1-1-2011

Can They Do That to Me?! Does the 8th Amendment Protection Children's Best Interests?

Maryam Ahranjani
University of New Mexico - School of Law

CAN THEY *DO* THAT TO ME?! DOES THE EIGHTH AMENDMENT PROTECT CHILDREN'S BEST INTERESTS?

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"A nation's greatness is measured by how it treats its weakest members."**

I. INTRODUCTION

Anti-Federalists strongly believed that a Bill of Rights containing basic protections for Americans should be included in the Constitution.[1] They eventually succeeded in having ten amendments added in 1791, four years after the passage of the Constitution.[2] One of these rights was the Eighth Amendment, which provides, "Excessive bail shall not be required, nor

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*Maryam Ahranjani is associate director of the Marshall-Brennan Constitutional Literacy Project, a national program based at American University Washington College of Law (WCL) that trains and mobilizes talented upper-level law students around the country to teach minority and low-income students about their constitutional rights and responsibilities. She also serves as an adjunct professor at WCL, teaching both an upper-level constitutional law course focused on public education, and an externship course. She appreciates the support of Phillip Buckley from the University of Pennsylvania for his guidance and feedback on this piece. Special thanks also go to Jamie Raskin, Steve Wermiel, Margaret Montoya, and Paul Figueroa and his beautiful son Rumi Alejandro Ahranjani Figueroa, who was born shortly after this piece was written.

**Often attributed to Mahatma Gandhi, among others.

1. Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 16 (2006).

2. *See* U.S. CONST. amend. I–X; George Anastaplo, *Amendments to the Constitution of the United States: A Commentary*, 23 LOY. U. CHI. L.J. 631, 654 (1992).

excessive fines imposed, nor cruel and unusual punishments inflicted."[3] While public schools did not exist in the eighteenth century,[4] the Framers envisioned protecting citizens, particularly the most vulnerable, from government imposition of excessive punishment in recognition of human dignity.[5]

This Essay explores the application of the Eighth Amendment in criminal sentences and corporal punishment in the school context with respect to juveniles,[6] one of the largest and most vulnerable groups in our society. Part II analyzes case law and legislation related to corporal punishment of children in schools, which has been inflicted since the inception of common schools in the United States.[7] Part III analyzes case law and legislation related to juvenile criminal punishment. Until recently, several states administered the death penalty to juveniles,[8] and a number of states still sentence juveniles convicted of homicide crimes to life in prison without the possibility of parole.[9] Finally, in Part IV, this essay proposes that although an adult-focused approach to Eighth Amendment analysis is slowly leading in the direction of more humane treatment of children, infusion of a child-centered approach in these two particular contexts will more quickly lead to outcomes more consistent with evolving standards of decency and the practices of peer nations.

II. JUDICIAL AND STATUTORY RESPONSES TO CORPORAL PUNISHMENT IN PUBLIC SCHOOLS

A. *Supreme Court Refuses to Apply the Eighth Amendment to Paddling in* Ingraham v. Wright

The United States Supreme Court has considered just one case about the Eighth Amendment's application in public schools. In *Ingraham v. Wright*, students who were paddled multiple times by their teachers asserted that they had been subjected to cruel and unusual punishment at school in violation of the Eighth Amendment.[10]

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3. U.S. CONST. amend. VIII.

4. *See* Noah Feldman, *Non-sectarianism Reconsidered*, 18 J.L. & POL. 65, 66 (2002).

5. *See* U.S. CONST. pmbl.; U.S. CONST. amend. VIII.

6. The terms "juvenile," "young people," and "youth" will be used interchangeably to mean persons under the age of 18.

7. *See* Ingraham v. Wright, 430 U.S. 651, 660 (1977) (providing that "[t]he use of corporal punishment in this country as a means of disciplining schoolchildren dates back to the colonial period").

8. *See* Roper v. Simmons, 543 U.S. 551 (2005) (banning the imposition of the death penalty upon juveniles).

9. *See* Graham v. Florida, 130 S. Ct. 2011, 2034 (2010) (holding that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide").

10. *Ingraham*, 430 U.S. at 653.

The Florida statute in effect explicitly allowed limited corporal punishment, "proscribing punishment which was 'degrading or unduly severe' or which was inflicted without prior consultation with the principal or the teacher in charge of the school."[11] The authorized punishment consisted of one to five blows "on the buttocks with a flat wooden paddle measuring less than two feet long, three to four inches wide, and about one-half inch thick."[12] The normal paddling would not result in any apparent physical injury to the student.[13] "School authorities viewed corporal punishment as a less drastic means of discipline than suspension or expulsion."[14] Despite the statutory procedural requirements, teachers at Drew Junior High School often paddled students without first consulting the principal.[15]

Sixteen students testified that the regime at Drew Junior High School was exceptionally harsh.[16] "The testimony of [petitioners] Ingraham and Andrews, in support of their individual claims for damages, is illustrative."[17] Because he was slow to respond to his teacher, Ingraham was paddled more than twenty times "while being held over a table in the principal's office."[18] "The paddling was so severe that he suffered a hematoma requiring medical attention and keeping him out of school for several days."[19] The second petitioner, Andrews, "was paddled several times for minor infractions. On two occasions he was struck on his arms, once depriving him of the full use of his arm for a week."[20]

The Court recognized that teachers "may impose reasonable but not excessive force to discipline a child"[21] to the extent that use of force is "necessary for [the child's] proper control, training or education."[22] The majority pointed out that use of unreasonable force will subject the educator to possible civil and criminal liability in virtually all states.[23] The Court emphasized reasonableness in light of the facts of the case in terms of determining whether the force is justifiable, and noted that the following factors are to be taken into account: "The seriousness of the offense, the attitude and past behavior of the child, the nature and severity of the punishment, the age and

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11. *Id.* at 655 (citing FLA. STAT. ANN. § 232.27 (repealed 2003)).
12. *Id.* at 656.
13. *Id.* at 656–57.
14. *Id.* at 657.
15. *Id.* (citing Ingraham v. Wright, 498 F.2d 248, 255 & n.7 (5th Cir. 1974), *vacated on rehearing*, 525 F.2d 909 (5th Cir. 1976), *aff'd*, 430 U.S. 651 (1977)).
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* (footnote omitted) (citation omitted).
20. *Id.* (citation omitted).
21. *Id.* at 661.
22. *Id.* (alteration in original) (quoting RESTATEMENT (SECOND) OF TORTS § 147(2) (1965)) (internal quotation marks omitted).
23. *Id.* (citations omitted).

strength of the child, and the availability of less severe but equally effective means of discipline."[24]

In a contentious 5-4 decision, the Court held that the Eighth Amendment does not apply to the paddling of children as a means of maintaining discipline in public schools.[25] Although petitioners contended that criminals should not be afforded greater protection than schoolchildren, and even though "the Framers of the Eighth Amendment could not have envisioned our present system of public and compulsory education, with its opportunities for noncriminal punishments,"[26] the Court declined to apply the protections of the Eighth Amendment to the school context.[27]

According to the majority, the schoolchild does not need the protection of the Eighth Amendment.[28] Though attendance may not always be voluntary, the respondents persuaded the Court that public school remains an open institution where children are not physically restrained from leaving school during school hours, and at the end of the school day are free to return home.[29] "Even while at school, the child brings with him the support of family and friends and is rarely apart from teachers and [others] who may witness and protest instances of mistreatment."[30] Because of "[t]he openness of the public school and its supervision by the community," the Court was satisfied that there are "significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner."[31]

Justice White dissented forcefully and was joined by Justices Marshall, Brennan, and Stevens.[32] They rejected the Court's conclusion that corporal punishment in public schools, no matter how severe, could never qualify as "cruel and unusual punishment" within the meaning of the Eighth Amendment.[33] They wondered why certain punishments, such as beatings, "are so barbaric and inhumane" that they could never lawfully be imposed on criminals, but could now theoretically be imposed on students without violating the Eighth Amendment.[34]

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24. *Id.* at 662 (citing RESTATEMENT (SECOND) OF TORTS § 150 cmt. c–e (1965); 1 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 3.20 (1956)).

25. *See id.* at 652, 683.

26. *See id.* at 668.

27. *Id.* at 671.

28. *See id.* at 670.

29. *See id.*

30. *Id.*

31. *Id.*

32. *Id.* at 683 (White, J., dissenting).

33. *Id.* at 683–84.

34. *See id.* at 684–85. In support of this point, Justice White argued that "if it is constitutionally impermissible to cut off someone's ear for commission of murder, it must be unconstitutional to cut off a child's ear for being late to class." *Id.* at 684.

B. Corporal Punishment in the Aftermath of Ingraham v. Wright

After *Ingraham*, several lower courts and state legislatures addressed the issue of corporal punishment. In the wake of *Ingraham*, lower courts have given students the ability to "recover money damages against schools where there is a severe injury and the force applied was wholly disproportionate to the underlying problem or misbehavior."[35] *Garcia v. Miera*[36] and *Metzger v. Osbeck*[37] are two examples of lower courts allowing students to recover money damages when there is a serious injury resulting from a clearly disproportionate use of force compared to the underlying offense.

Clearly, "*Ingraham v. Wright* was a major disappointment to the opponents of corporal punishment in school, but they redoubled their efforts in the state legislatures over the next two decades."[38] When *Ingraham v. Wright* was decided, "only two states[, Massachusetts and New Jersey,] banned corporal punishment,"[39] but today, only nineteen states continue to allow the practice.[40] As of 2011, thirty-one states and the District of Columbia ban corporal

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35. JAMIN B. RASKIN, WE THE STUDENTS: SUPREME COURT CASES FOR AND ABOUT STUDENTS 175 (3d ed. 2008).

36. 817 F.2d 650, 652–53, 658 (10th Cir. 1987) (holding that a nine-year-old girl, who was allegedly held upside down and paddled so forcefully by the school principal that it resulted in permanent scarring, could be entitled to recover under a "constitutional tort" theory).

37. 841 F.2d 518, 519–21 (3d Cir. 1988) (holding that a student who was punished for using abusive language by being choked by a teacher, after which he fell face down on a concrete floor, suffering lip lacerations, a broken nose, broken teeth, and other injuries, may be entitled to recover money damages under a deprivation of substantive due process theory).

38. RASKIN, *supra* note 35, at 174.

39. *Id.* *See also* Ingraham v. Wright, 430 U.S. 651, 663 (1997) ("Only two States, Massachusetts and New Jersey, have prohibited all corporal punishment in their public schools." (citing MASS. GEN. LAWS ANN. ch. 71 § 37G (2009); N.J. STAT. ANN. § 18A: 6-1 (2010))).

40. *See* ALA. CODE § 16-28A-1 (LexisNexis 2001); ARIZ. REV. STAT. ANN. § 15-843 (2009 & Supp. 2011); ARK. CODE ANN. § 6-18-503 (2000 & Supp. 2011); COL. REV. STAT. ANN. § 22-32-109.1 (2011); FLA. STAT. ANN. § 1003.32 (West 2009); GA. CODE ANN. § 20-2-730 to -731 (2009); IDAHO CODE ANN. § 33-1224 (2008); IND. CODE ANN. § 31-34-1-15 (LexisNexis 2007); KY. REV. STAT. ANN. § 503.110 (LexisNexis 2008); LA. REV. STAT. ANN. § 223 (West 2001); MISS. CODE ANN. § 37-11-57 (1972); MO. ANN. STAT. § 160.261 (West 2010 & Supp. 2011); Act of June 23, 2011, ch. 282, 2011 N.C. Sess. Laws ch. 282 § 2 (West) (repealing North Carolina's previous statutes, N.C. GEN. STAT. § 115C-390 to -391 (LexisNexis 2009 & Supp. 2010), which dealt with corporal punishment, but replacing them with new provisions giving each local school board the authority to determine whether it will allow corporal punishment of students, subject to some restrictions); OKLA. STAT. ANN. tit. 21, § 844 (West 2002); S.C. CODE ANN. § 9-63-260 (2004); TENN. CODE ANN. § 49-6-4103 (2009); TEX. PENAL CODE ANN. § 9.62 (West 2011); WYO. STAT. ANN. § 21-4-308 (2011); KAN. STAT. ANN. § 21-3609 (2007 & Supp. 2010) (repealed 2011) (although this statute was repealed, Kansas law does not appear to otherwise prohibit corporal punishment in schools); *see also Discipline at School*, THE CTR. FOR EFFECTIVE DISCIPLINE (July 1, 2010), http://www.stophitting.com/index.php?page=statesbanning (citing *Civil Rights Data Collection*, U.S. DEP'T OF EDUC., http://ocrdata.ed.gov/ (last visited October 11, 2011)) (noting that only nineteen states allow corporal punishment).

punishment either explicitly by statute or regulation, or implicitly by policy.[41] The map below illustrates the states that ban corporal punishment as of October, 2011.[42]

FIGURE 1[43]

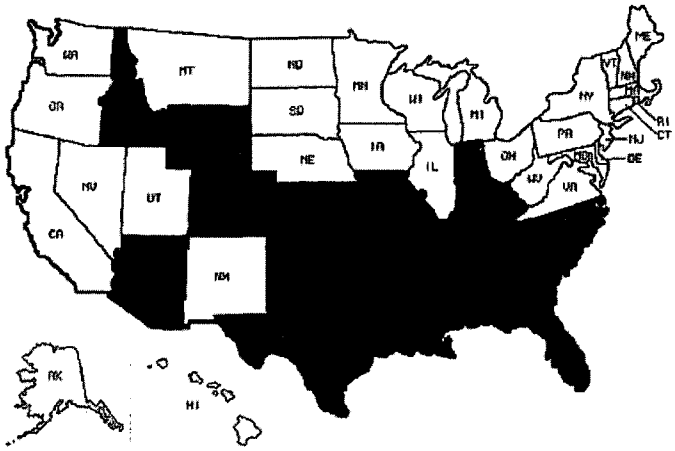

Figure 1 illustrates the nineteen states in gray that have laws permitting corporal punishment in schools.[44] During the 2006–2007 school year, "223,190 school children in the U.S. were subjected to physical punishment."[45] Most states that ban corporal punishment passed their statutes during the 1980s and 1990s,[46] presumably as a reaction to the Supreme Court's holding in *Ingraham v. Wright*.[47]

The story behind the numbers is quite disturbing. According to one recent study, "[t]he large majority of instances of corporal punishment . . . [involve] minor infractions, such as having a shirt untucked, being tardy[,] . . . or talking during class."[48] Minority students, particularly African-Americans, are

41. *See infra* TABLE 1; *see also* THE CTR. FOR EFFECTIVE DISCIPLINE, *supra* note 40 (noting the same).

42. *See infra* TABLE 1; *see also* THE CTR. FOR EFFECTIVE DISCIPLINE, *supra* note 40 (providing the map of states).

43. THE CTR FOR EFFECTIVE DISCIPLINE, *supra* note 40.

44. *See supra* note 40.

45. THE CTR FOR EFFECTIVE DISCIPLINE, *supra* note 40.

46. *See infra* TABLE 1.

47. *See* 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, 453 (1998).

48. *A Violent Education: Corporal Punishment of Children in US Public Schools*, HUMAN RIGHTS WATCH & AM. CIVIL LIBERTIES UNION, 35 (Aug. 2008), http://www.hrw.org/sites/default/files/reports/us0808webwcover.pdf (footnotes omitted) (citations omitted).

significantly more likely to have corporal punishment inflicted on them.[49] Although African-American children comprise 17% of public school students, 36% of students who have corporal punishment inflicted on them are African-American.[50] These racial disparities have only grown over time.[51] Students with disabilities are far more likely to be hit, often times for behavior related to their disabilities.[52] For example, students with Tourette's are paddled for uncontrollable verbal outbursts.[53] Notably, the vast majority of states that have not banned corporal punishment in schools are in the South.[54] Almost 40% of all the corporal punishment cases in the country occur in Texas and Mississippi.[55] Five states—Texas, Mississippi, Arkansas, Alabama, and Georgia—accounted for almost 75% of the country's corporal punishment cases in 2005–2006.[56]

Those who oppose corporal punishment argue that it discourages learning, fails to deter future misbehavior, and at times provokes future misbehavior.[57] They point to numerous studies to support their assertions that hitting children hurts them more than it helps them.[58] Those who support corporal punishment argue that students who are physically disciplined perform better than those who are not.[59] Much like the majority in *Ingraham*,[60] they argue that corporal

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49. *Id.* at 44 (citing *Civil Rights Data Collection*, U.S. DEP'T OF EDUC., http://ocrdata.ed.gov/Projections_2006.aspx (last visited Dec. 15, 2011)).

50. *Id.* at 44 (citing *Civil Rights Data Collection*, U.S. DEP'T OF EDUC., http://ocrdata.ed.gov/Projections_2006.aspx (last visited Dec. 15, 2011)); THE CTR. FOR EFFECTIVE DISCIPLINE, *supra* note 40.

51. *See* THE CTR. FOR EFFECTIVE DISCIPLINE, *supra* note 40. For example, in 1976, white students accounted for 65% of the number of children struck at school, while black students accounted for 29%. *Id.* In 2006, however, white students accounted for only 53% of students struck, while black students accounted for 36%. *Id.*

52. *See Impairing Education: Corporal Punishment of Students with Disabilities in US Public Schools*, HUMAN RIGHTS WATCH & AM. CIVIL LIBERTIES UNION, 2 (Aug. 2009), http://www.aclu.org/files/pdfs/humanrights/impairingeducation.pdf.

53. *See id.* at 35 (citing *Tourette Syndrome Fact Sheet*, NAT'L INST. NEUROLOGICAL DISORDERS & STROKE (June 15, 2011), http://www.ninds.nih.gov/disorders/tourette/detail_tourette.htm).

54. *See supra* note 40; *supra* FIGURE 1.

55. THE CTR. FOR EFFECTIVE DISCIPLINE, *supra* note 40.

56. *See id.*

57. *See, e.g.*, *More than 200,000 Kids Spanked at School*, CNN.com (August 20, 2008), http://articles.cnn.com/2008-08-20/us/corporal.punishment_1_corporal-punishment-student (quoting Alice Farmer, author of a joint report from Human Rights Watch and the American Civil Liberties Union) (arguing the same).

58. *See, e.g.*, HUMAN RIGHTS WATCH & AM. CIVIL LIBERTIES UNION, *supra* note 48, at 4 (discussing research that indicates corporal punishment encourages students to lash out and become aggressive); Bitensky, *supra* note 47, at 424–25 (arguing that "the overwhelming evidence of the injurious effects of corporal punishment of children is accompanied by almost no evidence of lasting benefits").

59. *See, e.g.*, Jason M. Fuller, Comment, *The Science and Statistics Behind Spanking Suggest that Laws Allowing Corporal Punishment Are in the Best Interests of the Child*, 42 AKRON L. REV. 243, 246–49 (2009) (discussing several studies which indicated that spanking had either positive effects, or at worst no negative effects, on a child's behavior and development); Theodore Kettle,

punishment may be administered in such a way that is fair, swift, and effective, as long as it is a reasonable amount of force.[61] As the majority of the Court pointed out in *Ingraham*, "[p]rofessional and public opinion is sharply divided on the practice."[62] However, in the nearly thirty-five years since *Ingraham*, public and professional opinion seems to be moving in favor of the elimination of corporal punishment.[63]

As mentioned earlier, the five states in which the practice is still common are located in the South.[64] Some might argue that the North-South divide reflects personal values that must be respected and allowed to persist.[65] Some parents choose to use corporal punishment at home,[66] and they feel that its use in school is perfectly appropriate and even encouraged.[67] They may argue that the differences toward paddling reflect regional and cultural norms, even outside the school setting,[68] and that the federal government should not dictate their traditions.[69]

Notably, this conversation seems to center on the adult state actor's or adult parent's point of view. It does not seem to include what a child might say in terms of his or her best interest and what practices are effective. I argue that the current analysis is adult-focused and more interested in the state's need for efficiency in schools and for parents' interest in teaching conforming behavior. A child-centered approach may actually lead to a reasonable compromise for both camps.

Pro-Spanking Studies May Have Global Effect, NEWSMAX (Jan. 7, 2010, 11:11 AM), http://www.newsmax.com/PrintTemplate.aspx?nodeid=345669 (same).

60. *See* Ingraham v. Wright, 430 U.S. 651, 661, 676 (1977).

61. *See, e.g.*, Fuller, *supra* note 59, at 246–47, 249 (describing spanking as "a discipline method defined as striking a child on the buttocks or extremities 'without inflicting physical injury' and with the intent to modify behavior," and arguing that if a child learns best through physical punishment he or she should receive a spanking in response to misbehavior).

62. *Ingraham*, 430 U.S. at 660.

63. *See* Fuller, *supra* note 59, at 263–64.

64. *See supra* text accompanying notes 54–56.

65. *See generally* Bitensky, *supra* note 47, at 422 (noting that cultural identity may play a role in whether one supports or objects to prohibiting corporal punishment).

66. *See* Fuller, *supra* note 59, at 252 (noting that "most people support corporal punishment in the home").

67. *See* Dexter Mullins, *Pro-paddle: Students, Families Fight to Keep Corporal Punishment*, THE GRIO (Mar. 8, 2011), http://www.thegrio.com/education-1/students-parents-demand-paddling-remain-in-school.php.

68. *See* Bitensky, *supra* note 47, at 422 (noting cultural identity may play a role in whether one supports or objects to prohibiting corporal punishment); Mullins, *supra* note 67 (discussing disagreement over paddling at a predominantly black school, where "African-American parents in particular were outraged that they had to 'haggle with non African-Americans' about how to raise their sons" (quoting *Town Hall Statement*, ST. AUGUSTINE HIGH SCHOOL, http://purpleknights.com/cms/?page_id=940 (last visited Dec. 15, 2011))).

69. *See* Susan H. Bitensky, *Section 1983: Agent of Peace or Vehicle of Violence Against Children?*, 54 OKLA. L. REV. 333, 349 (2001) (noting that some parents argue against "governmental interference" in regards to a purported federal constitutional right to corporally punish their children).

In the ideal home, the child has a close relationship with his parents and shared expectations in terms of behavior.[70] The child also knows that deviations from expected behavior will result in certain punishment.[71] However, in the school setting, the student does not have the same intimate relationship with the person administering corporal punishment and does not have the same understanding of expectations.[72] Therefore, from a child's perspective, punishment in the home is very different from punishment in school. In addition, as illustrated by lower court decisions and state statutes, the national trend is to move away from corporal punishment in school,[73] and, in fact, many peer nations in Europe have banned corporal punishment in school and at home.[74] The infusion of a child-centered approach may yield different results without disrupting cultural norms. After considering how the Eighth Amendment has been applied to youth in the criminal justice context, Part III explores the full benefits of a child-centered approach.

III. CURRENT STATE OF EIGHTH AMENDMENT JURISPRUDENCE FOR JUVENILE OFFENDERS

As described in Part I, the Eighth Amendment protects citizens against infliction of cruel and unusual punishment by the state. Given the serious implications of Eighth Amendment violations for a vulnerable population like children, consideration of a child-centered approach to all situations in which the Eighth Amendment arises for juveniles provides a more comprehensive and useful contribution. In addition to schools, another important area of Eighth Amendment case law that applies to young people arises in the context of juvenile offenders. This section explores the history of the death penalty as a backdrop for the evolution of criminal punishment as applied to juveniles, and then focuses on the current case of *Graham v. Florida*.

A. U.S. Supreme Court Jurisprudence

In applying the Eighth Amendment to the criminal context, the Supreme Court has often said that the Eighth Amendment prohibits two kinds of government practices: those that were cruel and unusual when the Constitution was written, and those that offend the "evolving standards" of decency of the

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70. *See* AM. ACAD. PEDIATRICS, *Guidance for Effective Discipline*, ASSOCIATED COUNSELORS & THERAPISTS, http://www.beachpsych.com/pages/cc62.html (last visited Dec. 15, 2011).

71. *See id.* (discussing punishment as a way to eliminate undesired behavior).

72. *See* HUMAN RIGHTS WATCH & AM. CIVIL LIBERTIES UNION, *supra* note 48, at 4.

73. *See* Part II.B.

74. *See* Bitensky, *supra* note 47, at 361.

society.[75] "[T]he death penalty has been available—and controversial—since the [United States] was founded."[76] Although the death penalty is still used with some frequency in certain states,[77] its critics are chipping away at the practice.[78] The number of people sentenced to die has sharply declined in the new century.[79] The number of states that have banned the use of the death penalty has increased to sixteen, plus the District of Columbia.[80] Throughout our nation's history, the number of juveniles sentenced to death decreased[81] as states increasingly enacted prohibitions against this punishment, which is part of the reason that the Supreme Court abolished the juvenile death penalty in 2005.[82]

One important factor leading to the decline in jury sentences of death "has been media coverage about wrongful convictions of people on death row."[83] These cases involved "DNA technologies to examine evidence that can conclusively refute the finding of guilt."[84] Some people speculate that jurors, now very much aware that the justice system is imperfect, are fearful of putting an innocent person to death and, as a result, are choosing instead to sentence people to life in prison without the possibility of parole.[85] Of the thirty-four states that have death penalty laws, all have life without parole statutes.[86]

Another possible explanation for the decline in sentences of death "is the reluctance of prosecutors to incur the high costs of litigating capital punishment cases."[87] "According to one estimate, prosecution costs in a non-capital case rarely exceed $10,000, but because of the large number of procedural safeguards

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75. *See* Ford v. Wainwright, 477 U.S. 399, 405–06 (1986) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).

76. MARYAM AHRANJANI, ANDREW G. FERGUSON & JAMIN B. RASKIN, YOUTH JUSTICE IN AMERICA 248 (2005); *see Part I: History of the Death Penalty: Introduction to the Death Penalty*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/part-i-history-death-penalty (last visited Dec. 15, 2011).

77. *See Facts About the Death Penalty*, DEATH PENALTY INFORMATION CENTER, 2–3 (Dec. 13, 2011), http://www.deathpenaltyinfo.org/documents/FactSheet.pdf.

78. AHRANJANI ET AL., *supra* note 76, at 248.

79. *See* DEATH PENALTY INFORMATION CENTER, *supra* note 77, at 3.

80. *Id.* at 1.

81. AHRANJANI ET AL., *supra* note 76, at 248, 250.

82. Roper v. Simmons, 543 U.S. 551, 566–68 (2005).

83. AHRANJANI ET AL., *supra* note 76, at 248; *see Part II: History of the Death Penalty: Limiting the Death Penalty*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/part-ii-history-death-penalty (last visited Dec. 15, 2011).

84. AHRANJANI ET AL., *supra* note 76, at 248; *see* DEATH PENALTY INFORMATION CENTER, *supra* note 83.

85. *See* Richard C. Dieter, *Sentencing for Life: Americans Embrace Alternatives to the Death Penalty*, DEATH PENALTY INFORMATION CENTER, (Apr. 1993), http://www.deathpenaltyinfo.org/sentencing-life-americans-embrace-alternatives-death-penalty.

86. *Life Without Parole*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/life-without-parole (last visited Dec. 15, 2011).

87. AHRANJANI ET AL., *supra* note 76, at 249.

built into death penalty cases, they can routinely reach $500,000 or more,"[88] and sometimes even cost several million dollars per case.[89]

Furthermore, religion has played a role in declining support for the death penalty as an answer to crime.[90] With growing media attention on ineffective counsel in criminal cases,[91] governors imposing moratoriums on the death penalty,[92] and the Supreme Court's ban on the execution of people with "mental retardation,"[93] enthusiasm for the death penalty is slowly fading.[94] Still, the death penalty remains an option in most states and is an important feature of the criminal justice landscape.

In terms of the applicability of the death penalty to juveniles:

> The colonies and the states that would later form the United States have a long history of executing juveniles who murder. The first such execution of a convict under the age of eighteen took place in 1642 in Plymouth Colony, Massachusetts.
>
> At the beginning of 2005, the laws of twenty states permitted executions of juveniles, but few engaged in the practice. In fact, a number of states had actively backed away from executing juvenile offenders. For example, in 1992 Indiana increased the minimum age for imposing the death penalty to eighteen. Montana did the same in 1999. Bills were introduced in ten state legislatures that would raise to eighteen the legal limit for imposition of capital punishment. Nonetheless, [at the beginning of 2005], in the majority of states that permitted the death penalty, if a prosecutor decided that a juvenile had committed an especially terrible murder and demonstrated a lack of regard for human life, he or she could choose to seek the death penalty.
>
> The juvenile death penalty has long been controversial. Its supporters believe that it is just punishment for young people who commit savage crimes. If you are old enough to take someone else's life, they think, you are old enough to suffer the loss of your own.

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88. *Id.*

89. *See* Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283, 339 n.198 (2008) (quoting David A. Wallace, *Dead Men Walking—An Abuse of Executive Clemency Power in Illinois*, 29 U. DAYTON L. REV. 379, 396 (2004)).

90. *See* DEATH PENALTY INFORMATION CENTER, *supra* note 83 (explaining that the Roman Catholic Church and most Protestant denominations now oppose the death penalty).

91. *See, e.g.*, Ronald J. Tabak, *Finality Without Fairness: Why We Are Moving Towards Moratoria on Executions, and the Potential Abolition of Capital Punishment*, 33 CONN. L. REV. 733, 740 (2001) (discussing "major media coverage" of one execution, and the defendant's claims of ineffective assistance of counsel).

92. *See, e.g.*, DEATH PENALTY INFORMATION CENTER, *supra* note 83 (noting that Illinois Governor George Ryan declared a moratorium on executions in 2000).

93. *See* Atkins v. Virginia, 536 U.S. 304, 319 (2002) (striking down the death penalty for people with intellectual disabilities).

94. *See* M.J. Lee, *Death Penalty Support at New Low*, POLITICO (Oct. 13, 2011, 6:40 AM), http://www.politico.com/news/stories/1011/65843.html.

> Juries could decide whether the defendant was sufficiently mature to understand what he or she was doing. Furthermore, supporters of the juvenile death penalty argue that the punishment deters criminal gangs and drug-dealing operations from recruiting minors to commit murders for them.
>
> Opponents of the juvenile death penalty point out that juveniles are not trusted to vote, drink alcohol, or make personal medical decisions. Thus, society in this respect already acknowledges the intellectual immaturity and inadequate judgment of its youth. Should they be killed because of bad decisions they make as minors? Moreover, opponents argue that little reliable evidence is available that the death penalty works to prevent young people, who are often impulsive and shortsighted, from committing crimes. These critics have long argued that the United States—until recently the only democratic country with a juvenile death penalty—should join the rest of the world in abolishing the punishment.
>
> Mirroring recent general trends, prosecutors began seeking the death penalty for juveniles less often, and juries imposed it less frequently. In 1994, eighteen juveniles were sentenced to death; in 1999 fourteen were, and by 2000 only two juveniles were. Between 1989 and 2005, six states banned the execution of juveniles.
>
> The death penalty is unlike any other punishment in that it is not only permanent and irreversible but requires an act of state violence against the body of the condemned prisoner. For these reasons, the Supreme Court has long struggled with the issue and faced repeated claims that executions of juveniles are horrific and uncivilized.[95]

The law has evolved significantly since the Court first considered the Eighth Amendment's applicability to young criminal offenders.

In *Thompson v. Oklahoma*,[96] the Court considered whether the execution of persons under sixteen years of age was unconstitutional in light of the Eighth Amendment's ban on cruel and unusual punishment.[97] The Court reasoned that giving the death penalty to children in this age range would not deter criminals from committing violent crimes because "adolescents may have less capacity to control their conduct and to think in long-range terms than adults."[98]

> One year after *Thompson*, the Supreme Court heard a case involving a capital defendant who was seventeen years old when he committed crimes—murder, sodomy, robbery, and receiving stolen property—for

95. AHRANJANI ET AL., *supra* note 76, at 250–51.
96. 487 U.S. 815 (1988).
97. *See id.*
98. *Id.* at 834 (quoting Eddings v. Oklahoma, 455 U.S. 104, 115 n.11 (1982)).

> which he was sentenced to death. In another case, Missouri certified as an adult a juvenile defendant who was sixteen years old when he committed a murder. He was convicted of first-degree murder and sentenced to death. The Supreme Court merged the two cases and held in *Stanford v. Kentucky* that imposition of capital punishment on a defendant for a crime committed at sixteen or seventeen years of age did not violate evolving standards of decency and, therefore, did not constitute cruel and unusual punishment under the Eighth Amendment.[99]

The next case in the chronology of Eighth Amendment juvenile criminal cases is *Atkins v. Virginia*, a case about an adult with a very low IQ,[100] which is related because of the question of mental culpability.[101] In *Atkins*, the Supreme Court held that executing a mentally retarded adult is cruel and unusual punishment in part because it exacts retribution against a person who is less culpable due to a lack of understanding of his or her actions.[102] That decision, which overruled the precedent set in *Penry v. Lynaugh*,[103] "gave opponents of the juvenile death penalty hope that the Supreme Court would return its attention to the 'evolving standards of decency' under the Eighth Amendment."[104]

The biggest success for juvenile death penalty opponents came in January 2004, when the Supreme Court agreed to hear a case called *Roper v. Simmons*.[105] The issue in the case was whether executing an offender who was seventeen years old at the time of the crime violated the Eighth Amendment's protection against cruel and unusual punishment,[106] and the facts of the case were gruesome. Missouri seventeen-year-old Christopher Simmons and his friends broke into the home of an elderly woman, duct taped her eyes and mouth, bound her hands and feet with electrical wire, covered her head with a towel, and threw her from a nearby bridge to her death in the waters below.[107] Simmons even bragged to his friends about the crime.[108] In a 5-4 decision, the Court held that executing juveniles did violate the Eighth Amendment's ban on cruel and unusual punishment.[109]

In deciding that individuals under the age of eighteen should not be executed, the Court relied on sociological and scientific research to determine

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99. AHRANJANI ET AL., *supra* note 76, at 255–56 (citing Stanford v. Kentucky, 492 U.S. 361 (1989)).

100. *See* Atkins v. Virginia, 536 U.S. 304, 338 (2002) (Scalia, J., dissenting).

101. *See id.* at 316.

102. *See id.* at 318–19.

103. 492 U.S. 302 (1989), *abrogated by* Atkins v. Virginia, 536 U.S. 304 (2002).

104. AHRANJANI ET AL., *supra* note 76, at 252 (quoting *Atkins*, 536 U.S. at 312).

105. 543 U.S. 551 (2005).

106. *Id.* at 555–56.

107. *Id.* at 556–57.

108. *Id.* at 557.

109. *Id.* at 554, 575.

the applicable "evolving standards of decency."[110] The Court acknowledged scientific studies that proved that juveniles lack maturity and a sense of responsibility that adults possess.[111] The Court also reasoned "that juveniles are more vulnerable or susceptible to negative influences and outside pressures."[112] In support of these findings, the Court cited the national consensus exhibited by other laws prohibiting minors from enjoying the privileges adults enjoy, such as "voting, serving on juries, and marrying without parental consent."[113]

The Court also looked to the infrequency with which states were imposing capital punishment on juvenile offenders,[114] in addition to death penalty practices in other countries.[115] Because the Court normally avoids considering international law,[116] the fact that it considered practices in other countries was significant and demonstrated the Court's commitment to a more comprehensive analysis of evolving standards of decency. Between 1990 and when the case was heard in 2004, the United States was among only eight countries who had executed a juvenile.[117] The other seven countries were Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China.[118] Unlike the United States, however, all of these countries had either stopped or publicly disavowed executing juveniles.[119]

With all of this in mind, Justice Kennedy wrote for the majority and stated that "the death penalty is disproportionate punishment for offenders under 18."[120] This decision effectively overruled *Stanford v. Kentucky*.[121] Arguably, the death penalty is a unique punishment because it irrevocably takes the life of those sentenced. Many argue, however, that life in prison without parole is an equally severe punishment because although it does not sentence the inmate to death, it effectively sentences the inmate to die in prison and permanently removes him from society, friends, family, and freedom.[122] After *Roper*,

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110. *See id.* at 563–64, 569–70.

111. *See id.* at 569 (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

112. *Id.* (citing Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)).

113. *Id.*

114. *See id.* at 564–65.

115. *Id.* at 577 (citing Brief for Respondent at 49–50, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633)).

116. *See, e.g.*, Michael Hollander, Note, *Gay Rights in Uganda: Seeking to Overturn Uganda's Anti-Sodomy Laws*, 50 VA. J. INT'L L. 219, 252 (2009) (noting that willingness to cite international law is "a rare occurrence in U.S. Supreme Court jurisprudence").

117. *Roper*, 543 U.S. at 577.

118. *Id.*

119. *Id.* (citing Brief for Respondent, *supra* note 115).

120. *Id.* at 575.

121. *See id.* at 574 ("These considerations mean *Stanford v. Kentucky* should be deemed no longer controlling on this issue.").

122. *See, e.g.*, Robert Hardaway, *Beyond a Conceivable Doubt: The Quest for a Fair and Constitutional Standard of Proof in Death Penalty Cases*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 221, 227 (2008) (citing Christian Fraser, *Italy Inmates Seek Death Penalty*, BBC NEWS (ROME) (May 31, 2007, 12:37 GMT), http://news.bbc.co.uk/2/hi/6707865.stm) (noting that 310 Italian prisoners sentenced to life in prison signed a petition demanding "the death penalty be

juvenile advocates proposed that the Court strike down life imprisonment without parole as a violation of the Eighth Amendment's ban on cruel and unusual punishment.[123]

In 2009, the Supreme Court narrowed the question to whether life imprisonment without parole for non-homicide crimes violated the Eighth Amendment.[124] The Court heard oral arguments in two cases, *Sullivan v. Florida*[125] and *Graham v. Florida.*[126] While the writ of certiorari was dismissed in *Sullivan*, the Court's opinion in *Graham* looked to *Sullivan* for context.[127] In *Sullivan*, the petitioner, Joe Sullivan, was charged with sexual battery at the age of thirteen and sentenced to life in prison.[128] This sentence made Sullivan one of only two thirteen-year-olds in the country sentenced to life without parole for a non-homicidal crime.[129] The actual facts of the case occurred in 1989 when Sullivan, who was mentally disabled and lived in a physically and sexually abusive home, was convinced by two older boys to commit a home burglary, where they stole money and jewelry before leaving.[130] Later that afternoon, the home owner was sexually assaulted in the home and Sullivan was blamed, although speculation has been made that one of the older assailants was responsible.[131] Nevertheless, the two older boys received short sentences to juvenile detention, while Sullivan was tried in adult court.[132]

During Sullivan's one-day trial, biological evidence collected from the victim was not entered into evidence at trial and in fact "was destroyed before it could be subjected to DNA testing."[133] Additionally, Sullivan was identified by voice identification by the victim, but the victim had rehearsed the identification with the prosecutor prior to trial.[134] A six-person jury convicted Sullivan.[135] One of the most surprising details of Sullivan's case was the fact that Sullivan's lawyer failed to object to the voice identification and "filed a brief on appeal

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re-introduced as an alternative to what they considered to be the much more severe and cruel sentence of life in prison"); David A. Harris, *The Criminal Defense Lawyer in the Juvenile Justice System*, 26 U. TOL. L. REV. 751, 776 (1995) ("A strong argument can be made that life in prison is as severe, if not more severe, a punishment for a juvenile than is the death penalty.").

123. Interview with Bernardine Dohrn, Founder, Children and Family Justice Ctr. at Nw. Univ. Sch. of Law, in Chi., Ill. (May, 2010).

124. *See* Graham v. Florida, 130 S. Ct. 2011, 2017–18 (2010).

125. 130 S. Ct. 2059 (2010) (per curiam).

126. 130 S. Ct. 2011.

127. *See id.* at 2031.

128. *See Sullivan v. Florida/Graham v. Florida*, EQUAL JUSTICE INITIATIVE, http://eji.org/eji/childrenprison/deathinprison/sullivan.graham (last visited Dec. 15, 2011).

129. *Id.*

130. *Id.*

131. *See id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

saying that there were no issues to challenge in his case."[136] Sullivan's lawyer was later disbarred, but Sullivan remained in jail and resigned to a wheelchair as a result of his Multiple Sclerosis.[137]

On November 9, 2009, Sullivan argued to the Supreme Court that his sentence of life without parole violated the Eighth Amendment's ban against cruel and unusual punishment.[138] Sullivan's case heavily relied on *Roper*.[139] Sullivan argued that the punishment of life without parole is equally as severe and permanent, rendering it equally unconstitutional.[140]

On the same day, Terrance Graham also had the opportunity before the Supreme Court to challenge the constitutionality of the life without parole sentence he received as a minor.[141] Graham was sixteen years old when he and another youth tried to rob a store and the co-defendant hit the store manager with a metal bar.[142] The store manager had to receive stitches.[143] Graham was charged with armed burglary with assault and battery, and with attempted armed robbery, and after entering a guilty plea, the Court sentenced him to concurrent three-year terms of probation.[144] One year later, at the age of seventeen, Graham found himself in trouble again when he was accused of committing a home invasion with two twenty-year-old men.[145] Graham denied involvement in the robbery but admitted to violating his probation by missing curfew.[146] The judge found him guilty of both charges, and sentenced him to life without parole.[147]

Before the Supreme Court, Graham argued that his sentence of life without parole violated the Eighth Amendment's ban on cruel and unusual punishment because only thirty juveniles in six states had received a life sentence for committing a non-homicide offense.[148] Additionally, in his appellate brief, Graham argued that such a sentence for a minor contradicted international law, pointing out the fact that the United States is the only country in the world that sentences children to die in prison.[149] Because *Roper* paved the way for

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136. *Id.*

137. *See id.*

138. *See* Oral Argument at 6:01, Sullivan v. Florida, 130 S. Ct. 2059 (No. 08-7621), *available at* http://www.oyez.org/cases/2000-2009/2009/2009_08_7621.

139. *See id.* at 2:43 ("[O]ur argument was that the reasoning of Roper is similarly applicable to someone sentenced to life in prison without parole.").

140. *See id.* at 17:15.

141. Graham v. Florida, 130 S. Ct. 2011, 2017–18 (2010).

142. *Id.* at 2018.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 2019.

147. *Id.* at 2020.

148. *See* Oral Argument at 0:39, Graham v. Florida, 130 S. Ct. 2011 (No. 08-7412), *available at* http://www.oyez.org/cases/2000-2009/2009/2009_08_7412.

149. Brief for Petitioner at 64–65, Graham v. Florida, 130 S. Ct. 2011 (2010) (No. 08-7412), 2009 WL 2159655 (citing Connie de la Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. REV. 983, 989–90 & nn.18 & 20 (2008)).

consideration of international law in a juvenile Eighth Amendment case,[150] it appeared the argument was persuasive.[151]

After hearing both arguments, the Supreme Court issued its modified decision on July 6, 2010.[152] In an opinion delivered by Justice Kennedy, the Court held the sentence of life without parole for a minor who committed a non-homicide offense to be in violation of the Eighth Amendment.[153] Looking to both international law and United States precedent, the Court found the sentence to be contrary to the widely held belief that "juveniles have lessened culpability" because they are less mature, have an "underdeveloped sense of responsibility, [and] are more vulnerable . . . to negative influences."[154] This belief, which was part of the basis for the decision in *Roper*, demonstrates that juveniles should be given the chance to reform because they are still developing members of society.[155] Taking all of this into consideration, the Court found the sentence of life without parole for minors guilty of a non-homicide crime to be cruel and unusual punishment.[156]

After the Supreme Court struck down juvenile life without parole for non-homicide cases, the question became whether it would consider banning the practice in homicide cases. In November, 2011, the Court agreed to hear two cases, *Miller v. Alabama*[157] and *Jackson v. Hobbs*,[158] to review whether life without parole for 14-year-old defendants convicted of felony murder pursuant to mandatory sentencing guidelines violates the Eighth Amendment's ban on cruel and unusual punishment.[159] Oral arguments in the cases are scheduled for March 20, 2012.[160]

Petitioners, both sympathetic young men who experienced and witnessed physical, drug, and alcohol abuse, request the Court to rely on *Roper* and *Graham* and find that it is cruel and unusual punishment not to consider mitigating factors.[161] Supporters believe the Court should consider adolescent

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150. *See supra* text accompanying notes 114–119.

151. *See Graham*, 130 S. Ct. at 2033–34.

152. *Id.* at 2011.

153. *Id.* at 2034.

154. *Id.* at 2026, 2030, 2033 (quoting Roper v. Simmons, 543 U.S. 551, 569–70 (2005)) (internal quotation marks omitted).

155. *See Roper*, 543 U.S. at 570–71.

156. *See Graham*, 130 S. Ct. at 2034.

157. Miller v. State, 63 So. 3d 676 (Ala. Crim. App. 2010), *cert. granted*, 132 S. Ct. 548 (Nov. 7, 2011) (No. 10-9646).

158. Jackson v. Norris, No. 09-145, 2011 WL 478600 (Ark. Feb. 9, 2011), *cert. granted*, 132 S. Ct. 548 (Nov. 7, 2011) (No. 10-9647).

159. *See* Lyle Denniston, *New Review on Youths' Punishment*, SCOTUSBLOG (Nov. 7, 2011, 12:36 PM), http://www.scotusblog.com/2011/11/new-review-on-youths-punishment/.

160. *Argument Calendar*, SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalMAR2012.pdf (last visited Jan. 20, 2011).

161. *See* Petition for Writ of Certiorari at *4–5, *10, Miller v. Alabama, No. 10-9646, 2011 WL 5322568 (Mar. 21, 2011); Petition for Writ of Certiorari at *4–5, *8–9, Jackson v. Arkansas, No. 10-9647, 2011 WL 5322575 (Mar. 21, 2011).

development research indicating that juveniles are immature, thrill-seekers who do not understand consequences, as it did in *Roper* and *Graham*.[162] But, the Court has traditionally treated homicide cases as fundamentally different than non-homicide.[163] Petitioners' briefs appeal to a sense of fundamental fairness that juveniles should be treated differently than adults and point out that the United States is the only country in the world that sentences juveniles to life without parole.[164]

IV. INTERNATIONAL PERSPECTIVES AND INFUSING A CHILD-CENTERED APPROACH

Notwithstanding the future holdings of *Miller* and *Jackson*, the outcomes in both the Eighth Amendment contexts considered in this essay, corporal punishment in public schools and juveniles in the criminal justice system, are moving toward more humane results for children. Although the Supreme Court has refused to apply the Eighth Amendment to corporal punishment in schools,[165] state and international laws are slowly chipping away at its practice.[166] As mentioned earlier, the practice rarely occurs in all but five states.[167] An official publication of the American Academy of Pediatrics states that "[d]espite its common acceptance, . . . spanking is a less effective strategy than timeout or removal of privileges for reducing undesired behavior in children. Although spanking may immediately reduce or stop an undesired behavior, its effectiveness decreases with subsequent use."[168]

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162. *See The Issue*, THE CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, http://www.endjlwop.org/the-issue/; Jeffrey James Shook, *Pennsylvania Locks Away Too Many Juveniles Forever*, POST-GAZETTE (May 22, 2011), http://www.postgazette.com/pg/11142/1148022-109-0.stm.

163. *See* Sherry F. Kolb, *The U.S. Supreme Court Takes up the Eighth Amendment and Juvenile Killers: Is Life Without Parole Too Severe?*, VERDICT.JUSTIA.COM (Nov. 30, 2011), http://verdict.justia.com/2011/11/30/the-u-s-supreme-court-takes-up-the-eighth-amendment-and-juvenile-killers.

164. *See* Petition for Writ of Certiorari at *3–4, *Miller*, No. 10-9646, 2011 WL 5322568 (citing Connie de la Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. REV. 983, 990 (2008)); Petition for Writ of Certiorari at *3–4, *Jackson*, No. 10-9647, 2011 WL 5322575 (citing same).

165. *See* Ingraham v. Wright, 430 U.S. 561 (1977).

166. *See* Alice Farmer & Kate Stinson, *Failing the Grade: How the Use of Corporal Punishment in U.S. Public Schools Demonstrates the Need for U.S. Ratification of the Children's Rights Convention and the Convention on Rights of Persons with Disabilities*, 54 N.Y.L. SCH. L. REV. 1035, 1036 (2009–10) (citing HUMAN RIGHTS WATCH & AM. CIVIL LIBERTIES UNION, *supra* note 48, at 71–75) ("Corporal punishment in schools is prohibited under international law. . . . "); THE CTR. FOR EFFECTIVE DISCIPLINE, *supra* note 40.

167. *See supra* text accompanying note 56.

168. Comm. on Psychological Aspects of Child & Family Health, Am. Acad. of Pediatrics, *Guidance for Effective Discipline*, 101 PEDIATRICS 723, 726 (1998) (footnote omitted), *available at* http://aappolicy.aappublications.org/cgi/reprint/pediatrics%3B101/4/723.pdf.

Furthermore, by banning the juvenile death penalty and life imprisonment without parole for non-homicide offenses in the past six years, the Court has chipped away at disproportionate punishment of juveniles relative to their culpability. Some argue that the Court should have gone so far as to eliminate the possibility of life imprisonment without parole for all juvenile offenders;[169] by the end of the 2011–2012 term, the Court will have spoken on at least its applicability to 14-year-olds convicted of felony murder.[170]

Many developed nations have banned the practice of corporal punishment,[171] and most have banned life imprisonment without parole for juveniles.[172] Even countries in Latin America and Africa recently have eliminated corporal punishment in the family.[173] "The United Nations Committee on the Rights of the Child . . . challenges laws permitting any physical punishment of children and has called on all governments in the world to prohibit physical discipline, including within the family."[174]

If these changes are already happening, what is the need for a child-centered approach? The changes have taken decades to occur and have incurred significant financial costs. Infusing a child-centered approach to analysis of punishment of youth may yield outcomes that are more consistent with evolving standards of decency in the United States and also across the world, and may achieve these results in a more expedient fashion. Perhaps the most important reason time is so important is that the stakes are so high. The lives of children literally hang in the balance while lawyers find the perfect plaintiffs and legislatures battle out competing interests.

James G. Dwyer, a law professor at William and Mary Law School, suggests that infusing a child-centered approach into the conversation about children's education may yield a system that best promotes the welfare of children.[175] Dwyer's premise is that conversations about what is best for children are often really about what is best for adults.[176] He argues that if the perspective of children is taken into account in determining what sort of education best

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169. *See, e.g.*, Editorial, *Too Young for Life Without Parole*, WASH. POST, May 18, 2010, at A18 ("We believe the same opportunity-without-guarantee should exist even for those who commit homicide as juveniles . . . .").

170. *See* cases cited *supra* notes 157–158.

171. *See Discipline and the Law*, THE CTR. FOR EFFECTIVE DISCIPLINE (June 1, 2010), http://www.stophitting.com/index.php?page=laws-main.

172. *See* Graham v. Florida, 130 S. Ct. 2011, 2033 (2010) (explaining that life without parole for juvenile offenders has been banned in most countries except the United States); de la Vega & Leighton, *supra* note 164, at 990 & n.20 (noting that while eleven countries may have laws permitting a sentence of life without parole for a juvenile offender, the United States is the only country in the world that actually has juvenile offenders in prison serving this sentence).

173. *See* THE CTR. FOR EFFECTIVE DISCIPLINE, *supra* note 171 (describing that Uruguay and Venezuela in 2007, and Tunisia and Kenya in 2010, banned corporal punishment in the home).

174. Kettle, *supra* note 59.

175. *See* James G. Dwyer, *Changing the Conversation About Children's Education*, *in* MORAL AND POLITICAL EDUCATION 314, 329 (Stephen Macedo & Yael Tami eds., 2002).

176. *See id.* at 314.

promotes the welfare of children, we may have different outcomes.[177] This approach could also yield positive outcomes in the Eighth Amendment context for juveniles as well.

In the Eighth Amendment context, the adult-centered approach has been applied to consider what is best for the state and, to a lesser extent, parents.[178] Application of a child-centered approach in the corporal punishment context frames the debate around what is best for children. While many states have banned corporal punishment in school, there are still five states that regularly implement the practice, and it does not look like they plan to change their laws any time soon.[179] Infusing a child-centered approach into the adult-centered approach would mean placing greater value on the impact of physical punishment on children's psychosocial and education development rather than the current focus on maintaining discipline and order in the schools. In other words, using a child-centered approach re-frames the pros and cons. If one concludes that corporal punishment is not best for children, then a child-centered approach would dictate that corporal punishment in school should be eliminated.

Further, in the criminal context, the Supreme Court has taken into account the retributive and deterrent value of the death penalty and of life imprisonment without parole. These goals reflect an interest in determining what is best for society. A child-centered approach would seek to determine the best interest of children and, therefore, would place higher value on the rehabilitative value of these punishments. While each approach may yield the same result, that result may be reached more quickly if both are implemented simultaneously.

During the current economic crisis, questions about America's continuing role as a global leader have arisen.[180] If we really are concerned about maintaining the rule of law, and our reputation as a nation that is concerned about civil and human rights, we ought to infuse a child-centered approach into *every* context in which children's well-being arises, but certainly during conversations about punishment of arguably our most vulnerable members of society.

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177. *See id.*

178. *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 681 (1977) (noting the states' legislative judgment "that corporal punishment serves [its] important educational interests").

179. *See* THE CTR. FOR EFFECTIVE DISCIPLINE, *supra* note 40 (reporting that five states conduct most acts of corporal punishment in schools, and that in those states a combined total of 161,607 instances occurred during the 2005–06 school year).

180. *See, e.g.*, Bernd Debusmann, *A Final Goodbye to Superpower America?*, REUTERS (Mar. 11, 2011, 5:12 PM), http://blogs.reuters.com/bernddebusmann/2011/03/11/a-final-goodbye-to-superpower-america/.

APPENDIX

TABLE 1

State Without Corporal Punishment	Year Enacted	Present Statute
Alaska	1989[181]	ALASKA ADMIN. CODE tit. 4, § 07.010 (2009)
California	1986[182]	CAL. EDUC. CODE §§ 49000–49001 (West 2006)
Connecticut	1989[183]	CONN. GEN. STAT. ANN. § 53a–18 (West 2007)
Delaware	2003[184]	DEL. CODE ANN. tit. 14, § 702 (2007)
District of Columbia	1977[185]	D.C. MUN. REGS. tit. 5-E § 2403 (2010)
Hawaii	1973[186]	HAWAII REV. STAT ANN. § 302A-1141 (LexisNexis 2010)
Illinois	1993[187]	105 ILL. COMP. STAT. ANN. 5/24–24 (West 2006)
Iowa	1989[188]	IOWA CODE ANN. § 280.21 (West 2011)
Maine	1975[189]	ME. REV. STAT. ANN. tit. 17–A, § 106 (2006 & Supp. 2010)
Maryland	1993[190]	MD. CODE ANN., EDUC. § 7-306 (2008)
Massachusetts	1972[191]	MASS. GEN. LAWS ANN. ch. 71, § 37G (West 2009)
Michigan	1989[192]	MICH. COMP. LAWS ANN. § 380.1312 (West 2005)
Minnesota	1989[193]	MINNESOTA STAT. ANN. § 121A.58 (2008)
Montana	1991[194]	MONT. CODE ANN. § 20-4-302 (2011)
Nebraska	1988[195]	NEB. REV. STAT. ANN. § 79-295 (West 2008)
Nevada	1993[196]	NEV. REV. STAT. ANN. 392.4633 (LexisNexis 2008 & Supp. 2009)
New Hampshire	—	N.H. REV. STAT. ANN. § 627:6 (LexisNexis 2007 & Supp. 2010)[197]

181. ALASKA ADMIN. CODE tit. 4, § 07.010 (1989) (including Alaska Administrative Register 111, Aug. 25, 1989, amending ALASKA ADMIN. CODE tit. 4, § 07.010 (1989)).

182. Act of Sept. 23, 1986, ch. 1069, 1986 Cal. Stat. 3749.

183. Act of July 1, 1989, Pub. L. No. 89-186 § 1, 1989 Conn. Acts 297 (Reg. Sess.).

184. Act of April 15, 2003, ch. 17, 74 Del. Laws 14 (2003).

185. 24 D.C. 1005, 1039 (July 29, 1977).

186. Act of May 22, 1973, ch. 145, 1973 Haw. Sess. Laws 227.

187. Act of May 19, 1993, Pub. L. No. 88-346 § 1, 1993 Ill. Acts 2726.

188. Corporal Punishment in Schools Act of 1989, ch. 71, 1989 Iowa Acts 80.

189. Act of Mar. 1, 1976, ch. 499, § 106, 1975 Me. Laws 1273, 1289 (passed in 1975).

190. Act of May 11, 1993, ch. 207, 1993 Md. Laws 1528.

191. Act of Mar. 23, 1972, ch. 107, 1972 Mass. Acts 52.

192. Act of Jan. 19, 1989, no. 521, 1988 Mich. Pub. Acts 2142.

193. Act of May 10, 1989, ch. 114, 1989 Minn. Laws 238.

194. Act of Apr. 4, 1991, ch. 325, 1991 Mont. Laws 795.

195. Act of Mar. 4, 1988, ch. 316, 1988 Neb. Laws 175.

196. Act of July 13, 1993, ch. 625, 1993 Nev. Stat. 2622.

197. There is a degree of uncertainty about whether New Hampshire bans corporal punishment. The statute states that teachers may use force "when it is necessary for the

New Jersey	1967[198]	N.J. STAT. ANN. § 18A:6–1 (West 2010)
New Mexico	2011[199]	N.M. STAT. ANN. § 22-5-4.3 (West, Westlaw through First Regular Session of 2011)
New York	1985[200]	NEW YORK COMP. CODES R. & REG. tit. 8, § 19.5 (2007)
North Dakota	1989[201]	N.D. CENT. CODE § 15.1-19-02 (2003 & Supp. 2011)
Ohio	2009[202]	OHIO REV. CODE. ANN. § 3319.41 (LexisNexis 2009)
Oregon	1989[203]	OR. REV. STAT. § 339.250(12)(a) (2009)
Pennsylvania	2005[204]	22 PA. CODE. § 12.5 (2011)
Rhode Island	—	Banned by School Board Policy[205]
South Dakota	1990[206]	S.D. CODIFIED LAWS § 13-32-2 (2004)
Utah	1992[207]	UTAH ADMIN. CODE r. 277-608 (LexisNexis 2003)
Vermont	1984[208]	VT. STAT. ANN. tit. 16, § 1161a (2004)
Virginia	1989[209]	VA. CODE ANN. § 22.1-279.1 (2011)
Washington	1993[210]	WASH REV. CODE ANN. § 28A.150.300 (West 2011)
West Virginia	1994[211]	WEST VA. CODE ANN. § 18A-5-1 (LexisNexis 2007 & Supp. 2011)
Wisconsin	1988[212]	WIS. STAT. ANN. § 118.31 (2004)

*Dates listed are when the ban was enacted, unless otherwise noted.

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maintenance of discipline." N.H. REV. STAT. ANN. § 627:6 (LexisNexis 2007 & Supp. 2010). However, one commentator notes that under New Hampshire law "a child is incompetent to consent to contact, such as corporal punishment, which would be an assault." C.C. Swisher, *Constitutional Abuse of Public School Students: An Argument for Overruling* Ingraham v. Wright, 8 WHITTIER J. CHILD. & FAM. ADVOC. 3, 55 (2008–2009) (citing N.H. REV. STAT. ANN. § 626.6 (2007)).

198. Title 18A Education, of the New Jersey Statutes of 1968, ch. 271, 1967 N.J. Laws ii, 1, 24 (passed in 1967).

199. Act of Apr. 6, 2011, 2011 N.M. Laws, ch. 97, § 1 (West) (amending N.M. STAT. ANN. § 22-5-4.3 (2007 & Supp. 2010)).

200. N.Y. Reg. (Feb. 27, 1985).

201. Corporal Punishment in Schools Act of 1989, ch. 162, 1989 N.D. Laws 505.

202. H.R. 1, 128th Gen. Assemb., Reg. Sess. (Ohio 2009), *available at* http://www.legislature.state.oh.us/BillText128/128_HB_1_EN_N.pdf (amending OHIO REV. CODE. ANN. § 3319.41 (LexisNexis 2009)).

203. Act of July 27, 1989, ch. 889, 1989 Or. Laws 1672.

204. 35 Pa. Bull. 6510, 6658 (Dec. 3, 2005).

205. Although Rhode Island does not ban corporal punishment by statute, every school board in the state has banned the practice. *See* Scott A. Gartner, *Strip Searches of Students: What Johnny Really Learned at School and How Local School Boards Can Help Solve the Problem*, 70 S. CAL. L. REV. 921, 967 n.202 (1997).

206. Act of Feb. 28, 1990, ch. 128, 1990 S.D. Sess. Laws 172.

207. 92-16 Utah Bull. 34 (Aug. 15, 1992).

208. Act of Apr. 11, 1984, ch. 145, 1984 Vt. Acts & Resolves 101.

209. Act of Mar. 20, 1989, ch. 287, 1989 Va. Acts 379.

210. Act of Apr. 21, 1993, ch. 68, 1993 Wash. Sess. Laws 189.

211. Act of Mar. 12, 1994, ch. 33, 1994 W. Va. Acts 254.

212. Act of Apr. 20, 1988, ch. 303, 1987 Wis. Sess. Laws 1042.