child); cf. Leigh Goodmark, *From Property to Personhood: What the Legal System Should Do for Children in Family Violence Cases*, 102 W. VA. L. REV. 237, 292–93, 296 (1999) (positing that, although children who have seen or undergone domestic physical violence may find testifying in court to be therapeutic, the experience “can be incredibly stressful for some children”); Rachel L. Melissa, Comment, *Oregon's Response to the Impact of Domestic Violence on Children*, 82 OR. L. REV. 1125, 1139–43 (2003) (observing that, in spite of a division among researchers over the effect of testifying as a witness on children, it may be emotionally harmful for the child witness if he or she has seen domestic violence and is asked to testify against its perpetrator).

277. Bitensky, *supra* note 171, at 447.

278. I have no evidence to support this statement. It is surmise based on logic and common sense.

279. U.S. CONST. amend. XIII, § 2.

280. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 287–88, 295–96

private sector actors,<sup>282</sup> meaning that Section 2 legislation can cover everyone who conceivably could be a corporally punished child or a corporal punisher. However, it does not axiomatically follow from these precepts that Congress also has the power under Section 2 to prohibit the *activity* of corporally punishing children. Further legal argumentation is needed to make that case. This Article maintains that under either of two theoretical constructs, Congress can rely on Section 2 to pass a nationwide ban against all corporal punishment of children, in conjunction with or as disjunctive to having the Court recognize an implied ban in Section 1.

The first theoretical construct endowing Congress with discretion to legislate a ban on the punishment is based on portions of the analysis previously provided by this Article. Part I establishes that the Supreme Court has subsumed within Section 1's prohibition of slavery a prohibition on conditions closely akin to slavery,<sup>283</sup> and, Part I also demonstrates that corporal punishment consigns children, at least for the duration of the punishment, to such a condition.<sup>284</sup> The conclusion necessarily ensues that, if Congress has the prerogative to enact proscriptions on and means of recourse against slavery (which it indubitably does<sup>285</sup>), then Congress must have the power to enact a ban on corporal punishment of children.<sup>286</sup>

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(1976); Carter, *supra* note 104, at 1358; John B. Attanasio, *The Constitutionality of Regulating Human Genetic Engineering: Where Procreative Liberty and Equal Opportunity Collide*, 53 U. CHI. L. REV. 1274, 1309 n.182 (1986).

281. See Amar, *supra* note 273, at 404 (pointing out that at least one congressional enactment pursuant to the Thirteenth Amendment was “quintessentially about children”); Michael H. LeRoy, *Compulsory Labor in a National Emergency: Public Service or Involuntary Servitude? The Case of Crippled Ports*, 28 BERKELEY J. EMP. & LAB. L. 331, 356 (2007).

282. *Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 438–39 (1968).

283. See *supra* Part I.A.

284. See *supra* notes 108–75 and accompanying text.

285. *Griffin*, 403 U.S. at 105; see Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1818–19 (2010) (asserting that the Thirteenth Amendment gives Congress the power “not only to prevent slavery but to establish freedom”); cf. John Harrison, *State Sovereign Immunity and Congress's Enforcement Powers*, 2006 SUP. CT. REV. 353, 363 (2006) (declaring that Congress' power under the Thirteenth Amendment encompasses legislative enforcement of the Amendment's Section 1 guarantees).

286. See Balkin, *supra* note 285, at 1818–19; Dina Mishra, *Child Labor as Involuntary Servitude: The Failure of Congress to Legislate Against Child Labor Pursuant to the Thirteenth Amendment in the Early Twentieth Century*, 63

The workings of the second construct entail a more involved explanation. The Court has repeatedly held that Section 2 provides Congress with the latitude to legislate against “the badges and incidents of slavery.”<sup>287</sup> This is a conceptually separate Section 2 power from that discussed above because the interactions coming within Congress’ crosshairs under this theory need not be actual slavery or even closely akin to slavery.<sup>288</sup> That distinction partially clarifies what “badges and incidents of slavery” do not have to be; but it also leaves quite unclear what they are. Having offered this cryptic trope, the Court has gone on to variously describe the “badges and incidents of slavery” as the “relic[s] of slavery,”<sup>289</sup> the “burdens and disabilities” of slavery,<sup>290</sup> and the “inseparable incident[s]” of slavery<sup>291</sup> which existed in the antebellum South. Substituting nebulous synonyms for the original nebulous metaphor did not, however, add much to our understanding.

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RUTGERS L. REV. 59, 63–72 (2010) (making the case for Congress, via Section 2 of the Thirteenth Amendment, to regulate child labor); *Griffin*, 403 U.S. at 105 (observing that “surely there has never been any doubt of the power of Congress to impose liability on private persons under § 2 of [the Thirteenth] amendment . . . . Not only may Congress impose such liability, but the varieties of private conduct that it may make criminally punishable or civilly remediable *extend far beyond the actual imposition of slavery or involuntary servitude*” (emphasis added)).

287. *E.g.*, *City of Memphis v. Greene*, 451 U.S. 100, 125 & n.39 (1981) (citing *The Civil Rights Cases*, 109 U.S. 3, 20 (1883)); *Griffin*, 403 U.S. at 105; *Jones*, 392 U.S. at 439.

Some commentators and lower courts have turned this holding about Congress’ Section 2 power on its head by deriving from it a negative inference, i.e., that if Congress has the power to forbid or regulate badges and incidents of slavery under Section 2 of the Thirteenth Amendment, then courts are confined to adjudicating actual enslavement or involuntary servitude, and nothing else, under Section 1. *Carter*, *supra* note 104, at 1340. However, the Supreme Court has never taken this position. *Id.* at 1342.

288. *See Jones*, 392 U.S. at 440–44 (holding that a statute, enacted pursuant to Section 2 of the Thirteenth Amendment, validly barred private and public racial discrimination in sale and rental of property); *Griffin*, 403 U.S. at 105 (holding that Congress legislated within the scope of its Section 2 discretion, under the Thirteenth Amendment, in creating a cause of action for Black citizens who were “victims of conspiratorial, racially discriminatory private action aimed at depriving them of the basic rights that the law secures to all free men”).

289. *Jones*, 392 U.S. at 441–43.

290. *The Civil Rights Cases*, 109 U.S. at 22; *Jones*, 392 U.S. at 441.

291. *Hodges v. United States*, 203 U.S. 1, 38 (1906) (Harlan, J., dissenting), *overruled in part by Jones*, 392 U.S. 409.

The Court basically punted on this issue to Congress, setting in motion a circular process by which legislators would decide what contemporary practices constitute “badges and incidents of slavery” under Section 2,<sup>292</sup> but any needed review of legislators’ decisions would land the matter back before the judiciary. The Court accorded Congress extensive leeway in making the initial decision, i.e., as long as the lawmakers’ decision was rational, judges should not disturb it.<sup>293</sup> The process has yielded legislation, some of which has been challenged as beyond Congress’ Section 2 powers.<sup>294</sup> It is in reacting to those legislative templates that the Court found its way to providing “badges and incidents of slavery” with some intelligible, albeit fragmented, substance.<sup>295</sup>

Thus, the Court has found that “badges and incidents of slavery” includes racial discrimination in the sale or rental of property,<sup>296</sup> curtailment or denial of freedom of interstate movement,<sup>297</sup> and abridgement of the right to enter into and enforce contracts.<sup>298</sup> Moreover and perhaps more importantly, these decisions tell us something valuable about how Congress should go about its Section 2 business.<sup>299</sup> They illustrate the Court’s methodologies, which are still good law, with respect to determining the specific content of “badges

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292. *Jones*, 392 U.S. at 439–40.

293. *Id.* at 440–41.

294. See *Runyon v. McCrary*, 427 U.S. 160, 179 (1976) (upholding, under Section 2, a statute proscribing racial discrimination in the making and enforcement of contracts); *Griffin v. Breckenridge*, 403 U.S. 88, 104–06 (1971) (upholding, under Section 2, a statute protecting the right to engage in interstate travel); *Jones*, 392 U.S. at 439–44 (upholding, under Section 2, a statute barring race discrimination in the sale and rental of property).

295. See *infra* notes 296–98 and accompanying text.

296. *Jones*, 392 U.S. at 439–44.

297. *Griffin*, 403 U.S. at 104–06.

298. *Runyon*, 427 U.S. at 179.

299. Legal scholars have suggested a wealth of possible methodologies by which Congress could give content to “badges and incidents of slavery.” See, e.g., Mark D. Rosen, *Was Shelley v. Kraemer Incorrectly Decided? Some New Answers*, 95 CALIF. L. REV. 451, 508 (2007) (proposing that, in defining “badges and incidents of slavery,” Congress should balance the commitment to liberty and property against the commitment to eliminate vestiges of slavery); Tsesis, *supra* note 190, at 367–68 (theorizing that Congress should interpret ‘badges and incidents of slavery’ to encompass an arbitrary denial of each person’s opportunity to lead a meaningful life); Rebecca E. Zietlow, *Free at Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255, 268 (2010) (declaring that Congress should understand “badges and incidents of slavery” as an anti-subordination promise).

and incidents of slavery.”<sup>300</sup>

*Jones v. Alfred H. Mayer Co.* is emblematic. In *Jones*, the Court adopted a technique of historical inquiry as to whether the statutorily banned practice, i.e., in that case, twentieth-century racial discrimination in property transactions, had also figured into the everyday lives of southern slaves;<sup>301</sup> it was only after the inquiry revealed that the practice had been a quotidian of slave life that the Court held that the statute concerned badges and incidents of slavery and was therefore a constitutional exercise of Section 2 power.<sup>302</sup>

Another technique, proffered as a dictum in the *Civil Rights Cases*<sup>303</sup> and cursorily noted in *Jones*,<sup>304</sup> is prominently on display in *Griffin v. Breckenridge*. The *Griffin* Court focused on whether an objective of challenged Section 2 legislation is to dismantle restraints upon “basic rights that the law secures to all free men.”<sup>305</sup> The statute in issue protected the fundamental constitutional right to travel interstate,<sup>306</sup> a right that the Court also characterized as preserving human freedom.<sup>307</sup> Based primarily on this human freedom aspect of the right, the Court upheld the statute as within the scope of Section 2.<sup>308</sup> While *Griffin’s*

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300. See *infra* notes 301–08 and accompanying text.

301. *Jones* 392 U.S. at 440–43; see Carter, *supra* note 104, at 1366.

302. *Jones*, 392 U.S. at 443–44; Colbert, *supra* note 102, at 3–4, 30.

303. The Civil Rights Cases, 109 U.S. 3, 22 (1883) (averring that, though the Court was not deciding whether the Thirteenth Amendment alone could support the challenged legislation, Congress had assumed it had the power to “declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery”).

304. *Jones*, 392 U.S. at 441 (stating that “the badges and incidents of slavery . . . included restraints upon ‘those fundamental rights which are the essence of civil freedom’”) (quoting *The Civil Rights Cases*, 109 U.S. at 22).

305. *Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971). For a similar reading of *Jones*, see Charles H. Jones, Jr., *An Argument for Federal Protection Against Racially Motivated Crimes: 18 U.S.C. § 241 and the Thirteenth Amendment*, 21 HARV. C.R.-C.L. L. REV. 689, 733–35 (1986).

306. *Griffin*, 403 U.S. at 105–06.

307. *Id.*; John Valery White, *Vindicating Rights in a Federal System: Rediscovering 42 U.S.C. § 1985(3)’s Equality Right*, 69 TEMP. L. REV. 145, 192 n.164 (1996).

308. *Griffin*, 403 U.S. at 105–07; *Federal Remedy to Redress Private Deprivations of Civil Rights*, 85 HARV. L. REV. 95, 101–02 (1971). But see Linda E. Fisher, *Anatomy of an Affirmative Duty to Protest: 42 U.S.C. Section 1986*, 56 WASH. & LEE L. REV. 461, 478 (1999) (asserting that the right to interstate travel rests, in part, on the Thirteenth Amendment). It should be clarified that the *Griffin* Court did not equate the “basic rights that the law secures to all free

invocation of “freedom rights” opens the barn door wide enough under Section 2 to let through a sizeable legislative cavalry, this Article resists the temptation to gamble on such rights. Though *Griffin* was decided more than forty years ago, the Court has not further developed or defined Thirteenth Amendment freedom rights,<sup>309</sup> making them an unpredictable and flimsy source of support.

In lieu thereof, this Article turns to *Jones*’ historical-inquiry methodology for ascertaining what badges and incidents of slavery are,<sup>310</sup> and ascertains that the methodology wholly supports congressional discretion under Section 2 to enact a ban on corporal punishment of children. This Article has already expatiated, in relation to Section 1, upon the fact that legalized corporal punishment of slaves, adult and juvenile, was the norm in the antebellum South.<sup>311</sup> It bears restating, now for purposes of Section 2, that it was a customary, really a humdrum affair, for slaveholders to hit, whip, and flog their human “chattel.”<sup>312</sup>

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men” with fundamental constitutional rights, though the Court did not preclude that an overlap could occur in certain instances. *Griffin*, 403 U.S. at 105–06; cf. *Federal Remedy to Redress Private Deprivations of Civil Rights*, *supra*, at 101–02. The tip-off that the Court intended no equation of the two types of rights is that there are two separate rationales for the *Griffin* holding, each predicated on a different constitutional theory. A theory grounded in the Thirteenth Amendment is that, because travelling interstate is basic to freedom, a Section 2 statute protecting such activity is effectively regulating a badge and incident of slavery and, consequently, the statute must be a constitutional exercise of legislative power. *Griffin*, 403 U.S. at 105. The other theory is grounded on the existence of a fundamental federal constitutional right to travel interstate. *Id.* at 105–06. The Court explains that said right “is within the power of Congress to protect by appropriate legislation.” *Id.* at 106. The only reason to make this point, in the context of this case, was to provide another rationale for the outcome. See *Jones*, *supra* note 305, at 716–17 (agreeing that the Court provided these two separate rationales, in the alternative, for the outcome in *Griffin*).

309. See *White*, *supra* note 307, at 192 n.164 (reporting that the Court, since *Griffin*, has not recognized other rights as freedom rights).

310. See *supra* note 302 and accompanying text.

311. See *supra* note 81 and accompanying text.

312. Swinney, *supra* note 81, at 36 (stating that the lash was the primary means of controlling slaves); For further descriptions of the flogging of slaves, see BLASSINGAME, *supra* note 81, at 251; DOUGLASS, *supra* note 81, at 52, 121; 4 PAGE SMITH, *THE NATION COMES OF AGE* 585, 615–16 (1981); Aremona G. Bennett, *Phantom Freedom: Official Acceptance of Violence to Personal Security and Subversion of Proprietary Rights and Ambitions Following Emancipation, 1865–1910*, 70 CHI.-KENT L. REV. 439, 440 (1994).

But the whip was the common instrument of punishment—indeed, it was the emblem of the master’s authority. Nearly every slaveholder used it, and few grown slaves escaped it entirely. Defenders of the institution [of slavery] conceded that corporal punishment was essential in certain situations; some were convinced that it was better than any other remedy.

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Some overseers, upon assuming control, thought it wise to whip every hand on the plantation to let them know who was in command . . . .<sup>313</sup>

The history documents, without relief, that corporal punishment was an everyday ritual inflicted on southern slaves regardless of their age;<sup>314</sup> it was nothing less than southern standard operating procedure before the Civil War. The significance of this proposition is that, under Supreme Court precedents, it exposes and stamps today’s corporal punishment of children as a badge and incident of slavery.<sup>315</sup> And, of course, the import of the punishment as a badge and incident of slavery is that, under Section 2 of the Thirteenth Amendment, Congress is empowered to enact a ban on the punishment.<sup>316</sup>

Incidentally, Congress can give teeth to such a ban, or to one enacted under the first theoretical construct, by including enforcement measures in it such as a private cause of action for damages or for an equitable remedy against the statute’s violators or by making them subject to criminal liability.<sup>317</sup> Reinforcing a ban in this manner would not be a departure; rather, a ban with bite would be consistent with other

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313. KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 174, 177 (1984).

314. *See, e.g.*, 146 CONG. REC., 106TH CONG., 2D SESS., at E2106 (Nov. 14, 2000) (averring that whipping slaves, including children, was omnipresent in the South); HURMENCE, *supra* note 87, at 9 (setting forth slave Fannie Moore’s recollection of a childhood beating dispensed by her master); KING, *supra* note 87, at 20, 29, 215, 217 (recounting various episodes of slave masters whipping slave children); Burton, *supra* note 87, at 39, 46 (remarking upon slave masters’ standard practice of whipping slave children); Schermerhorn, *supra* note 87, at 204, 208–09 (providing a slave child’s description of being flogged).

315. *See supra* notes 310–12 and accompanying text.

316. *See supra* note 287 and accompanying text.

317. *Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971); Azmy, *supra* note 252, at 1036.

legislation passed under Section 2.<sup>318</sup>

The analysis presented in this Part II should be dauntingly difficult to overcome; it arises, comfortably and conspicuously, from historical fact and from solid legal precedents going back almost half a century. There is a counterargument, though, that makes a credible attempt. It is the exhalation of an antebellum South engulfed in all kinds of physical violence among all kinds of people.<sup>319</sup> The gist of the critique is that, given the general mayhem, corporal punishment of slaves was just another symptom of the South's unbridled violence, and that, in this context, the physical assaults comprising the punishment were not peculiar to the master-slave relationship.<sup>320</sup> Historical investigation as per *Jones*, the logic goes, therefore cannot support categorizing corporal punishment of children in the twenty-first century as a badge and incident of slavery within Congress' purview.<sup>321</sup>

Though superficially arresting, the rebuttal does not work upon closer inspection. Perhaps the most blatant flaw is that what slaves suffered at their masters' hands is on all fours with the accepted definition of corporal punishment of children while the run-of-the-mill physical violence in the antebellum South, outside of the master-slave relation, cannot be squared with that definition except by occasional happenstance. It will be recalled that corporal punishment, as defined in this Article, is the use of physical force upon a child's body with the intention of causing the child to experience bodily pain so as to correct or punish the child's

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318. See William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 71 n.284 (2004) (listing statutes which the Court has identified as predicated on Congress' Section 2 powers under the Thirteenth Amendment, including some providing for civil causes of action or for criminal penalties).

319. BILL CECIL-FRONSMAN, *COMMON WHITES: CLASS AND CULTURE IN ANTEBELLUM NORTH CAROLINA* 170 (1992); BERTRAM WYATT-BROWN, *HONOR AND VIOLENCE IN THE OLD SOUTH* 27, 36, 39, 104, 131, 140, 145-46, 150, 189 (1986).

320. This counterargument comes from Professor Paul Finkelman, in response to my oral presentation of the outlines of the Section 2 thesis described hereinabove. Paul Finkelman, President William McKinley Distinguished Professor of Law, Albany Law School, Co-Panelist, 14th Annual Conference of the Association for the Study of Law, Culture, and the Humanities (Mar. 11, 2011).

321. *Id.*

behavior.<sup>322</sup> Giving the counterargument the benefit of a doubt by assuming *arguendo* that some incidents of this regnant southern violence may have fulfilled the definition or a part thereof, the master's corporal punishment of his slaves and corporal punishment of children *always and necessarily* fulfill every constitutive element of the definition. That correspondence is established by Part I<sup>323</sup> herein and is made a precondition to the analysis in Part II,<sup>324</sup> and this Article's demonstration of it throughout should be the counterargument's quietus.

But, juristic jousting is hard to stop once begun, especially upon discovering that one is comparatively well-armed. Momentarily putting to one side corporal punishment of slaves, the intense culture of violence in which the pre-war South wallowed was quite distinctive.<sup>325</sup> A major factor shaping this ethos was a code of honor zealously embraced and sanctified by white southern men.<sup>326</sup> The code embodied a preoccupation with upholding male and family honor that was tied to a sense of self and was dependent upon the respect of the community.<sup>327</sup> For these men, the only way to ensure that community respect remained intact in the face of insult was through physical force; they had a proclivity if not a compulsion to fight, often in duels, over any threatened sully of their honor.<sup>328</sup> Clearly, physical violence instigated by a fierce commitment to honor has almost nothing in common, beyond the violence itself, with either legalized corporal punishment of yesterday's slaves or of today's children.<sup>329</sup> The white southern men who were spurred to action by this mania wielded sword or pistol

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322. See BITENSKY, CORPORAL PUNISHMENT, *supra* note 18, at 2–3.

323. See *supra* Part I.A.

324. See *supra* Part II.A.

325. JOHN HOPE FRANKLIN, THE MILITANT SOUTH, 1800–1861, at 2, 53, 62, 131 (1984); see NICOLAS W. PROCTOR, BATHED IN BLOOD: HUNTING AND MASTERY IN THE OLD SOUTH 71 (2002); WYATT-BROWN, *supra* note 319, at 27, 36, 39, 104, 131, 140, 145–46, 150, 189.

326. CECIL-FRONSMAN, *supra* note 319, at 171–72; FRANKLIN, *supra* note 325, at 131; CHRISTOPHER J. OLSEN, POLITICAL CULTURE AND SECESSION IN MISSISSIPPI: MASCULINITY, HONOR, AND THE ANTIPARTY TRADITION, 1830–1860, at 11 (2000); PROCTOR, *supra* note 325, at 71; WYATT-BROWN, *supra* note 319, *passim*.

327. OLSEN, *supra* note 326, at 11; CECIL-FRONSMAN, *supra* note 319, at 171.

328. FRANKLIN, *supra* note 325, at 2, 53.

329. See *id.*

against each other with intent to prevent or eradicate a stain upon honor, not with an intent to correct or punish misconduct as required by the definition of corporal punishment of children.

Perhaps most telling of all, it should be borne in mind that the Section 2 statutes, which have been upheld by the Court as within Congress' power,<sup>330</sup> regulated or proscribed as badges and incidents of slavery modern incarnations of practices that were not confined solely to the southern master-slave relationship. These practices, it was previously mentioned, include racial discrimination in the sale or rental of property,<sup>331</sup> curtailment or denial of interstate travel,<sup>332</sup> and abridgement of the right to enter into and enforce contracts.<sup>333</sup> However, in describing the plight of white southern womanhood before the Civil War, one scholar contributes that "Scarlett O'Hara to the contrary, . . . [white] women in the antebellum South 'took no part in governmental affairs, were without legal rights over their property or guardianship of their children, were denied adequate educational facilities, and were excluded from business and the professions.'"<sup>334</sup> And, "[i]t was not until the 1850s that state legislatures began to reform the common law of marital status as it governed wives' capacity to engage in legal transactions, and to modify the doctrine of marital service that gave husbands ownership of their wives' earnings."<sup>335</sup>

It has here been shown, and said probably overmuch, that the counterargument has no legs. Earlier, and more crucially, this Article makes an analytically conservative and affirmative showing that Congress has the power under Section 2 of the Thirteenth Amendment to rationally classify corporal punishment of children either as a form of slavery itself or as a badge and incident of slavery, and, hence, to

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330. See *supra* notes 296–98 and accompanying text.

331. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439–44 (1968).

332. *Griffin v. Breckenridge*, 403 U.S. 88, 104–06 (1971).

333. *Runyon v. McCrary*, 427 U.S. 160, 179 (1976).

334. LORRAINE DUSKY, *STILL UNEQUAL: THE SHAMEFUL TRUTH ABOUT WOMEN AND JUSTICE IN AMERICA* 254–55 (1996) (quoting VIRGINIUS DABNEY, *LIBERALISM IN THE SOUTH* 361 (1932)).

335. Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880*, 103 *YALE L.J.* 1073, 1083 (1994).

enact a ban on the punishment. Whether Congress should do so from a policy perspective is, naturally, a different question.

*B. Policy Reasons for Congress to Enact a Ban on Corporal Punishment of Children*

For purposes of crafting legal analysis, Part I of this Article provides a thorough exposition of the adverse effects and moral trespasses corporal punishment visits upon children.<sup>336</sup> A very brief recapitulation of that information is set forth here in aid of the policy discussion.

Recent scientific studies have decisively demonstrated that corporal punishment of children, regardless of its intensity, venue, or the particular identities of the people involved, puts children at serious risk in multiple ways. If there was some worthwhile benefit achieved by corporally punishing children, perhaps compromising the entire population of spanked children in this manner could be justified, though the dividends would have to be colossal to withstand a cost-benefit analysis. Even then, corporal punishment advocates would have a very, very hard sell. The odds against their success can be best appreciated when one realizes that the proponent of spanking would be in the position of a physician who recommends that parents should give their children medicine which does no good to speak of, but which definitely could jeopardize the children. No reasonable caregivers would agree to administer a single dose; rather, they would hasten to lock the “medicine” away with other poisons.

Allowing the massive cohort of American children to continue to be imperiled by negative serious outcomes is not befitting a society claiming to espouse family values and to celebrate its children.<sup>337</sup> The unacceptability of the status quo is further compounded by the ethical objections to corporal punishment of children,<sup>338</sup> e.g., objections that the

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336. See *supra* Part I.

337. See IRENE TAVISS THOMSON, CULTURE WARS AND ENDURING AMERICAN DILEMMAS 91 (2010) (pointing out that more than other nationalities, Americans consider the family as very important); cf. Muzaffar Chishti, *A Redesigned Immigration Selection System*, 41 CORNELL INT’L L.J. 115, 122 (2008) (referring to the “deeply-rooted American value” of emphasizing family).

338. For a full discussion of the moral concerns over corporal punishment of children, see BITENSKY, CORPORAL PUNISHMENT, *supra* note 18, at 1–46.

punishment inflicts unnecessary somatic pain and is unfair in comparison to the protection adults have under criminal assault and battery laws.<sup>339</sup> Though Americans have not been attuned to think of corporal punishment of children as an exigency calling for federal intervention, it may, in fact, be just that, if only we will see it.<sup>340</sup> Indeed, the well-being, optimal development, and happiness of innumerable children are at stake, and that should be exigency enough.

Yet, children's salubrity is not the only reason for Congress to act. Adult well-being hangs in the balance too. The adverse effects of childhood corporal punishment may last into and throughout the victim's majority, ruining or impeding prospects for personal fulfillment.<sup>341</sup> Adult punishers also may experience a sense of loss because the punishment is associated with deterioration of the parent-child relationship<sup>342</sup> and may provoke guilt feelings for having caused pain to a child they care about.<sup>343</sup> The toll exacted by

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339. See *supra* notes 146–74 and accompanying text.

340. I single out Americans because a substantial part of the rest of the world has taken action against corporal punishment of children. The global community has made corporal punishment of children a human rights violation. BITENSKY, CORPORAL PUNISHMENT, *supra* note 18, at 47–151. As of this writing, over one hundred countries have banned school corporal punishment, including thirty-three that have banned the punishment entirely. *Global Table*, GLOBAL INITIATIVE TO END ALL CORPORAL PUNISHMENT OF CHILDREN (last visited Oct. 27, 2012) <http://www.endcorporalpunishment.org/pages/frame.html> (follow “Global progress,” then “Global table”).

341. Gershoff, *supra* note 128, at 547–48; see Lansford & Dodge, *supra* note 41, at 265–67 (determining that more frequent use of childhood corporal punishment is related to higher prevalence of violence and approval of violence at a societal level); Corrine E. Leary et al., *Parental Use of Physical Punishment as Related to Family Environment, Psychological Well-Being, and Personality in Undergraduates*, 23 J. FAM. VIOLENCE 1, 5–6 (2008) (ascertaining that undergoing childhood physical discipline may be related to one's family environment and psychological health in young adulthood); Murray A. Straus, *The Special Issue on Prevention of Violence Ignores the Primordial Violence*, 23 J. INTERPERSONAL VIOLENCE 1314, 1314, 1316–18 (2008) (summarizing studies that show corporal punishment of children may lead to other interpersonal and societal physical violence); Jennifer Wareham et al., *A Test of Social Learning and Intergenerational Transmission Among Batterers*, 37 J. CRIM. JUST. 163, 169–71 (2009) (conveying that corporal punishment of children is linked to interpersonal violence in adulthood); see also ALICE MILLER, FOR YOUR OWN GOOD: HIDDEN CRUELTY IN CHILD-REARING AND THE ROOTS OF VIOLENCE 61, 65–66, 115–17, 172 (Hildegard Hannum & Hunter Hannum trans., 1990) (theorizing that childhood corporal punishment may lead to more aggressive adults when such children grow up).

342. Gershoff, *supra* note 128, at 541–42.

343. BITENSKY, CORPORAL PUNISHMENT, *supra* note 18, at xvi; NANCY

childhood physical chastisement may therefore be a source of continuing individualized impairment and discontent among adults.

It is common sense that all these impaired lives are bound to have a cumulative effect on society at large, even upon individuals who have never physically chastised a child or been physically chastised themselves during childhood. The punishment's childhood outcomes that may continue into adulthood include increased aggressiveness, increased antisocial and criminal tendencies, and the exacerbation of emotional instability.<sup>344</sup> Adults possessing any or a combination of these attributes have the psychological wherewithal to either engage in inhumane conduct or to turn an indifferent eye in that direction.<sup>345</sup> When masses of adults are so afflicted, they collectively resemble nothing so much as a tinderbox that may or may not combust, but that makes maintenance of social peace continually precarious.

We have never lived in an America populated by adults who were spared the rod during childhood. We cannot know with certainty what that America would be like, but modern scientific findings overwhelmingly indicate that pitiless aggressiveness and antisocial cruelties should gradually become less frequent and perhaps imperceptibly fade from the scene.<sup>346</sup> Martin Luther King, Jr. dared to dream of an irenic brotherhood without the input of science.<sup>347</sup> Are we

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SAMALIN WITH MARTHA MORAGHAN JABLOW, *LOVING YOUR CHILD IS NOT ENOUGH: POSITIVE DISCIPLINE THAT WORKS* 73 (1987).

344. See Gershoff, *supra* note 128, at 541–42.

345. BITENSKY, *CORPORAL PUNISHMENT*, *supra* note 18, at 24–28; GREVEN, *supra* note 29, at 199, 201–04, 206–07; MILLER, *supra* note 341, at 62, 66–75, 79–84, 86–91, 115, 139–97, 242–43, 264–65; BENJAMIN SPOCK, *DR. SPOCK ON PARENTING: SENSIBLE ADVICE FROM AMERICA'S MOST TRUSTED CHILD-CARE EXPERT* 151–52 (1988); Herman, *supra* note 276, at 36–39.

346. See *supra* notes 135, 214–16 and accompanying text.

347. The Reverend Martin Luther King, Jr.'s famous "I have a Dream" speech includes the following:

I have a dream that one day on the red hills of Georgia, sons of former slaves and sons of former slave-owners will be able to sit down at the table of brotherhood.

....

I have a dream that one day, down in Alabama, . . . little black boys and black girls will be able to join hands with little white boys and white girls as sisters and brothers.

....

. . . This is the faith that I go back to the South with. . . With this faith we will be able to transform the jangling discords of our nation into a

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perhaps not lesser citizens to ignore such dreams when science has our backs?

### CONCLUSION

This Article has advanced the proposition that proscribing all corporal punishment of children may help to put a wearied human race on the high road toward a more anodyne and secure life. Not that utopia is around the corner; there are no final destinations in the quest to be more civilized and humane.

The Article also bears a subtextual leitmotiv that is a corollary of prohibiting such punishment—a corollary of epochal proportions. The prohibition, in making bodily integrity sacrosanct, would necessarily and instantly elevate children to full-fledged personhood, much like the slaves before them. It would constitute a genuine watershed in the history of American childhood and in the progressive recognition of human dignity.

It is almost too good to be true that of all the Constitution, the Thirteenth Amendment virtually beckons us down this path. Men in deepest sympathy with the abolitionist cause authored the Amendment.<sup>348</sup> The abolitionists themselves, scandalized by physical coercion, among other indignities, crusaded to abolish slavery;<sup>349</sup> for the same reason, they struggled against corporal punishment of children.<sup>350</sup> How splendid and providential, then, that standard constitutional analysis enables the Amendment to finally fulfill the abolitionist's lesser-known mission.

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beautiful symphony of brotherhood.

Martin Luther King, Jr., *I Have a Dream*, in *I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD* 101, 104–05 (James Melvin Washington ed., 1992).

348. See *supra* text accompanying note 189.

349. See *supra* notes 4–5 and accompanying text.

350. See *supra* notes 3–6 and accompanying text.