Corporal Punishment and the Legal System

Leonard P. Edwards
CORPORAL PUNISHMENT AND THE LEGAL SYSTEM

Judge Leonard P. Edwards*

Withhold not correction from the child; for if thou beatest him with the rod, he shall not die. Thou shalt beat him with the rod, and shalt deliver his soul from hell.¹

Conservative estimates indicate that almost 2,000 infants and young children die from abuse or neglect by parents or caretakers each year, or 5 children every day. The vast majority are under 4 years, an age when they are most vulnerable to physical attacks and to the dangers created by lack of supervision and severe neglect, and are isolated from teachers or others who might intervene to protect them. Violence towards very young children has reached the level of a public health crisis and is similar in scope to the destruction of teenagers by street gunfire.²

I. INTRODUCTION

Corporal punishment is the intentional infliction of physical force by a parent or parent figure upon a child with the purpose of correcting the child's behavior.³ While it could be argued that corporal punishment is a battery,⁴ and therefore

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³. Murray A. Straus & Denise A. Donnelly, Corporal Punishment of Adolescents by American Parents, 24 YOUTH & SOCIETY 420 (1993). See also Murray A. Straus, Beating the Devil Out of Them 4 (1994). The more ordinary definition of corporal punishment is punishment inflicted on the body. The term originally included death, mutilation, branding, bodily confinement, irons, the pillory and more. See OXFORD ENGLISH DICTIONARY 954 (2d ed. 1989). For the purposes of this paper, the narrower term will be used.
⁴. Battery is defined as "intentional and wrongful contact with a person without his or her consent that entails some injury or offensive touching." See
illegal, most Americans would undoubtedly disagree, viewing corporal punishment as the lawful parental discipline of a child.\(^5\)

Corporal punishment, however, does have its limits. Historically, common law held that a parent was “not permitted to resort to punishment which would exceed that properly required for disciplining purposes or which would extend beyond the bounds of moderation. Excessive or cruel conduct was universally prohibited.”\(^6\)

Adults have used corporal punishment to discipline children throughout history. All fifty states permit corporal punishment, either explicitly in state statutes or through court decisions.\(^7\) By official estimates, over ninety percent of American parents use corporal punishment to discipline their children.\(^8\) Gallup Poll results indicate that the amount of physical abuse and corporal punishment in the United States is actually several times greater than what official reports indicate.\(^9\)

There are different justifications for corporal punishment, but the most frequently cited reason is that it is a necessary means of correcting and controlling a child’s behavior. A majority of people in the United States believe that parents must have corporal punishment as a disciplinary option if they are going to raise their children effectively.\(^10\) Most child

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\(^7\) Annotation, \textit{Criminal Liability for Excessive or Improper Punishment Inflicted on Child by Parent, Teacher, or One in Loco Parentis}, 89 A.L.R.2d 396 (1965).


development experts support the use of moderate corporal punishment.\textsuperscript{11}

Corporal punishment can be excessive. It has the potential to lead to serious injury or even death. Thus, all states have enacted laws setting limits on corporal punishment.\textsuperscript{12} Generally, such statutes and related court decisions declare that corporal punishment must be "reasonable and justifiable."\textsuperscript{13}

Whether corporal punishment is lawful or excessive is oftentimes the focus of legal proceedings. A parent who punishes his or her child excessively may be prosecuted criminally, may have the child removed from his or her care in a juvenile court proceeding, and may be sued civilly by an individual representing the interests of the child.\textsuperscript{14}

The purpose of this article is to address the legal response to corporal punishment in the United States. After reviewing the history of corporal punishment and examining its effects, the discussion will focus upon court proceedings to demonstrate how the legal system deals with claims of excessive corporal punishment. The different types of legal proceedings in which the issue of corporal punishment arises will be explored, including criminal, child welfare, civil and child custody actions. The article will also address the changing attitudes toward corporal punishment in the United


Dr. James Dobson, one of the most widely read experts on child rearing, writes that corporal punishment is an important part of child rearing. While he urges moderation, he points out that it has to hurt to be effective.

It is not necessary to beat the child into submission; a little bit of pain goes a long way for a child.

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The spanking may be too gentle. If it doesn't hurt, it isn't worth avoiding next time. A slap with the hand on the bottom of a multi-diapered thirty-month-old is not a deterrent to anything. It isn't necessary to beat a child, but he should be able to feel the message.

\textbf{James Dobson, Dare to Discipline} 23, 44 (1970).

\textsuperscript{12} See generally Annotation, supra note 7.

\textsuperscript{13} Carpenter v. Commonwealth, 44 S.E.2d 419, 423 (Va. 1947); People v. Whitehurst, 12 Cal. Rptr. 2d 33 (1992); see also text and sources cited in Annotation, supra note 7.

\textsuperscript{14} Compare infra parts IV, VII, VIII.
States and the reasons that there has been less tolerance for such punishment in the latter half of the twentieth century.

This article will explore how the law deals with the conflicting social policies of family integrity, including the freedom for parents to discipline their children as they see fit, and the prevention of child abuse. While each policy is legitimate, each carries with it serious social consequences. Many parents believe that their children will not grow up to be law-abiding or ethical adults without firm correction during their childhood. On the other hand, over 2000 children die each year as a result of abuse by parents, while tens of thousands more are seriously injured as the result of excessive discipline.

In conclusion, this article suggests that corporal punishment with respect to all children under the age of five be declared illegal in the United States, but that no criminal penalty be attached to violations of this law. Several European countries have taken this approach with the result that corporal punishment, child deaths and serious injuries to children in those jurisdictions have been reduced without affecting parents' ability to raise children effectively.

II. HISTORICAL BACKGROUND

Adults have physically disciplined children for centuries. The Babylonians, ancient Hebrews, ancient Greeks, and Romans all granted fathers a proprietary interest in their children, thus permitting the sale or exchange

15. See supra note 10.
17. See infra part XII.
18. Five thousand years ago in the schools of Sumer, there was a “man in charge of the whip” to punish boys upon the slightest pretext. SAMUEL N. KRAMER, FROM THE TABLETS OF SUMER: TWENTY-FIVE FIRSTS IN MAN'S RECORDED HISTORY 3-9 (1956).
20. Id. at 316.
21. Id. at 318; Mason P. Thomas, Child Abuse and Neglect, Part I: Historical Overview, Legal Matrix and Social Perspectives, 50 N.C. L. REV. 293, 294 (1972).
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of children and the right to kill them. There were no significant changes in attitudes toward children through the Middle Ages.\textsuperscript{23} De Mause wrote that "the history of childhood is a nightmare from which we have only recently begun to awaken."\textsuperscript{24} He concluded that a very large percentage of children born prior to the eighteenth century were what we would today term battered children, and received regular beatings, both at home and school. Such beatings were inflicted from infancy through childhood.\textsuperscript{25}

The Bible sanctions corporal punishment, and religious and other moral teachings have approved of the threat and use of force as a proper method of disciplining children.\textsuperscript{26} Martin Luther believed that parents could use extreme measures, even death, when children were disobedient.\textsuperscript{27} Throughout the Bible, numerous passages support severe physical treatment of children.\textsuperscript{28} Based upon religious authority, many believed that children were inherently evil and that beating was an effective method of driving the devil from them.\textsuperscript{29} "Spare the rod and spoil the child" is but one example of the Bible's instructions to parents.\textsuperscript{30}

\begin{itemize}
\item M. Herman, \textit{A Statutory Proposal to Prohibit the Infliction of Violence upon Children}, 19 Fam. L.Q. 1, 2-10 (1985).
\item Lloyd de Mause, \textit{The Evolution of Childhood}, in \textit{The History of Childhood} 26-29 (Lloyd de Mause \& Peter Bedrick eds., 1974); see generally John Boswell, \textit{The Abandonment of Children in Western Europe from Late Antiquity to the Renaissance} (1988).
\item Lloyd de Mause, \textit{supra} note 23, at 1. De Mause goes on to say "The further back in history one goes, the lower the level of child care, and the more likely children are to be killed, abandoned, beaten, terrorized and sexually abused." \textit{Id}.
\item Id. at 41. John Wesley's mother described her children's upbringing, explaining that "[w]hen they turned a year old . . . they were taught to fear the rod and to cry softly." Straus \& Donnelly, \textit{supra} note 3, at 21. See also Joseph E. Illick, \textit{Anglo-American Child Rearing}, in \textit{The History of Childhood} 329 (Lloyd de Mause \& Peter Bedrick eds., 1974); John Walzer, \textit{A Period of Ambivalence: Eighteenth-Century American Childhood}, in \textit{The History of Childhood} 369 (Lloyd de Mause \& Peter Bedrick eds., 1974).
\item Proverbs 22:15; Proverbs 10:13.
\item \textit{What Luther Says: An Anthology} 145 (E. Plass ed., 1959).
\item See \textit{infra} notes 29-30 and accompanying text.
\item Other Biblical support of corporal punishment includes the following: "Besides this, we have had earthly fathers to discipline us and we respected
Corporal punishment is an integral part of American life. Most immigrants who came to America brought with them a tradition of corporal punishment. During the Colonial period, such punishment was thought to be a "desirable and necessary instrument of restraint upon sin and immorality," as well as having a regenerative effect on the child's character. Since a child's original nature was considered evil, corporal punishment enabled the child to become a fit person, and any failure was seen as a matter of inadequate application.

The attitude of Colonial Americans toward children persisted and even flourished during the first half of the nineteenth century. The philosophical and theological conver-

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31. See text and sources cited in Greven, supra note 30.

32. HERBERT A. FALK, CORPORAL PUNISHMENT 48 (1941). Moreover, the Colonial laws were harsh. A 1646 law declares:

If any child(ren) above sixteen years old and of sufficient understanding shall curse or smite their natural father or mother, they shall be put to death, unless it can be sufficiently testified that the parents have been very unchristianly negligent in the education of such children, or so provoked them by extreme and cruel correction that they have been forced thereunto to preserve themselves from death or maiming . . .

If a man have a stubborn or rebellious son of sufficient years of understanding, vis. sixteen, which will not obey the voice of his father or the voice of his mother, and that when they have chastened him will not harken unto them, then shall his father and mother, being his natural parents, lay hold on him and bring him to the magistrates assembled in Court, and testify to them by sufficient evidence that this their son is stubborn and rebellious, and will not obey their voice and chastisement, but lives in sundry notorious crimes. Such a son shall be put to death.


gence of the doctrines of Calvinism, the Enlightenment, and Romanticism fueled extensive discourse on both the nature of children and the responsibilities of parents. Periodicals of the era regularly carried columns advising parents to "love their children with tenderness and affection... but, at the same time, command the strictest obedience, even from their earliest infancy." Personal accounts of the resulting "contests of wills" were frequently reported in newspaper columns and magazines.

I then asked her if she would say "Dear Mama!" "No-no" was her reply. I then whipped her. She still continued perseveringly obstinate, crying "no, no" to every command to obey. She put up her lips for a kiss, but I refused her unless she obeyed me. Upon reiterating her refusal, I alternately whipped and shut her up. It may be thought incredible, but this contest for supremacy actually lasted four hours! At last I gained the victory.

Not everyone called for corporal punishment as the primary form of "training" children, but most shared a belief that physical punishment was appropriate and that a child's will must be broken.

Westward expansion in the later nineteenth century brought change to the parent-child relationship. As recorded in the diaries of young settlers, accounts of frontier life show general abandonment of the harsh rule of parental supremacy that predominated earlier decades. Whether due to an inability to monitor their children's activities as closely, or as a result of the recognition of children as contributors to the family effort, frontier parents showed less concern for child discipline and submission to authority.

35. Id. at 126 (citation omitted).
36. Id. at 130 (quoting Government of Children, MOTHER'S MAGAZINE, Aug. 1835, at 3).
37. See, e.g., William G. McLoughlin, Evangelical Child Rearing in the Age of Jackson: Francis Wayland's Views on When and How to Subdue the Willfulness of Children, in GROWING UP IN AMERICA 87 (N. Ray Hiner & Joseph M. Hawes eds., 1985). In October, 1831, Francis Wayland, a prominent Baptist minister and scholar, sent an anonymous letter to American Baptist Magazine which detailed the "starving into submission" of a 15-month-old child. Id. See generally HANRAHAN, supra note 34, at 121-31.
39. Id. at 158-62.
ever, this void was soon filled by the schoolmaster. Western lore is replete with stories of heavy-handed school teachers demanding the strictest discipline from their charges. Though the source of physical discipline shifted somewhat by the early 1900s, children continued to be subjected to an American tradition of corporal punishment.

While there has been some decrease in its amount and severity in the twentieth century, corporal punishment remains an integral part of American family life. National surveys report that almost all American parents endorse corporal punishment and utilize it on their own children from infancy through the teenage years.

III. Effects of Corporal Punishment

There is a great deal of controversy regarding the effects of corporal punishment on children. For Americans who believe that reasonable corporal punishment is necessary to raise children to be responsible adults, the principal effect of corporal punishment is that children learn to obey and to respect authority. Further, it builds character, prevents bad behavior from re-occurring, and improves discipline.

Some people still believe that corporal punishment has religious significance. These people continue to believe that children are inherently evil and corporal punishment will drive out that evil. “Beating the devil out of them” refers to the belief that children are born evil and that beating is an effective means of driving the devil away.

Modern child development writers give differing messages to parents concerning the use of corporal punish-

40. Id. at 202-04. West notes accounts of teachers spanking students and “swinging [a student] by the ear. When two boys neglected to greet a west Texas teacher politely, she beat them three times a day for several days.” Id. at 203.
41. Straus & Donnelly, supra note 3, at 21-23.
42. Straus, supra note 10, at 140.
44. See, e.g., Dobson, supra note 11; Ray Guarendi & David P. Eich, Back to the Family: How to Encourage Traditional Values in Complicated Times (1990).
45. See generally Straus, supra note 3, at 3-4.
ment. Some believe that corporal punishment in moderation can be an effective parenting tool as a critical means of disciplining children and teaching them respect for authority. A few defend corporal punishment as an inherent parental right and criticize those who would limit its use as threatening family integrity. Some are opposed to the use of corporal punishment, but qualify their opposition by saying that it should only be used in certain situations or in modera-


47. See Dobson, supra note 11; Robert E. Larzelere, Should the Use of Corporal Punishment by Parents Be Considered Child Abuse? No!, in Debating Children's Lives: Current Controversies on Children and Adolescents 71 (Mary Ann Mason & Eileen Gambrill eds., 1994); see also Marvin J. Gersh, How to Raise Children at Home in Your Spare Time 107 (1966) ("Don't use harsh punishment if you can avoid it"); Stella Chess et al., Your Child Is a Person 89-96 (1972); Fitzhugh Dodson, How to Discipline — With Love 61 (1977) ("Some psychologists and psychiatrists have stated explicitly that no parent should ever spank a child. I think this is nonsense."); Lee Salk, What Every Child Would Like His Parents to Know 74-77 (1972); Paul Wood & Bernard Schwartz, How to Get Your Children to Do What You Want Them to Do 15-16 (1977); George A. Kelly, The Catholic Family Handbook 41 (1959); Dr. Balter, Dr. Balter's Child Sense 82 (1985); Frances L. Ilg & Louise Bates Ames, Parents Ask 179-80 (1962).

48. Rosemond, supra note 43, at 13 ("I have written this book in order to awaken as many as possible to the threat anti-spanking legislation poses to the integrity and autonomy of the American family and, as such, the very survival of individual freedom."). Reverend Clinton E. Birst, in lobbying for a North Dakota constitutional amendment which would give parents greater rights, said that passage of the amendment would safeguard the freedom to spank. See Mike Allen, Conservatives Lobby for Parental Rights, N.Y. Times, Jan. 15, 1996, at A7. He was concerned over social service agency interference with parents who hit their children with belts and plastic spoons. Id.

The United States Supreme Court provided some support for the idea that parents have a constitutional right to use corporal punishment in Meyer v. Nebraska, 262 U.S. 390 (1923). The Court spoke of the right "to marry, establish a home and bring up children" as components of the liberty protected by the Fourteenth Amendment. Id. at 399. See also Pierce v. Society of Sisters, 268 U.S. 510 (1925). Together these cases have been interpreted by the Court as acknowledging that under our constitutional scheme, "the custody, care and nurture of the child reside first in the parents." Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

There are, of course, limits on the amount of such punishment a parent can legally administer. That issue is central to this paper.
A few openly state that corporal punishment should never be practiced by parents. Several social scientists have concluded that corporal punishment is not an effective means of disciplining children and that it has harmful effects on the children who experience it. Murray A. Straus, the founder and co-director of the Family Research Laboratory at the University of New Hampshire, cites studies showing that some children who experience corporal punishment suffer serious psychological problems, including depression and suicide. His research also indicates that corporal punishment increases the likelihood of criminal behavior in children. Other studies support his findings. Research also indicates that corporal punishment increases the likelihood that children will assault a sibling or a spouse and be involved in street crime,

49. Carson, supra note 11. A leading pediatrician, Dr. Robert M. Reece, "oppose[s] all physical punishment as ineffective, potentially dangerous, and unfair," but also says that "[s]pansks anywhere but a few light blows on the buttocks or using anything other than an open hand . . . are 'out of bounds' and 'signal abuse.'" Betsy A. Lehman, Spanking Teaches the Wrong Lesson, Boston Globe, Mar. 13, 1989, at 27, reprinted in Straus & Yodanis, supra note 11, at 39.

50. Benjamin Spock, Dr. Spock on Parenting: Sensible Advice from America's Most Trusted Child-Care Expert 150-53 (1988); Nancy Samalin, Love and Anger 161-69 (1991); Robert W. Firestone, Compassionate Child-Rearing 192 (1993) ("It is important that parents never beat or physically abuse a child.").

51. Straus, supra note 3; Straus & Yodanis, supra note 11, at 37-38, 51, 60-64.

52. Straus, supra note 3, at 192-94.

53. Id. at 67-79; see also Irwin A. Hyman & James H. Wise, Corporal Punishment in American Education (1979); Glenda K. Kantor, Corporal Punishment of Adolescents by Parents: A Risk Factor in the Epidemiology of Depression, Suicide, Alcohol Abuse, Child Abuse and Wife Beating, 1994 Adolescence at 543.

delinquency and school violence.\textsuperscript{55} Numerous studies suggest a link between corporal punishment and child abuse.\textsuperscript{56}

Unfortunately, there are more immediate effects of corporal punishment. A national family violence survey indicates that each year a \textit{minimum} of 1.7 million children are severely assaulted by their parents, and an additional 5.4 million children are hit with objects.\textsuperscript{57} The United States Advisory Board on Child Abuse and Neglect found that corporal punishment takes a significant toll on the well-being of America’s children. Each year approximately 2000 American infants and young children die at the hands of their parents or caretakers.\textsuperscript{58} The Advisory Board also reports that 18,000 children a year are permanently disabled and approximately 142,000 are seriously injured. Children age four and younger are the most likely victims.\textsuperscript{59}


\textsuperscript{58} U.S. Dep’t of Health \& Human Servs., supra note 2, at xxiii-xxvi, 9. “In Los Angeles County in 1993, there were 50 homicide victims under age 10. Of these, 41 were killed by a parent or caretaker.” Paul Mones, \textit{Parents Killing Kids Shocking, Not Rare}, USA Today, Nov. 30, 1994, at 11A. The American Humane Association gives lower numbers. They estimate that in 1994, 1271 children died as a result of abuse or neglect with 54% from physical abuse, 42% from physical neglect, and 5% from a combination of the two. American Humane Association, \textit{Fact Sheet No. 1, Child Abuse and Neglect Data} (1995).

\textsuperscript{59} U.S. Dep’t of Health \& Human Servs., supra note 2, at 16.
Non-accidental head injury is the leading cause of death and long-term disability in child abuse cases. When infants under six months of age are shaken, whiplash-type head injuries can occur, evidenced by subdural and retinal hemorrhages without external signs of trauma. One expert believes that many so-called battered babies are actually shaken babies.

Can "normal" corporal punishment result in serious injury or death to a child? Some would respond that only "child abusers" cause such death and injuries. Yet, even "abusers" may claim they were exercising their parental rights to discipline their child. In one study examining child fatalities in forty-one cities across the United States, fatal child abuse was proven or found to be the cause of death in eighty-one cases. Forty-one percent of the parents who killed their children defended their actions by stating they were only trying to discipline them. The children's "misbehavior" included incessant crying, soiled diapers, annoying behaviors, blocking the parents' view of the TV, not taking out the trash, and not eating dinner. In addition, the reasonable parental discipline defense has been raised by a number of defendants accused of murdering their children.

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61. Id. at 33. See also JACY SHOWERS, OHIO RES. INST. ON CHILD ABUSE PREVENTION, SHAKEN BABY SYNDROME: THE PROBLEM AND A MODEL FOR PREVENTION (on file with author); John Caffey, The Whiplash Shaken Infant Syndrome: Manual Shaking by the Extremities with Whiplash-Induced Intracranial and Intraocular Bleeding, Linked with Residual Permanent Brain Damage and Mental Retardation, 54 PEDIATRICS 396 (1979).
62. Caffey, supra note 61, at 396.
63. See, e.g., infra part IV.
64. Hyman, supra note 46, at 25 (citing an unpublished 1994 study titled Death and Discipline: A Study of the Justification for Beating a Child to Death, Temple University, 1994).
65. Id.
66. Id.
67. Parents have raised the reasonable discipline argument regardless of the age of the child and even when the child was killed as a result of the discipline. See, e.g., Patterson v. State, 532 N.E.2d 604 (Ind. 1988) (wetting the bed
Should we change the law and social policy regarding corporal punishment, or should we simply acknowledge that some harm to children is a necessary but acceptable by-product of corporal punishment? An examination of the various ways in which corporal punishment is dealt with by the courts may be of assistance in answering these questions.

The following sections of this article address the different types of legal interventions which are used to solve the problems associated with corporal punishment. Such legal intervention takes place in criminal, child welfare, civil and child custody cases. In each context, the courts are asked to decide whether parental discipline is reasonable or excessive.

IV. CRIMINAL PROSECUTION OF CORPORAL PUNISHMENT

One response to corporal punishment is prosecution of the parent for criminal conduct.

A. Case Example: Carpenter v. Commonwealth 68

Mr. and Mrs. Carpenter were charged with assault and battery upon seven-year-old Agnes, a youngster under their care. 69 A neighbor reported that he observed Mr. Carpenter take a switch off a tree and strip the leaves off of it. 70 He saw

was found to be insufficient provocation for beating to death a six-year-old stepchild); Commonwealth v. Browdie, 654 A.2d 1159 (Pa. Super. Ct.) (squeezing a child to death because of her fussing was insufficient provocation to reduce a third degree murder conviction to voluntary manslaughter), aff'd, 671 A.2d 668 (Pa. 1996).

In one case, the father was accused of killing his two-year-old son as the result of physical abuse. State v. Wilkerson, 247 S.E.2d 905 (N.C. 1978). The evidence showed that the father kicked and beat the child, saying that the child had no manners and that he was going to bring him up the way the father's mother had brought him up, which he said was like going through hell. Id. at 907-08. He stated he did not really believe that was the best way to bring up a child, but it would make him a man, and "that's the way his son was going to be." Id. at 908.

The general rule is that, as a matter of law, a young child cannot provoke a defendant so as to reduce murder to voluntary manslaughter. People v. Crews, 231 N.E.2d 451 (Ill. 1967) (two-year-old child killed by parents whose defense was that their conduct was provoked by the child's behavior); Robinson v. State, 453 N.E.2d 280 (Ind. 1983) (three-year-old girl's bed wetting insufficient provocation); State v. Taylor, 452 N.W.2d 605 (Iowa 1990) (eight-month-old cannot provide provocation to reduce murder to voluntary manslaughter); see also State v. Vega, 253 S.E.2d 94 (N.C.), cert. denied, 444 U.S. 968 (1979).

68. 44 S.E.2d 419 (Va. 1947).
69. Carpenter, 44 S.E.2d at 420.
70. Id. at 421.
Mr. Carpenter go inside the trailer and heard Agnes scream as she received some "licks" for several minutes. Later that day, he heard more whipping taking place. On each occasion he called the police. However, they did not investigate the matter.

The next day, two people saw Agnes and observed that her legs were cut and bruised badly, her arms were bruised, and she had a gash across her forehead along with a bad bruise on her cheek. Mr. Carpenter was arrested the following day on a criminal warrant charging him with cruelly beating the child. A witness who saw Agnes on that day described her body:

On her back, from her shoulders down to her buttocks, and on her buttocks, it was a mass of stripes, some of which were open and bleeding, and some had scabs on them. Of that portion of her body, I would say there was not one-fourth of an inch that was not covered with a mass of those stripes; and also on her forehead there was a bruise, and there was a large gash right across her face; and the same as the scars that were on her body, her face and arms were covered with scars; and she was badly bruised from her hip down to her knees, on the side of her legs. It was just a bleeding mass of bruises.

Agnes testified that Mr. Carpenter had whipped her with a belt and a switch, stating "[h]e whipped me all over, wherever he could whip me." Mr. Carpenter only admitted whipping Agnes five or six times with a small switch broken from a tree in the yard. He whipped her because she had taken a box of candy that belonged to Mrs. Carpenter. Neither Mr. nor Mrs. Carpenter had any explanation for the bruises, welts and wounds all over Agnes' body.

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71. Id.
72. Id.
73. Id.
74. Carpenter, 44 S.E.2d at 421.
75. Id.
76. Id.
77. Id.
78. Id. at 422.
79. Carpenter, 44 S.E.2d at 422.
80. Id.
81. Id. at 421-22.
Mr. Carpenter was convicted of assault and battery.\textsuperscript{82} Mrs. Carpenter was found not guilty.\textsuperscript{83} Mr. Carpenter appealed his conviction to the Virginia Supreme Court.\textsuperscript{84} The supreme court noted in its opinion that this case was the court's first occasion to decide upon the type and degree of punishment which may be lawfully inflicted upon a child by a parent, or one standing \textit{in loco parentis}.\textsuperscript{85}

The court held that a parent has the right to punish a child within the bounds of moderation and reason, so long as he or she does it for the welfare of the child.\textsuperscript{86} If, however, the parent exceeds due moderation, he will become criminally liable.\textsuperscript{87} The court cited cases from Wyoming, West Virginia, Louisiana, Wisconsin, Indiana, Texas, and Pennsylvania in support of its position.\textsuperscript{88} The court stated that when there is a question regarding whether punishment has been moderate or excessive, the fact is one for the jury to determine from the circumstances of the case, including "the age, size and conduct of the child, the nature of his misconduct, the nature of the instrument used for punishment, and the kind of marks or wounds inflicted on the body of the child."\textsuperscript{89}

The court affirmed Mr. Carpenter's conviction finding that the jury properly concluded that he inflicted the wounds and that the punishment exceeded due moderation.\textsuperscript{90}

B. \textit{Case Example}: State v. DeLeon\textsuperscript{91}

Mr. DeLeon was convicted of abusing a family or household member, his fourteen-year-old daughter.\textsuperscript{92} The facts revealed that he arrived home to find that his daughter had brought a friend into the house against his express wishes.\textsuperscript{93} He had warned his daughter that he would spank her with a belt for breaking his rules.\textsuperscript{94} He then hit her six to ten times

\begin{footnotes}
\item[82.] Id. at 420.
\item[83.] Id. at 423.
\item[84.] Carpenter, 44 S.E.2d at 420.
\item[85.] Id.
\item[86.] Id. at 423.
\item[87.] Id.
\item[88.] Id.
\item[89.] Carpenter, 44 S.E.2d at 424.
\item[90.] Id. at 426.
\item[91.] 813 P.2d 1382 (Haw. 1991).
\item[92.] DeLeon, 813 P.2d at 1382.
\item[93.] Id. at 1383.
\item[94.] Id.
\end{footnotes}
above the knees on her stretch pants with a half-inch wide belt folded in two. The daughter said she felt a little pain which lasted about an hour and a half. She had bruises for about a week. She cried for half an hour, and he then cut her waist-long hair to about neck level.

The police were called and the daughter was taken to the hospital. She did not need medication, and there was no bleeding. A few hours later, the police officer noticed that her legs had some reddish, welt-type, raised skin above her knee joints. The raised skin area was about three to three and a half inches wide and about four and a half to five inches long. The injuries were turning from red to darker gray or blue.

At the time of the case, Hawaii law permitted force to be used toward another person if the actor is the parent and

(a) The force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his misconduct; and

(b) The force used is not designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation.

The trial judge found that the hair cutting was not gross degradation, and the Hawaii Supreme Court agreed. However, the trial court found the father guilty of causing "extreme pain" and thus convicted him of the crime charged. The supreme court disagreed, holding that the pain did not come "anywhere near death, serious bodily injury, disfigurement, extreme mental distress or gross degradation" and therefore was not serious pain. Consequently, the father's

95. Id.
96. Id.
97. DeLeon, 813 P.2d at 1383.
98. Id.
99. Id.
100. Id.
101. Id.
102. DeLeon, 813 P.2d at 1383.
103. Id. (citing Haw. Rev. Stat. § 703-309(1) (1988)).
104. Id. at 1384.
105. Id.
106. Id. at 1384.
conduct was within legal limits and the conviction was reversed.\footnote{DeLeon, 813 P.2d at 1384.}

C. Analysis

These two cases offer examples of a task the legal system is frequently called upon to perform: to determine whether force used against a child by a parent is criminal. All states recognize that there are circumstances in which a parent has the right to discipline a child. However, all states prohibit excessive punishment.\footnote{See, e.g., People v. Whitehurst, 12 Cal. Rptr. 2d 33 (Ct. App. 1992); Commonwealth v. Ogin, 40 A.2d 549 (Pa. 1988); see also Nanette Asimov, Spanking Debate Hits Assembly, S.F. CHRON., Jan. 30, 1996, at A1.} Thus, trial courts must inform jurors of a parent’s right to discipline a child\footnote{United States v. Ziots, 36 M.J. 1007 (A.C.M.R. 1993); People v. Whitehurst, 12 Cal. Rptr. 2d 33 (Ct. App. 1992).} and that criminal liability attaches only if the discipline was unnecessary or excessive.\footnote{Hopkins v. State, 434 S.E.2d 74 (Ga. Ct. App. 1993); People v. Sambo, 554 N.E.2d 1080 (Ill. App. Ct. 1990); State v. Ivey, 648 N.E.2d 519 (Ohio Ct. App. 1994).} The question of reasonableness is left to the trier of fact (the judge or jury).

State statutes identify several factors that have assisted courts in drawing the line between justifiable discipline and excessive force. Most important is the severity of the injuries inflicted, as illustrated in both cases above.

The motive of the actor has also been considered important in determining whether the punishment was excessive.\footnote{Campbell v. Commonwealth, 405 S.E.2d 1 (Va. Ct. App. 1991).} However, in the Model Penal Code and some state statutes, there has been an effort to create a more objective test. Thus, under the Model Penal Code, even a parent who sincerely believed that he could promote his child’s welfare by inflicting cruel and excessive punishment would not be protected by the law.\footnote{Model Penal Code § 3.08 commentary at 140 (1985).}

While parents have the right to corporally punish their children, that punishment must not be cruel or excessive.\footnote{Annotation, supra note 7, at 400.} But defining the line between permissible and excessive is difficult because the community standards used to define ex-
cessive punishment change over time.\textsuperscript{114} During the past few decades, court decisions have permitted less severe punishment.\textsuperscript{115} Moreover, corporal punishment that is excessive in one community may be permissible in another.\textsuperscript{116} The judge or jury will continue to define what is excessive punishment for children in each community.

V. CORPORAL PUNISHMENT AND THE JUVENILE COURT

Under its \textit{parens patriae} power, a state may intervene on behalf of abused or neglected children. All states have statutory schemes outlining the circumstances under which the state can remove children or place them with their parents under state supervision.\textsuperscript{117} Juvenile or family courts nor-

\begin{itemize}
\item \textsuperscript{114} "Words such as 'due,' 'moderate,' 'necessary,' and 'reasonable' as applied to chastisement are ever changing, according to the ideas prevailing in our minds during the period and conditions in which we live." Carpenter v. Commonwealth, 44 S.E.2d 419, 424 (Va. 1947).
\item \textsuperscript{115} After the DeLeon case, the Hawaii Legislature amended the penal code for the express purpose of "reduc[ing] the permitted level of force that a person responsible for the care of a minor . . . may use." State v. Crouser, 911 P.2d 725, 733 (Haw. 1996) (citing \textit{HOUSE CONF. COMM. REP. NO. 103, 1992 HOUSE J. at 843}).
\item \textsuperscript{116} The use of corporal punishment will continue to be controversial within communities. See Joseph Berger, \textit{School Chief’s Spanking of Son Divides a Town}, S.F. CHRON., Jan. 30, 1996, at A5.
\item \textsuperscript{117} The Florida and Wyoming statutes delineating the powers of the juvenile court to take jurisdiction of a child because of excessive corporal punishment are typical. For example, Florida Statute § 827.07 states in relevant part:
\begin{enumerate}
\item Legislative intent
The intent of this section is to provide for comprehensive protective services for abused or neglected children found in the state by requiring that reports of each abused or neglected child be made to the Department of Health and Rehabilitative Services in an effort to prevent further harm to the child or any other children living in the home and preserve the family life of the parents and children, to the maximum extent possible, by enhancing the parental capacity for adequate child care.
\item Definitions
\begin{itemize}
\item \textsuperscript{d} "Harm" to a child’s health or welfare can occur when the parent or other of other person responsible for the child’s welfare:
1. Inflicts, or allows to be inflicted upon, the child physical or mental injury, including injury sustained as a result of excessive corporal punishment.
\end{itemize}
\end{enumerate}
\textit{FLA STAT. ANN.} § 827.07 (West 1995).
Wyoming statute § 14-3-202 states in relevant part:
Definitions.
(a) As used in W.S. 14-3-201 through 14-3-215:
mally hear such cases. As in criminal cases, the meanings of "abuse" and "neglect" vary considerably from state to state.

A. Case Example: In the Interest of W.P.118

The parents of W.P. appealed a finding by the juvenile court that their daughter was an abused child who needed to be protected by the court.119 The court reached this decision because the father slapped the daughter on the side of her face and the mother pulled her hair.120

At that time, the Florida child welfare statute defined abuse as "any willful act that results in any physical, mental or sexual injury that causes or is likely to cause the child's physical, mental, or emotional health to be significantly impaired."121

The court of appeals reversed the finding that the child had been abused and thus needed state protection.122 The court noted that the father slapped the daughter after she had used vulgar language toward her mother, and that the mother pulled her hair after she had pushed her father against the wall.123 The court further noted that while the slap left a mark on W.P.'s face, she required no medical attention.124 Further, there was no evidence that the slap or hair pulling significantly impaired her physical, mental or emotional health.125 Consequently, the court concluded that there was insufficient evidence to establish that the parents

ii. "Abuse" means inflicting or causing physical or mental injury, harm or imminent danger to the physical or mental health or welfare of a child other than by accidental means, including abandonment, excessive or unreasonable corporal punishment, malnutrition or substantial risk thereof by reason of intentional or unintentional neglect, and the commission or allowing the commission of a sexual offense against a child as defined by law:

(B) "Physical injury" means death or any harm to a child including but not limited to disfigurement, impairment of any bodily organ, skin bruising, bleeding, burns, fracture of any bone, subdural hematoma or substantial malnutrition.

118. 534 So. 2d 905 (Fla Dist. Ct. App. 1988).
119. In the Interest of W.P., 534 So. 2d at 905.
120. Id.
121. Id.
122. Id.
123. Id.
124. In the Interest of W.P., 534 So. 2d at 905.
125. Id.
had abused her according to the statute's definition of abuse.\textsuperscript{126}

B. *Case Example: In the Interest of the Child*\textsuperscript{127}

In this case, the father punished his thirteen-year-old daughter for going to a party against his wishes and then lying about it.\textsuperscript{128} He hit her with a belt and beat her until she was black and blue.\textsuperscript{129} He also struck her face with his hand.\textsuperscript{130} At the trial she testified that her ears were ringing for about a day.\textsuperscript{131} Photographs showed large purple bruises covering the back of her left thigh and a part of the back of her right leg extending to the right knee.\textsuperscript{132} The South Carolina Family Court found that the child needed the protection of the court because of the abuse.\textsuperscript{133}

On appeal, the father claimed his conduct did not amount to child abuse and that the statute was unconstitutional since it interfered with his right to religious liberty.\textsuperscript{134} The court of appeals noted that under the state statute, corporal punishment is not considered child abuse as long as it is reasonable in manner and moderate in degree.\textsuperscript{135} Relying principally upon a doctor's testimony at trial which concluded that the injuries "would have involved a great deal of force to inflict this much damage to the skin,"\textsuperscript{136} and the fact that the father struck his daughter in the face, the court found that the force used by the father was not "moderate in degree."\textsuperscript{137}

The court also addressed the claim that the father's actions were protected as an exercise of his religious liberty.\textsuperscript{138} In support of his position at trial, the father enlisted the aid of a clergyman who testified that the Bible justified the father's conduct.\textsuperscript{139} The child's mother also testified and re-

\textsuperscript{126} Id.
\textsuperscript{128} *In the Interest of the Child*, 366 S.E.2d at 41.
\textsuperscript{129} Id.
\textsuperscript{130} Id.
\textsuperscript{131} Id.
\textsuperscript{132} Id.
\textsuperscript{133} *In the Interest of the Child*, 366 S.E.2d at 41.
\textsuperscript{134} Id.
\textsuperscript{135} Id. at 42.
\textsuperscript{136} Id.
\textsuperscript{137} Id.
\textsuperscript{138} *In the Interest of the Child*, 366 S.E.2d at 42-44.
\textsuperscript{139} Id. at 42.
ferred to the Bible, citing Proverbs: "Withhold not correction from the child; for if thou beatest him with the rod, he shall not die."\textsuperscript{140}

The court rejected the religious argument, noting that the statute does not regulate the father's beliefs, but rather regulates his actions.\textsuperscript{141} The court pointed out that the court's intervention into family life was minimal since the child was permitted to remain with her parents and the parents were only required to participate in a counseling program.\textsuperscript{142}

\textbf{C. Case Example: In re Ethan H.}\textsuperscript{143}

In this New Hampshire case, the appellate court had to decide whether a mother who had spanked her seven-year-old child six times with an imitation leather belt had abused him.\textsuperscript{144} She maintained that she was punishing him because he had thrown food at the dinner table.\textsuperscript{145} The agency investigator observed some bruises on the child's lower back and took him to a doctor for a further examination.\textsuperscript{146} The doctor confirmed the existence of bruises, but stated that he would not have suspected child abuse and would not have filed a report as mandated by law in situations where child abuse is suspected.\textsuperscript{147}

The New Hampshire statute defines an "abused child" as "any child who has been \ldots [p]hysically injured by other than accidental means."\textsuperscript{148} The trial court found that the child fell within the statutory definition.\textsuperscript{149} The mother appealed.\textsuperscript{150} At the next hearing (a new trial), the mother testified that she previously spanked her children, regarded it as proper, and would continue to spank them in the future if necessary.\textsuperscript{151} There was no testimony as to whether the bruises

\textsuperscript{140. \textit{Id.} (citing Proverbs 23:13-14).}
\textsuperscript{141. \textit{Id.} at 43.}
\textsuperscript{142. \textit{Id.} at 43.}
\textsuperscript{143. \textit{609 A.2d 1222} (N.H. 1992).}
\textsuperscript{144. \textit{In re Ethan H.}, \textit{609 A.2d} at 1222.}
\textsuperscript{145. \textit{Id.}}
\textsuperscript{146. \textit{Id.}}
\textsuperscript{147. \textit{Id.} at 1223.}
\textsuperscript{148. \textit{Id.}}
\textsuperscript{149. \textit{In re Ethan H.}, \textit{609 A.2d} at 1223.}
\textsuperscript{150. \textit{Id.}}
\textsuperscript{151. \textit{Id.}}
were "harm or injury" under the meaning of the statute.\footnote{152}
At the same hearing, the mother explained her philosophy on corporal punishment:

I believe corporal punishment when done judiciously and appropriately for the circumstances is a definite form of punishment. It's not the one people would ever use initially. I mean, you know, to strike out constantly at children and/or use that as your only form of discipline would be ludicrous. But what I'm saying to you is that the circumstances warranted it. And you know your child and you know the situation. There are times when it can be appropriate.\footnote{153}

The superior court upheld the original trial court's finding that the child was "abused."\footnote{154}

The New Hampshire Supreme Court reversed the finding of child abuse, stating that there had been a failure to establish that the child's bruises were indicative of harm or injury.\footnote{155} Pointing out that under New Hampshire law reasonable corporal punishment is allowable, the court concluded that no child abuse had occurred.\footnote{156}

D. Analysis

These three cases highlight the complexities surrounding the legal response to corporal punishment in the context of child welfare proceedings. State statutes and court decisions recognize that some corporal punishment by a parent is justified, but do not provide clear guidance as to where the line between reasonable spanking and child abuse should be drawn.\footnote{157} In addition to determining whether the parental discipline was "reasonable" or "excessive," juvenile courts often must address other factors, such as possible future harm to the child, in order to determine whether a child

\footnote{152. Id.}
\footnote{153. Id. at 1224.}
\footnote{154. In re Ethan H., 609 A.2d at 1225.}
\footnote{155. Id. at 1226.}
\footnote{156. Id.}
\footnote{157. The following is excerpted from a recommended model statute defining proper grounds for intervention when a child has been physically abused. "The Grounds for Intervention are: . . . [s]erious bodily injury inflicted by Parents upon their Child, or an attempt to inflict such injury, or the repeated failure of Parents to prevent their Child from suffering such injury." JOSEPH GOLDSTEIN ET AL., BEFORE THE BEST INTEREST OF THE CHILD 187-96 (1979).}
CORPORAL PUNISHMENT

needs protection.\footnote{158} This task is not made any easier by state statutes that define the legality of spanking more specifically. A California statute, for example, reads that "[f]or the purposes of this subdivision, 'serious physical harm' does not include reasonable and age-appropriate spanking to the buttocks where there is no evidence of serious physical injury."\footnote{159} While specifying the buttocks as the legally permissible area where corporal punishment may be inflicted reduces the dangers of injury to more sensitive areas of the body, the failure to define "age-appropriate" leaves many unanswered questions. For example, is any spanking of an infant less than one-year-old appropriate?

These cases highlight the issues raised when children are brought before the juvenile court because of alleged physical abuse by their parents. The court must decide whether incidents of corporal punishment are legitimate acts of parental authority or whether they constitute abusive conduct. If the court finds the acts to be abusive, it can take steps to protect the child, either by removing the child from parental care or returning the child to the parents on a conditional basis. For example, the court might require parents to refrain from corporal punishment of their child, or attend parenting classes or a counseling program. When parents demonstrate that they have changed their behavior and that the child is safe in their care, court supervision will no longer be necessary, and the case can be dismissed.\footnote{160}

\footnotetext{158} In State v. West, 634 N.E.2d 1123 (Ill. App. Ct. 1994), the juvenile court found the child was neglected under the Illinois statute, stating that the degree of injury was not conclusive, but that the court must look to the likelihood of future injury to the child. Id. at 1129.

\footnotetext{159} CAL. WELF. & INST. CODE § 300(a) (West 1995).

\footnotetext{160} For example, in the case of In re Jose M., 254 Cal. Rptr. 364 (Ct. App. 1988), the juvenile court concluded that the child needed court protection after finding that his mother and stepfather had excessively disciplined him. The juvenile court returned the child to his mother and stepfather on condition that they not use corporal punishment, the family undergo intensive therapy, and the parents participate in individual or family counseling. Id. at 366. At the court hearing, the mother argued that she had been making progress in counseling, that the court should permit the family to resolve the case informally, and that voluntary services would be sufficient to protect the child. The social worker indicated that there was a strong potential for backsliding and a recurrence of physical abuse. Id. The juvenile court agreed with the social worker and placed the child under the jurisdiction of the court. Id. The appellate court affirmed the juvenile court's actions, stating that there was evidence of a strong potential for recurrence of the abuse. Id. at 367, 368.
VI. CRIMINAL PROSECUTION OR JUVENILE COURT INTERVENTION

Criminal prosecution and juvenile court actions are two alternative forms of state intervention on behalf of an allegedly abused child. Criminal prosecution focuses upon the alleged abuser and seeks to punish him for his actions. Juvenile court proceedings, on the other hand, address the needs of the child and attempt to protect the child from abuse while ensuring that the child is raised in a family setting.

The cases outlined above demonstrate the rather arbitrary nature of state intervention after allegedly excessive corporal punishment is detected. All of these cases could have been prosecuted in the criminal courts, in juvenile court child welfare proceedings, or in both courts simultaneously.

Reflecting on the impact that a criminal prosecution has upon a family, one judge opined that juvenile court proceedings constitute the preferable form of state intervention, since the family has an interest in a continuing relationship.

If the conduct engaged in by appellants is not condoned by the professionals within our agencies that promote the welfare of children, the means by which that conduct is best altered is not through the imposition of criminal convictions. While the evidence in this case is strongly suggestive that appellants are not fully suited to their parental tasks, I believe that other forms of legal intervention are available to protect the interest of the juveniles involved before invocation of the criminal law and its unavoidable devastating effect on the hope of resolving appellants' problems in parenting.161

As indicated in Figure 1, different decision makers are involved in determining whether a criminal prosecution or a juvenile court action will be initiated. The prosecutor/district attorney decides whether criminal charges will be brought, while the Department of Children's Services or Social Services initiates juvenile court child welfare proceedings. The standards of proof are different in each setting, as are the consequences of a true finding. In a criminal prosecution, the defendant may be placed on probation or incarcerated, while in a juvenile court case, the child may be removed from parental care.

Both types of proceedings have a proper role in our legal system. When parental conduct is clearly abusive, the parent must be punished, and criminal proceedings will serve that purpose. Where the parent believes that his or her conduct was justifiable, the juvenile court may be the better forum for the case to be heard. The juvenile court has the power to protect the child by removal from parental care. At the same time, the juvenile court can work with the family to teach its members more appropriate behavior.

**Figure 1**

**Criminal Prosecution Versus Juvenile Court Intervention**

<table>
<thead>
<tr>
<th></th>
<th>Criminal Court</th>
<th>Juvenile Court</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Purpose</strong></td>
<td>Punish offenders, protect society, deter other potential offenders</td>
<td>Protect children and preserve families</td>
</tr>
<tr>
<td><strong>Parties</strong></td>
<td>The State and the defendant</td>
<td>State, child and parents</td>
</tr>
<tr>
<td><strong>Investigation</strong></td>
<td>Law enforcement</td>
<td>Child Protective or Social Services Agency</td>
</tr>
<tr>
<td>**Initiation of Proceed-</td>
<td>Prosecuting attorney, or the Grand Jury files charges</td>
<td>Social Services Agency files petition</td>
</tr>
<tr>
<td>ings**</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Evidentiary Rules</strong></td>
<td>Criminal rules of evidence</td>
<td>Civil rules of evidence</td>
</tr>
<tr>
<td><strong>Standard of Proof</strong></td>
<td>Beyond a reasonable doubt</td>
<td>Preponderance of the evidence for the truth of the Petition and clear and convincing evidence for removal of the child</td>
</tr>
<tr>
<td><strong>Possible Consequences</strong></td>
<td>Jail, probation, fine</td>
<td>Removal of the child, return of child on conditions</td>
</tr>
</tbody>
</table>

**VII. Civil Actions**

Historically, children could not sue their parents for damages caused by a parent's harm to them, including any
harm caused by corporal punishment. The doctrine of parental tort immunity used to apply in almost all states, thus preventing a child-plaintiff from maintaining tort actions against a parent. In addition, the parental privilege exception has been utilized and extended to include the infliction of reasonable punishment and chastisement by a parent or other person standing in loco parentis.

In recent years, some courts have shown a willingness to restrict the application of these doctrines and permit civil lawsuits by children against their parents. Courts in some states have permitted exceptions in situations where the child was emancipated before the acts took place, and in cases where the parent exhibited wanton, willful, or malicious conduct. Some courts have also permitted a child to recover damages against a parent or parent figure for acts of corporal punishment.

In the case of Gillott v. Gillott, an eight-year-old child-plaintiff broke a dish while drying the family dishes. Her stepmother became irate and hit her with doubled fists numerous times. After the child had been found in shock a few days later, the family doctor examined her. He discovered that she was suffering from serious internal injuries. Both her spleen and kidney were removed. At trial, one

164. "A parent is privileged to apply such reasonable force or to impose such reasonable confinement upon his child as he reasonably believes to be necessary for its proper control, training, or education." Restatement (Second) of Torts § 147 (1965).
166. Rodriguez v. Johnson, 504 N.Y.S.2d 379 (Civ. Ct. 1986). In the Rodriguez case, a bus driver was held liable for corporal punishment of a student riding the school bus, even though the driver acted with some provocation, did not use excessive force and struck the child, not maliciously, but out of frustration and anger. The trial judge took the position that "the physical assault of children, regardless of the degree, cannot be legally countenanced." Id. at 556.
169. Gillott, 335 P.2d at 738.
170. Id.
171. Id.
172. Id.
173. Id.
doctor suggested that the injuries could have been caused by blows from fists.\textsuperscript{174} The jury found for the child-plaintiff in the amount of $50,000.\textsuperscript{175}

The defendant appealed, claiming that she had the right to punish her step-daughter.\textsuperscript{176} The appellate court affirmed the jury award, noting that a parent has no immunity with respect to willful torts.\textsuperscript{177} While a parent "may administer reasonable punishment with impunity, . . . when he exceeds that limit and does so willfully, he commits a battery and is civilly liable for the consequences."\textsuperscript{178} The court went on to approve language from the case of \textit{Emery v. Emery},\textsuperscript{179} which noted

\begin{quote}
While it may seem repugnant to allow a minor to sue his parent, we think it more repugnant to leave a minor child without redress for the damage he has suffered by reason of his parent's willful or malicious misconduct. A child, like every other individual, has a right to freedom from such injury.\textsuperscript{180}
\end{quote}

In a recent Ohio case,\textsuperscript{181} children brought a civil action against their father and stepmother for assault, battery, and negligent and intentional infliction of severe emotional distress.\textsuperscript{182} The children alleged that in response to a violation of family rules, their father and stepmother dragged one of them by the hair and pounded her head against a wall.\textsuperscript{183} The father and stepmother denied these allegations, giving an entirely different version of what happened.\textsuperscript{184} The trial court granted the parents' motion for summary judgment, holding that the doctrine of parental immunity served as a bar to the children's claims against them.\textsuperscript{185}

The court of appeals reversed the trial court, noting that the Ohio Supreme Court had abolished the doctrine of paren-

\textsuperscript{174} \textit{Gillett}, 335 P.2d at 738.
\textsuperscript{175} \textit{Id.} at 737.
\textsuperscript{176} \textit{Id.}
\textsuperscript{177} \textit{Id.} at 740.
\textsuperscript{178} \textit{Id.} at 737.
\textsuperscript{179} 289 P.2d 218 (Cal. 1955).
\textsuperscript{180} \textit{Gillett}, 335 P.2d at 737 (quoting \textit{Emery v. Emery}, 289 P.2d 218, 223 (Cal. 1955)).
\textsuperscript{182} \textit{Id.} at 1237.
\textsuperscript{183} \textit{Id.} at 1238
\textsuperscript{184} \textit{Id.}
\textsuperscript{185} \textit{Id.}
tal immunity without reservation.\textsuperscript{186} The appellate court wrote that Ohio statutes permitted reasonable corporal punishment by parents, but that such punishment could not be excessive.\textsuperscript{187}

Although the law of Ohio has recognized that parents have the right of restraint over their children and the duty of correcting and punishing them for misbehavior, "such punishment must be reasonable and not exceed the bounds of moderation and inflict cruel punishment."\textsuperscript{188}

These cases demonstrate that the law will no longer protect parents from legal actions for damages when the parental conduct has been excessive. When parents inflict unreasonable corporal punishment on their children, the law will permit the children to bring a civil action for damages against the parents.

\section{VIII. Corporal Punishment and Child Custody Decisions}

In contested custody cases, many state statutes permit a trial court to consider factors including abuse of the child. A California statute, for example, permits a court making custody decisions to consider "(a) the health, safety and welfare of the child; and (b) any history of abuse by one parent against the child or against the other parent . . . ."\textsuperscript{189} Such abuse could include excessive corporal punishment but not reasonable parental discipline.

\textbf{A. Case Example: Boland v. Leska}\textsuperscript{190}

In this case, the parents divorced and the mother received custody of both boys.\textsuperscript{191} During a visit a few years later, the father discovered bruises on one of the boys and refused to return both children to their mother.\textsuperscript{192} The mother filed a writ of habeas corpus, and the boys were re-

\begin{thebibliography}{99}
\bibitem{186} Murray, 623 N.E.2d at 1238.
\bibitem{187} \textit{Id.} at 1240
\bibitem{188} \textit{Id.}
\bibitem{189} \textit{CAL. FAMILY CODE} § 3011(b) (West 1995).
\bibitem{191} \textit{Id.} at 76.
\bibitem{192} \textit{Id.}
\end{thebibliography}
turned to her custody. The judge, in a subsequent custody trial, ruled that the boys should remain with their mother.

The father appealed, claiming that he should have received custody because the boys were physically abused by the mother's husband. The facts showed that the stepfather bruised one boy when he grabbed his pajama top because the child failed to answer his mother's questioning. A second bruise occurred when the stepfather slapped the boy for losing a sweater.

The appellate court agreed with the trial court that neither incident constituted child abuse. Noting that parents may use corporal punishment to discipline their children so long as it does not become malicious abuse, the court found that the stepfather had no malicious intent in punishing the child. The court stated, "[b]oth instances considered closely followed errant behavior by the child, and neither involved extreme force or was part of a repeated course of unwarranted punishment."

While domestic relations courts may consider a parent's use of corporal punishment as a factor in a child custody case, the punishment would have to be excessive to be determinative.

IX. CORPORAL PUNISHMENT AT SCHOOLS

School authorities have traditionally been permitted to use corporal punishment to correct students' behavior. This right has been analogized to the right of parents to discipline their children. However, just as with parents, corporal punishment in the school context has its limits.
A. Case Example: State v. Pendergrass

One early case involved the schoolmaster of a small school who was convicted of assault and battery on a six- or seven-year-old girl. He whipped her with a switch and caused marks on her body. The jury found the schoolmaster guilty, and he appealed.

The North Carolina Supreme Court reversed the conviction. The court found that the schoolmaster's power was similar to that of a parent and that correction by corporal punishment was permissible so long as it caused only temporary pain and no permanent injury.

We think also that the jury should have been further instructed that, however severe the pain inflicted, and however in their judgment it might seem disproportionate to the alleged negligence or offense of so young and tender a child, yet if it did not produce nor threaten lasting mischief, it was their duty to acquit the defendant ....

This 1837 case addressed an issue that has reoccurred in thousands of schools across the country. The issue of the level of corporal punishment a school official may inflict upon students who have violated school regulations often arises in modern day cases.

B. Case Example: Arkansas D.H.S. v. Caldwell

Caldwell, a middle school assistant principal, paddled three fifth grade students who had been caught smoking. She learned of the smoking incident from a teacher. After questioning the girls individually and together, and after consulting with another administrator, she decided that paddling was the appropriate punishment. She followed the normal procedure for administering the paddling which in-

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203. Id.
204. Id.
205. Id.
206. Id.
207. Pendergrass, 19 N.C. at 365.
208. Id.
210. Id. at 511.
211. Id. at 512.
212. Id.
included having another teacher serve as a witness. The children were made to tell the witness what they had done wrong and had to bend over and touch their knees during the paddling, so that their buttocks would be easily hit. The swats were described as "average" and delivered without anger.

A few days later, the mother of one girl who received three licks with the paddle noticed bruises on her daughter's buttocks. She reported the paddling to school officials as a possible incident of child abuse. An investigation by Family and Children's Services "substantiated" the allegation and forwarded a report to the State Central Registry as required by Arkansas law. At a hearing demanded by the assistant principal to expunge her name from the state registry of child abusers, the hearing officer found that there was "some credible evidence" to substantiate the occurrence of abuse. On appeal to the circuit court, the hearing officer's finding was reversed and her name was ordered stricken from the registry.

The court of appeals agreed with the circuit court and found no credible evidence to support the allegation of abuse. The court relied upon the caseworker's testimony that she did not believe the paddling was abusive and that the only physical evidence was that of bruising. The court found that one factor standing alone was not sufficient to support the finding of abuse.

Although the punishment for school violations has not changed substantially in some schools for more than 140 years, the process for administering the discipline has become much more elaborate, and the review and oversight is more complex. The Caldwell case took four years to be decided, involved three levels of review and utilized significant resources of both the parties and the court system.

213. Id.
214. Caldwell, 832 S.W.2d at 512.
215. Id.
216. Id.
217. Id.
218. Id. at 511.
219. Caldwell, 832 S.W.2d at 511.
220. Id.
221. Id. at 513
222. Id.
223. Id.
Corporal punishment at school has been upheld by the United States Supreme Court against several constitutional challenges. In the case of *Ingraham v. Wright*, the court held that public schools do not violate the Eighth Amendment's prohibition against cruel and unusual punishment when they administer disciplinary corporal punishment. Acknowledging that the corporal punishment of prisoners was violative of the Eighth Amendment, the Court found that the openness of the public school and its supervision by the community provided significant safeguards against the kinds of abuses from which the Eighth Amendment protects convicted criminals. The Court also pointed out that potential criminal and civil proceedings would further protect a child from excessive punishment. Finally, the Court held that the Due Process Clause of the Fourteenth Amendment does not require notice and hearing before the imposition of corporal punishment in the school context. Thus, school officials may administer such punishment without notification to parents or other persons responsible for the care of the student.

Not all states permit corporal punishment in public schools. In fact, over the past decade, there has been a movement away from corporal punishment in the school setting, with more than half of the states currently prohibiting its use. Strong criticism of the use of such punishment has

225. *Ingraham*, 430 U.S. at 664.
226. *Id.* at 670.
227. *Id.*
228. *Id.* at 682.
229. *Id.* at 682.


No person employed by or engaged in a public school shall inflict, or cause to be inflicted corporal punishment upon a pupil. Every resolution, by-law, rule, ordinance, or other act or authority permitting or authorizing the infliction of corporal punishment upon a pupil attending a public school is void and unenforceable.
come from many sources, including researchers, educational theorists, and mental health experts. Parent organizations have criticized the use of corporal punishment without parental permission. School administrators often acquiesce to legislative changes, recognizing that civil liability for the improper application of corporal punishment can be costly and time consuming. Although some parents and school administrators will continue to support corporal punishment in public schools, based on the trend over the past ten years, it appears that corporal punishment will continue to decrease in the school environment.

CAL. EDUC. CODE § 49001(b) (West 1996).


The American Bar Association has taken a similar position: "BE IT RESOLVED, that the American Bar Association opposes the use of corporal punishment in institutions where children are cared for or educated and urges that state laws which permit such corporal punishment be amended accordingly." AMERICAN BAR ASS'N, RESOLUTION OF JUNE, 1986 (1985).


X. CORPORAL PUNISHMENT IN CRIMINAL/JUVENILE DELINQUENCY PROCEEDINGS

Many believe that corporal punishment should be utilized by courts and correctional authorities to punish criminal offenders, particularly children who violate the law. Some countries authorize such punishment for youthful offenders. For example, a youth convicted of malicious destruction of property in Singapore received a caning.\textsuperscript{234} His punishment received international attention.\textsuperscript{235} A South Carolina Juvenile Court Judge gave his belt to a grandmother and had her whip her eighteen-year-old grandson after he was found to be in possession of cocaine.\textsuperscript{236} A California legislator proposed a statute authorizing the courtroom paddling of any minor adjudged a ward of the juvenile court for placing graffiti upon real or personal property.\textsuperscript{237} The California attorney general rendered an opinion that such a statute would be constitutional.\textsuperscript{238}

The California legislative proposal runs counter to numerous federal court rulings prohibiting the use of violence against children in institutions.\textsuperscript{239} It is also notable that the use of a strap on adult prisoners has been held unconstitutional. In the case of \textit{Jackson v. Bishop},\textsuperscript{240} the United States Court of Appeals for the Eighth Circuit held that the use of the strap as a disciplinary measure violated the Eighth Amendment's proscription against cruel and unusual punish-
ment. Other appellate court decisions have restricted the use of physical punishment on convicted adult defendants.

XI. CHILDREN IN OUT-OF-HOME CARE

Some adults who stand *in loco parentis* to a child are prohibited from utilizing any type of corporal punishment. For instance, certain state regulations prohibit foster parents from using corporal punishment. California Foster Home Regulations declare that "[e]ach child shall have personal rights which include, but are not limited to, the following: ... To be free from corporal punishment or unusual punishment, infliction of pain, humiliation, intimidation, ridicule, coercion, threat, mental abuse, or other actions of a punitive nature ...." Other states have adopted similar restrictions for foster parents.

In some states, the prohibition against corporal punishment has been extended by statute to include licensed community care facilities, juvenile halls, juvenile ranches, camps, and forestry camps.

In California, the prohibition against corporal punishment has been extended by statute to private day nurseries, even if parents agree with the nurseries that the caretakers may use such punishment when their child is disobedient. This statute has been upheld by the court of appeal.

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241. Id. at 579.
242. See, e.g., Weems v. United States, 217 U.S. 349 (1910) (Supreme Court striking down a sentence which included the added punishment of *cadena temporal* as cruel and unusual).
243. Cal. Code Regs. tit. 22, § 87072. The California Agency-Foster Parent Agreement stipulates that foster parents must agree that they will "[n]ot use corporal punishment, punishment in the presence of others, deprivation of meals ... or any type of degrading or humiliating punishment and to use constructive alternative methods of discipline." Cal. Dep't of Social Servs., Form No. SOC-156 (Rev. Dec. 1985).
244. See, e.g., Iowa Code Ann. § 234.40 (West 1995). "The department of human services shall adopt rules prohibiting corporal punishment of foster children by foster parents licensed by the department." Id.
247. Johnson v. Department of Social Servs., 177 Cal. Rptr. 49 (Ct. App. 1981). The reasoning of the court was that parenting is personal in nature and the rights attached to it did not extend to third parties such as private day care providers. Id. at 53.
Corporal punishment is used by parents throughout the world and is universally accepted as a legitimate and necessary form of parental control over children. Thus, it was newsworthy when, in July of 1979, Sweden became the first nation to prohibit parents from corporally punishing their children. Since that time, Austria, Denmark, Finland, Poland, and Norway have followed Sweden's lead, and similar legislation is being considered in Germany and Great Britain.

Sweden had a long tradition of supporting corporal punishment. In 1920, when the family law was codified, parents were expressly granted the right to punish their children by using physical force. Moreover, Sweden's Penal Code allowed parents to avoid criminal liability for corporally punishing their children, so long as any injuries incurred were not permanent.

In the decades that followed, child rearing in Sweden included "regular — often weekly — harsh beatings to 'drive out the devil and make firm for God's will'." But as corporal punishment increasingly was accompanied by "widespread child abuse," the Swedish Legislature concluded that the only way to stem the tide of child abuse was to prohibit corporal punishment entirely. "The government's stated intent in passing the law was twofold: primarily to stop 'beatings' and, secondly, 'to create a basis for general information and education for parents as to the importance of giving children good care and as to one of the prime requirements of their care.'" The legislation contained no punishment for acts of corporal punishment. It simply declared that such acts were illegal.

Although a majority of Swedes opposed the law when passed fifteen years ago, it is now overwhelmingly supported. In 1994, seventy-one percent of Swedes favored using alter-

249. Olson, supra note 248, at 447.
250. PEGGY O'MARA, MOTHERING 42 (1994).
252. See O'MARA, supra note 250.
native methods of discipline. There are several reasons offered for this remarkable change. First, the law appears in the civil, not the criminal code. There are no criminal penalties for violations of this law. Second, the Swedish population has been educated by the government, the schools, and the media about the effects of corporal punishment. The government distributed mailings to every family with a young child, to schools, and to daycare facilities, explaining the alternative methods to be implemented in place of physical force. The media aggressively informed the public about the law on the air, in publications, and on milk cartons.

Finally, parents and children were educated. The new law was discussed with school children, emphasizing what parents could and could not do, and explaining how they should respond in a situation where they were punished corporally. Personal instruction was provided through parent education programs which taught parents how to discipline their children without the use of physical punishment.

As a result of these efforts "[i]t appears that the generational transmission of physical punishment as a childrearing method has been broken in Sweden." Further, societal results of the change have also been noticed. According to teachers, children are more well-behaved and easier to teach because they are accustomed to discipline at home. Moreover, violent crimes against people in Sweden are decreasing, another possible result of the abolition of corporal punishment.

XIII. CONCLUSION AND PROPOSAL

Corporal punishment of children remains an important part of American culture. Most parents believe it is a necessary tool for child rearing. Nevertheless, as the cases cited in this article reveal, American society has tolerated less and less severe forms of corporal punishment during the past generation. Today, only parents and, in some states, teachers

254. Feshbach, supra note 251, at 110.
255. Olson, supra note 248, at 447.
256. See O'MARA, supra note 250.
and school officials can legally hit children. Because of our mandatory child abuse reporting laws, corporal punishment in the home and in school is scrutinized more carefully than ever before. Criminal prosecutions and child welfare proceedings have examined many parents' use of corporal punishment. Although the constitution does not prohibit schools from using corporal punishment on unruly students, over half of all states now prohibit teachers from doing so. In a number of environments, including many foster and group homes, it is prohibited. An international trend indicates that some countries have been successful in reducing corporal punishment in their societies by passing laws prohibiting its use.

In spite of its popularity, a strong argument can be made that corporal punishment is an ineffective means of controlling children's behavior. Infants and small children, in particular, may not have the language ability to comprehend why the beating is taking place. Much evidence exists indicating that the infliction of corporal punishment actually breeds violence. Moreover, there is no doubt that physical abuse in the home has a devastating effect on thousands of children.

With these considerations in mind, it is appropriate to propose that corporal punishment be prohibited. Such proposals have been made in the past and, though amply supported by extensive research, have gone nowhere. Any se-

258. See Herman, supra note 22, at 27-32; Straus, supra note 3, at 149-161. 259. Bane, A Review of Child Care Books, 43 Harv. Educ. Rev. 669 (1973); David C. McClelland, The Importance of Early Learning in the Formation of Motives, in Motives in Fantasy, Action and Society 437 (John Atkinson ed., 1958). 260. Straus, supra note 3, at 81-97. 261. U.S. Dep't of Health & Human Servs., supra note 2; Straus, supra note 3, at 92-97. 262. Such a proposal was made by Dean Herman; Herman, supra note 22, at 42-51. That the proposal has not been successful or even seriously considered in state legislatures is an indication of the strong political forces against such a change. 263. The professional organizations that formally oppose corporal punishment of children include the American Academy of Pediatrics, the American Medical Association, the American Bar Association, the American Public Health Association, the American Psychological Association, the National Parent-Teacher Association, the National Association of School Psychologists, the National Education Association, the National Association of Social Workers, and the National Association of Pediatric Nurse Associates and Practitioners. See William Robson et al., Corporal Punishment in Childhood, 1992 Children's
rious attempt must be qualified in order to be politically realistic. Therefore, it is logical to begin where corporal punishment causes the greatest harm: with young children.

It should be illegal to use corporal punishment on all children under five years of age. Although violations should not be punished, the law should state that corporal punishment of any child under five is illegal and urge parents to follow its dictates. Under this proposed statute, federal, state, and local governments would be required to offer assistance to parents by teaching them about alternative methods of disciplining their children. In addition, the statute would require these same entities to widely publicize the prohibition against hitting children under five years of age and the dangers associated with such punishment. A copy of a draft statute is contained in Appendix A.

This proposal will hardly be greeted with support by most Americans. After all, most Americans experienced corporal punishment as children. Since many adults believe in their own success, why should they change methods of discipline from that which their parents used? Nevertheless, there are compelling reasons for supporting a statute outlawing corporal punishment.

The most powerful reason for such a law is to try to reduce the deaths and serious injuries from physical abuse to children. The numbers are staggering and bear repeating. Approximately 2000 infants and small children die from abuse or neglect by parents or caretakers each year, which is a forty-year high. The vast majority of these children are under four years of age. Parental and caretaker abuse results in approximately 18,000 permanently disabled children each year. Additionally, it is estimated that 141,700 infants and children were seriously injured due to abuse or neglect in 1990 alone.


264. See Showers, supra note 61.
266. Id. at 9.
267. Id.
268. Id.
Obviously, a significant number of parents and caretakers are abusive to the infants and children in their care, although many would characterize their actions as appropriate discipline. Most do not know what effect their physical discipline will have on their children. They have never been taught alternative ways of controlling or punishing their children. They also do not realize that education and training can change behavior and that parents can be taught to manage children effectively without violence.269

By letting adults know that it is not legal to strike young children, we, as a society, will begin to set a standard that will hopefully reduce the numbers of children who suffer from parental abuse each year. It may take a generation, but children who are raised without corporal punishment will in turn understand that there are effective means of educating and controlling their children without its use. More importantly, by setting a new tone in society, many parents will refrain from utilizing corporal punishment. The result will be that lives will be saved and children will suffer fewer lifetime disabilities.

Those who use corporal punishment in a disciplined and non-abusive fashion will resist this change, just as their counterparts in Europe did. However, the law must change in order to deter those who are unable to use corporal punishment without seriously abusing or killing their children.

Of course, such a law would not remove corporal punishment from the court system. Prosecutions testing behavior as possibly criminal would continue to be brought for serious cases, as would child welfare actions questioning possible parental abuse or neglect. As a new societal standard evolves, however, fewer and fewer such cases will arise, particularly those involving infants. That will only happen if we are courageous enough to declare that infants and children should not be corporally punished.

APPENDIX A

PROPOSED CORPORAL PUNISHMENT STATUTE

The Legislature hereby finds that each year within the state there have been at least ______ child deaths,\(^{270}\) ______ permanent injuries to children, and ______ serious injuries to children,\(^{271}\) all caused by parents or caretakers. The Legislature further finds that over ninety percent of these death and injuries are inflicted upon children less than five years old. The legislature further finds that often parents and caretakers inflict these deaths and injuries believing that the child deserves corporal punishment. The Legislature further finds that many parents and caretakers have not been informed about the dangers of hitting or shaking children under five years of age.

Therefore, the Legislature hereby declares that parents and caretakers shall not use corporal punishment upon or otherwise strike any child under five years of age for the purpose of punishment. There is no criminal penalty attached to this legislation.

The Legislature further instructs the Department of Health to develop and implement an educational program which will provide all parents and caretakers with information on how to raise and control young children without the use of physical discipline. This educational program shall be implemented in all counties and shall be offered free of charge.

\(^{270}\) The numbers for any state can be estimated using the figures collected by Philip McClain et al., Geographic Patterns of Fatal Abuse or Neglect in Children Younger than 5 Years Old, United States, 1979 to 1988, 148 PEDIATRICS & ADOLESCENT MED. 82-86 (1994). Based on their research, for example, the range of annual child abuse and neglect deaths among children younger than five years for Colorado is 13 to 25, for Ohio 34 to 68, for Louisiana 21 to 45 and for California 98 to 209. See id.; see also STATE CHILD DEATH REVIEW BOARD, CAL. DEP'T OF JUSTICE, CHILD DEATHS IN CALIFORNIA (1994).

\(^{271}\) The number for each state can be derived from the National Incidence and Prevalence of Child Abuse and Neglect: The 1988 Revised Report (NIS-2), which found that 10-to-15% of all “countable cases of child maltreatment” resulted in serious injuries. By taking the number of substantiated child abuse cases in a state and multiplying by the 10-to-15% estimate, a state’s number of serious abuse cases can be approximated. For example, in 1993, California reported 161,612 substantiated child abuse cases. NAT'L CTR. ON CHILD ABUSE & NEGLECT, U.S. DEP'T HEALTH & HUMAN SERVS., CHILD MALTREATMENT: 1993 REPORTS FROM THE STATES TO THE NATIONAL CENTER ON CHILD ABUSE AND NEGLECT 3-6 (1995). Using the 10-to-15% estimate from NIS-2, 16,000 to 24,000 serious abuse cases occurred in California in 1993. The number for other states can be based on their substantiated cases of child abuse and neglect. See id.