

2016

Reforming (But Not Eliminating) the Parental Discipline Defense

Hazel Blum

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Recommended Citation

Hazel Blum, *Reforming (But Not Eliminating) the Parental Discipline Defense*, 49 U. MICH. J. L. REFORM 921 (2016).
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REFORMING (BUT NOT ELIMINATING) THE PARENTAL DISCIPLINE DEFENSE

Hazel Blum

The right of parents to physically discipline their children is ingrained in American culture and recognized in our laws. Forty-nine states, through statute or common law, allow parental corporal punishment under the premise that properly administered parental discipline promotes child welfare and helps encourage proper behavior. This Note will examine the subset of states that have codified this right as an affirmative defense to acts of physical violence that would otherwise qualify as assault. First, Part II of this Note will examine the history of parental discipline in the United States, its connection to religion, and recent developments in international law. Part III will survey current sociological research that examines how corporal punishment affects child welfare. Then, Part IV will compare twenty-five states, identifying different ways the right to parental discipline has been reflected in statute. Finally, drawing from scientific literature, Part V will argue that the parental discipline defense should be retained, but will propose amending state statutes to justify a very narrow range of permissible discipline—namely, discipline that peer-reviewed research has shown to have beneficial or neutral effects on children. Finally, Part V will suggest changes that can be made to implement this reform.

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I. INTRODUCTION

In May 2014, NFL star Adrian Peterson used a switch to discipline his four-year-old son.¹ The young boy suffered multiple injuries, including “cuts and bruises to [his] back, buttocks, ankles, legs and scrotum, along with defensive wounds to [his] hands.”² Despite inflicting such severe harm, Peterson characterized his behavior as appropriate parental discipline with unintentional consequences.³ Following his felony indictment in Texas, Peterson later pleaded no contest to misdemeanor assault charges and served no jail time.⁴ The Peterson case ignited a public debate about whether, and how, parents should physically discipline their

1. Eric Prisbell & Brent Schrottenboer, *Adrian Peterson Avoids Jail Time in Child Abuse Case*, USA TODAY: SPORTS (Nov. 4, 2014, 8:46 PM), <http://www.usatoday.com/story/sports/nfl/vikings/2014/11/04/adrian-peterson-minnesota-vikings-child-abuse-plea-deal-misdemeanor/18466197/>.

2. Des Bieler, *The Details of Adrian Peterson’s Arrest Are Disturbing*, WASH. POST: EARLY LEAD (Sept. 12, 2014), <http://www.washingtonpost.com/blogs/early-lead/wp/2014/09/12/the-details-of-adrian-petersons-arrest-are-disturbing/>.

3. *Statement from Adrian Peterson*, MINNESOTA VIKINGS: NEWS (Sept. 15, 2014), <http://www.vikings.com/news/article-1/Statement-From-Adrian-Peterson/aabb41f8-1afe-4133-8b30-71390b6a3fbf>.

4. Peterson paid a \$4,000 fine and agreed to perform eighty hours of community service as a part of his plea. Lynn Zinser, *Peterson of Vikings Agrees to Deal in Child-Abuse Case*, N.Y. TIMES, Nov. 5, 2014, at B13, <http://www.nytimes.com/2014/11/05/sports/football/vikings-adrian-peterson-reaches-plea-deal-in-child-abuse-case.html>.

children,⁵ and opened a public discussion on state laws governing parental corporal punishment.⁶

Forty-nine states⁷ allow parents to use physical force as a disciplinary tool, recognizing the right either through statute or common law.⁸ Texas is one of twenty-five states that have codified the right to use force against children as an affirmative defense to allegations of assault. Texas's defense largely hinges on the 'reasonableness' of the parent's actions, a question of fact that is typically decided by a jury.⁹ This standard is vague and does not give juries much guidance—although Peterson's use of a switch to discipline his son would likely violate Texas law, the statute is too ambiguously worded to guarantee that outcome. Yet, a review of similar statutes in twenty-four other states reveals that, with few exceptions, most feature similarly broad wording. These broad, permissive statutes provide abusive parents with a shield from criminal liability and a license to continue abusive parenting.

Supporters of corporal punishment contend that discipline reasonably administered by a parent or guardian promotes good behavior and general welfare.¹⁰ But while the states have relied on this broad rationale to justify a wide range of corporal punishment practices,¹¹ the welfare rationale conflicts with social science research. Peer-reviewed studies of the short- and long-term effects of corporal punishment suggest that, as a whole, children are indisputably harmed by anything worse than mild corporal punishment, such as spanking the butt with an open hand.¹² Yet most states have

5. E.g., Victoria Taylor, *Discipline or Abuse? Adrian Peterson Case Reignites Corporal Punishment Debate*, N.Y. DAILY NEWS: HEALTH (Sept. 14, 2014, 4:42 PM), <http://www.nydailynews.com/life-style/health/adrian-peterson-case-revives-corporal-punishment-debate-article-1.1939370>; see also *Expert: Line Between Discipline and Child Abuse a "Grey Blur"*, CBS NEWS (Sept. 16, 2014, 11:02 AM), <http://www.cbsnews.com/news/adrian-peterson-case-line-between-discipline-and-child-abuse-a-gray-blur/>.

6. E.g., Denver Nicks, *Hitting Your Kids is Legal in All 50 States*, TIME, Sept. 17, 2014, <http://time.com/3379862/child-abuse/>.

7. Valerie Strauss, *Nineteen States Still Allow Corporal Punishment in School*, WASH. POST: ANSWER SHEET, Sept. 18, 2014, <http://www.washingtonpost.com/blogs/answer-sheet/wp/2014/09/18/19-states-still-allow-corporal-punishment-in-school/>; see also Corey Adwar, *These Are the Nineteen States That Still Let Public Schools Hit Kids*, BUSINESS INSIDER (March 28, 2014, 11:55 AM), <http://www.businessinsider.com/19-states-still-allow-corporal-punishment-2014-3>.

8. Deana Pollard, *Banning Child Corporal Punishment*, 77 TUL. L. REV. 575, 635 (2003).

9. See, e.g., *Assiter v. State*, 58 S.W.3d 743, 749–53 (Tex. App. 2000).

10. Robert Larzelere, *Child Outcomes of Nonabusive and Customary Physical Punishment by Parents: An Updated Literature Review*, 3 CLINICAL CHILD AND FAM. PSYCHOL. REV. 199, 210, 215 (2000).

11. E.g., Tex. Penal Code Ann. § 9.61; N.H. Rev. Stat. Ann. § 627:6; Neb. Rev. Stat. § 28-1413.

12. See Diana Baumrind, *Does Causally Relevant Research Support a Blanket Injunction Against Disciplinary Spanking by Parents?* Invited Address at the 109th Annual Convention of

written their statutes to facially permit use of much heavier force based on the unsupported fiction that it promotes child welfare.¹³

This Note argues that although states should retain the parental discipline defense, their legislators should rewrite their statutes to limit the defense to a specific range of disciplinary methods that social science research has shown to have either net-beneficial or net-neutral effects on children. Part II explores religious and cultural attitudes about corporal punishment, including an overview of traditional American attitudes toward corporal punishment. Specifically, it explores how religious teachings, including Evangelical Christianity, Methodism, and Judaism, affect attitudes towards parental discipline. Additionally, Part II will examine the build-up to and aftermath of Sweden's ban on corporal punishment—the first nation worldwide to codify such a ban. Part III looks at recent social science research into corporal discipline's effects on children. Sociological studies demonstrate that severe forms of corporal punishment harm children, even though they are permissible under the laws of many states. Part IV analyzes twenty-five state parental discipline statutes, identifying a three-element framework that most of these statutes share in common. This three-element framework will be utilized in Part V to suggest statutory revisions in order to better protect child welfare. Finally, Part V first argues that, because parental corporal punishment is deeply rooted in many segments of American culture, it should be moderated rather than abolished. Using the framework from current statutes, this Part suggests reforms that would enable states to prohibit harmful corporal punishment while preserving a narrowly defined right of parents to use mild forms of corporal punishment under specific conditions.

II. BACKGROUND: ATTITUDES TOWARDS CORPORAL PUNISHMENT THROUGHOUT THE WORLD

A successful effort to reform state corporal punishment laws must first recognize the religious traditions and sociopolitical factors that influence parents' behaviors and beliefs. In particular, the teachings of the Christian Old Testament and Jewish Tanakh contain verses that many followers construe as child-rearing

the Am. Psychological Ass'n 1 (Aug. 24, 2001), prdupl02.ynet.co.il/ForumFiles//12221272.pdf.

13. See, e.g., ALASKA STAT. ANN. § 11.81.430 (West 2015) (permitting a parent to use appropriate *non-deadly* force).

proscriptions from God that must be adhered to. Additionally, corporal punishment has been grappled with internationally, both by legislation within individual countries and through international treaties. International inertia toward limiting corporal punishment, coupled with lessons that the United States can learn through bans in other western democracies such as Sweden, provide important context and insight that can be used to reform parental discipline domestically.

A. Child Welfare and the Old Testament/Tanakh

The Old Testament is often cited in support of corporal punishment, particularly the following verses from the Book of Proverbs:

He that spareth his rod hateth his son: but he that loveth him chasteneth him betimes.¹⁴

Chasten thy son while there is hope, and let not thy soul spare for his crying.¹⁵

Foolishness is bound in the heart of a child; but the rod of correction shall drive it far from him.¹⁶

Withhold not correction from the child: for if thou beatest him with the rod, he shall not die.¹⁷

Thou shalt beat him with the rod, and shalt deliver his soul from hell.¹⁸

The Evangelical Christian, Methodist, and Jewish faiths provide three examples of how different approaches to exegesis produce different attitudes on corporal punishment.

1. The Evangelical and Methodist Churches: Divergent Perspectives

Most Christian denominations follow the Old Testament and generally adhere to its teachings. However, these denominations

14. *Proverbs* 13:24 (King James).

15. *Proverbs* 19:18 (King James).

16. *Proverbs* 22:15 (King James).

17. *Proverbs* 23:13 (King James).

18. *Proverbs* 23:14 (King James).

differ on how literally the text of the Old Testament should be interpreted, with diverging views on whether religion *requires* or simply *encourages* corporal punishment.

A central tenet of Christianity is the concept of original sin.¹⁹ Stemming from the Fall of Adam and Eve, this doctrine holds that all children are born inherently sinful and cannot be redeemed except by God's grace. Salvation requires adherence to the Bible, which, if read literally, commands parents to chastise their children with a rod. Parents who interpret the Bible literally may believe that subjecting their children to corporal punishment will help set them on the path to heaven.²⁰ In particular, many Evangelical Christians²¹ are biblical literalists and believe that the Bible affirmatively requires such discipline.²² Evangelicalism urges parents to "respond to a child's willful defiance through the use of physical discipline."²³ The passage in *Proverbs* "supports the frequent—yet bounded and restrained—use of corporal punishment by evangelical parents."²⁴ According to Focus on the Family, an independent organization associated with Evangelical Christianity, even provides a seven-step guide detailing proper spanking practice. A parent should: 1) Clearly warn—first interaction should be verbal; 2) Establish responsibility—ask "Johnny, what did you do wrong?"; 3) Avoid embarrassment; 4) Communicate grief; 5) Flick your wrist; 6) Sincere repentance; 7) Unconditional love.²⁵ The guide further directs parents to use a "wooden spoon or some other appropriately sized paddle and flick your wrist. That's all the force you need. It ought to hurt . . . and it's okay if it produces a few tears and sniffles."²⁶ The spoon, of course, is a stand-in for the biblical

19. See *Romans* 5:12.

20. *Proverbs* 23:14.

21. Evangelical Christianity is a movement that spans across Christian denominations, united by common principles that include "a high regard for and obedience to the Bible as the ultimate authority." They also stress Christ's sacrifice as enabling humanity's redemption, and believe religious teachings should spur activism on social issues. See *What is an Evangelical?*, NAT'L ASS'N OF EVANGELICALS, <http://nae.net/what-is-an-evangelical/> (last visited Apr. 9, 2016).

22. John P. Bartowski et al., *Conservative Protestant Discipline: Authority and Affection in Evangelical Families*, HARFORD INST. FOR RELIGION RESEARCH, <http://hrr.hartsem.edu/research/parentingandevangelicals.html> (last visited Apr. 9, 2016); Victor I. Vieth, *From Sticks to Flowers: Guidelines for Child Protection Professionals Working with Parents Using Scripture to Justify Corporal Punishment*, 40 WM. MITCHELL L. REV. 907, 912–22 (2014).

23. *Bartowski*, *supra* note 22.

24. *Id.*

25. Chip Ingram, *The Biblical Approach to Spanking*, FOCUS ON THE FAMILY, <http://www.focusonthefamily.com/parenting/effective-biblical-discipline/effective-child-discipline/biblical-approach-to-spanking> (last visited Apr. 28, 2015).

26. *Id.*

“rod.”²⁷ The guide clarifies that the purpose of spanking should always be to discipline (“to train for correction and maturity”) and never to punish (“to inflict a penalty for an offense”).²⁸

By contrast, the United Methodist Church takes a very different approach to biblical interpretation, and therefore a different stance on corporal punishment as well. Methodist interpretation of Scripture “seek[s] to relate the old words to life’s present realities.”²⁹ According to the church, “The Bible’s authority is . . . nothing magical. For example, we do not open the text at random to discover God’s will. The authority of Scripture derives from the movement of God’s spirit in times past and in our reading of it today.”³⁰

In 2004, this dynamic approach to biblical exegesis led the United Methodist Church to pass a resolution encouraging parents and schools to end corporal punishment.³¹ In 2012, the church reaffirmed this resolution, cautioning parents that “research has associated corporal punishment with increased aggression in children and adults, increased substance abuse, increased risk of crime and violence, low self-esteem, and chronic depression [I]t is difficult to imagine Jesus of Nazareth condoning any action that is intended to hurt children physically or psychologically Therefore . . . The United Methodist Church encourages its members to adopt discipline methods that do not include corporal punishment.”³²

2. Israel and Judaism

Jewish religious tradition plays a major role in shaping beliefs about corporal punishment, as demonstrated by Israeli family law. Special religious courts adjudicate matters of family law,³³ and those courts’ positions on corporal punishment changed significantly in

27. *See id.*

28. Chip Ingram, *Punishment Versus Discipline*, FOCUS ON THE FAMILY, <http://www.focusonthefamily.com/parenting/effective-biblical-discipline/effective-child-discipline/punishment-versus-discipline> (last visited Apr. 9, 2016).

29. *Our Christian Roots: The Bible*, UNITED METHODIST CHURCH, <http://www.umc.org/what-we-believe/our-christian-roots-the-Bible> (last visited Apr. 9, 2016).

30. *Id.*

31. *Discipline Children Without Corporal Punishment*, UNITED METHODIST CHURCH, <http://www.umc.org/what-we-believe/discipline-children-without-corporal-punishment> (last visited Apr. 9, 2016); Rita Swan, *Religious Attitudes on Corporal Punishment*, CHILDREN’S HEALTH CARE, http://childrenshealthcare.org/?page_id=146 (last visited Apr. 9, 2016).

32. *Discipline Children Without Corporal Punishment*, *supra* note 31.

33. Pascale Fournier et al., *Secular Rights and Religious Wrongs? Family Law, Religion and Women in Israel*, 18 WM. & MARY J. WOMEN & L. 333, 335 (2012).

the latter half of the twentieth century. In 1953, the Israeli Supreme Court adopted the parental discipline defense in the case of *Dalal Rassi*.³⁴ Justice Cheshlin opined that “parents are entitled to inflict corporal punishment upon their children in order to educate them in the correct paths and to teach them discipline . . . [but they] are obliged to exercise the greatest care, and may only inflict punishment which are humane and reasonable”³⁵ In 2000, Israel’s Supreme Court reversed course in the *Anonymous* case, removing the parental discipline defense and holding that any form of corporal punishment conflicted with a child’s right to “dignity and bodily integrity.”³⁶

The Israeli courts have referred to religious sources “as a basis for the curtailment of corporal punishment.” In *Anonymous*, Judge Rotlevi discussed *Proverbs*, reasoning that “the term rod refers to verbal chastisement . . . [and] is merely a call to the parent to educate his son through admonition and moral persuasion. Under no circumstances is this a call to spank the child.” Judge Melamed reached the same conclusion after interpreting *Proverbs*, determining that the reference to a rod must be interpreted “metaphorically rather than literally.”³⁷

The Israel Supreme Court’s recent move to restrict corporal punishment is in line with evolving interpretations of the Tanakh. The prevailing rabbinical interpretation of the “rod” in *Proverbs* is broad and non-literal.³⁸ The rod, according to some rabbinical scholars, represents more than a physical rod—it encompasses verbal chastisement and other non-physical means of discipline.³⁹ As Victor Vieth explains, “[I]n the circles of Jewish scholarship . . . smacking is not the place to start with eliminating bad habits or traits. If used at all, it is the last resort.”⁴⁰

34. CA 7/53 *Rassi v. Attorney General*, 7 PD 790 (1953) (Isr.).

35. *Id.*

36. CA 4596/98 *Anonymous v. The State of Israel*, 54(1) PD 145 (2000) (Isr.); *see also* Vieth, *supra* note 22, at 927.

37. CA 4596/98 *Anonymous v. The State of Israel*, 54(1) PD 145 (2000) (Isr.); Tamar Morag, *Religious Tradition and the Corporal Punishment of Children: A Comparison of the American and Israeli Legal Systems*, 25 INT’L J.L., POL’Y & FAM. 338, 357 (2011).

38. CA 4596/98 *Anonymous v. The State of Israel*, 54(1) PD 145 (2000) (Isr.); *see also* Vieth, *supra* note 22, at 925–26.

39. *See* Morag, *supra* note 37, at 357.

40. Vieth, *supra* note 22, at 926.

B. American Cultural Attitudes

The religious faith of Puritans in colonial America influenced early child discipline practices in burgeoning America.⁴¹ In 1620, Puritans broke away from the Church of England and emigrated from England in the 1600s to found colonies throughout New England. The Puritans disappeared as a formal group at the end of the seventeenth century, but their ethos continued to influence American culture.⁴² Puritan thought fixated on the biblical notion of original sin and corruption, believing that “only by severe and unremitting discipline could they achieve good.”⁴³

This emphasis on discipline appears in early colonial laws. In 1646, legislators in the Massachusetts colony passed a law allowing parents to put their son to death if he “will not obey the voice of his Father, or the voice of his Mother, and that when they have chastened him [he] will not harken unto them.”⁴⁴ Such laws reflected the prevailing view was that corporal punishment was “a desirable and necessary instrument of restraint upon sin and immorality.”⁴⁵ After the Revolutionary War, the colonial attitude toward corporal punishment persisted, albeit in more moderated forms.⁴⁶

America’s continuing acceptance of parental corporal punishment is consistent with “the sanctuary the family has enjoyed” from the reach of criminal law.⁴⁷ For example, spousal domestic violence was rarely prosecuted for much of the twentieth century,⁴⁸ and most states did not criminalize intra-marital rape until the 1970s.⁴⁹ Similarly, while accepting that a parent possesses “authority in her own household and in the rearing of her children,” the Supreme Court

41. See Nina Kang, *Puritanism and Its Impact Upon American Values*, 1 REV. EUR. STUD. 148, 149 (2009), <http://www.ccsenet.org/journal/index.php/res/article/viewFile/4585/3924> (“To the Puritans, a person by nature was inherently sinful and corrupt, and only by severe and unremitting discipline could they achieve good.”); see also MATTHEW PATE & LAURIE A. GOULD, *CORPORAL PUNISHMENT AROUND THE WORLD* 18 (2012).

42. *Id.* at 148, 151.

43. *Id.* at 149.

44. MAX FARRAND, *Introduction to THE LAWS AND LIBERTIES OF MASSACHUSETTS* 6 (photo. reprint Harvard Univ. Press. 1929) (1648).

45. Leonard P. Edwards, *Corporal Punishment and the Legal System*, 36 SANTA CLARA L. REV. 983, 988 (1996).

46. See *id.* at 988–89.

47. Dan Markel et al., *Criminal Justice and the Challenge of Family Ties*, 2007 U. ILL. L. REV. 1147, 1190 (2007) (“[I]n the context of crimes against children, the sanctuary the family has enjoyed against the criminal law has served in particular to perpetuate child abuse and neglect.”).

48. *History of Battered Women’s Movement*, IND. COAL. AGAINST DOMESTIC VIOLENCE, <http://www.icadvinc.org/what-is-domestic-violence/history-of-battered-womens-movement/> (last visited Apr. 10, 2016).

49. *Id.*

has recognized that society has an interest in protecting child welfare, especially “when only secular matters are concerned.”⁵⁰ In 1944, the Court explained that “the family itself is not beyond regulation in the public interest . . . [a]nd neither rights of religion nor rights of parenthood are beyond limitation . . . when state action impinges upon a claimed religious freedom, it must fall unless shown to be necessary for or conducive to the child’s protection against some clear and present danger.”⁵¹

In 1977, the Supreme Court elaborated on the fine line between parental and state interests in *Ingraham*, an Eighth Amendment challenge to corporal punishment in schools.⁵² Ultimately, holding that its use in schools was not cruel and unusual punishment, the Court explained that the practice must be considered against a “background of historical and contemporary approval of reasonable corporal punishment.”⁵³ The court permitted states to impose reasonable corporal punishment, considering the “seriousness of the offense, the attitude and past behavior of the child, the nature and severity of the punishment, and age and strength of the child, and the availability of less severe and equally effecting means of discipline.”⁵⁴

In 2015, corporal punishment remains prevalent in the United States. Forty-nine states and the District of Columbia definitively allow corporal punishment either by statute or through common law.⁵⁵ An additional nineteen states permit corporal punishment in schools.⁵⁶ Furthermore, recent public opinion polls reveal that parental corporal punishment enjoys strong support among the American public. In 2012, an estimated seventy percent of Americans supported spanking.⁵⁷ Breaking down the public opinion data by religion, religiosity, region, race, and political party reveals distinct trends. Born-again Christians are more supportive of spanking than their non-born-again counterparts, African Americans more than Caucasians, Southerners and Midwesterners more

50. *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944).

51. *Id.* at 166–67.

52. *Ingraham v. Wright*, 430 U.S. 651 (1977).

53. *Id.* at 663.

54. *Id.* at 662.

55. Minnesota has a patchwork of laws that many analyses interpret to ban parental corporal punishment. See Victor I. Vieth, *When Parental Discipline is a Crime: Overcoming the Defense of Reasonable Force in the Investigative State*, 16 UPDATE, no. 10 (Nat’l District Attorney’s Ass’n, Alexandria, Va.), Nov. 10, 2004, http://www.ndaajustice.org/ncpca_update_v16_no10.html (last visited Apr. 10, 2016).

56. Strauss, *supra* note 7.

57. See Harry Enten, *Americans’ Opinions on Spanking Vary By Party, Race, Region And Religion*, FIVETHIRTYEIGHT (Sept. 15, 2014, 4:49 PM), <http://fivethirtyeight.com/datalab/americans-opinions-on-spanking-vary-by-party-race-region-and-religion/> (last visited Apr. 10, 2016).

than Westerners and Northeasterners, and Republicans more than Democrats.

SELF-IDENTIFICATION WITH SPANKING⁵⁸

Religion	Born-again Christians	80%
	Not born-again Christians	65%
Race	African American	82%
	White	71%
Region	South	78%
	Midwest	74%
	West	65%
	Northeast	65%
Political Affiliation	Republican	80%
	Independent	70%
	Democrat	65%

C. The Tension Between Parental Autonomy and Child Welfare under United States Law

The majority approach to corporal punishment in the United States creates the following disconnect: a stranger who smacks a child on the street may be liable for assault, yet a parent who engages in the same conduct may enjoy broad statutory protection. This Part will briefly describe major Supreme Court cases that have helped to articulate the purpose of this distinction—why parental status alone justifies what would otherwise be criminal behavior.

States that have adopted the parental discipline defense via statute have uniformly phrased the defense as a justification for what would otherwise be criminal behavior. The implicit assumption that a parent best knows how to raise her children has been legally recognized, but is not without limitations.⁵⁹

Two Supreme Court cases from the 1920s, *Meyer*⁶⁰ and *Pierce*,⁶¹ framed the parental right of control as a liberty interest protected by substantive due process.⁶² *Meyer* reasoned that substantive due process “denotes not merely freedom from bodily restraint but also the right of the individual to . . . establish a home and bring up

58. *Id.*

59. *See, infra* note 66, and accompanying text.

60. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

61. *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925).

62. *See* Tamar Ezer, *A Positive Right to Protection for Children*, 7 YALE HUM. RTS. & DEV. L.J. 1, 12 (2004).

children.”⁶³ In 1944, the Supreme Court in *Prince* elaborated on this balance:

To make accommodation between these freedoms and an exercise of state authority always is delicate On one side is the obviously earnest claim for freedom of conscience and religion practice. With it is allied the parent’s claim to authority in her own household and in the rearing of her children Against these sacred private interests, basic in a democracy, stand the interests of society to protect the welfare of children, and the state’s assertion of authority to that end⁶⁴

In 1972, the Supreme Court moderated this right in *Yoder*, holding that parents (but not the state) have a “fundamental interest . . . to guide the religious future and education of their children.”⁶⁵ While affirming parents’ rights to control certain elements of a child’s upbringing, the Court carved out a limitation. The *Yoder* court held that the “power of the parent . . . may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.”⁶⁶

Finally, in 1979, the Supreme Court in *Parham*⁶⁷ considered whether parents may have their children committed to mental institutions against their will and in the absence of procedural formalities accorded to adults. The *Parham* court sided with the parents, reasoning that:

The law’s concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interest of their children.⁶⁸

Examining the legal landscape, Tamar Ezer posits that while *Parham* established a strong presumption that a parent has her child’s best interest in mind, “parental control is not absolute and

63. Meyer, 262 U.S. at 399.

64. *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944).

65. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); see also Ezer, *supra* note 62, at 13.

66. *Yoder*, 406 U.S. at 233.

67. *Parham v. J.R.*, 442 U.S. 584 (1979).

68. *Id.* at 602; see also Ezer, *supra* note 62, at 14–15.

hinges on the theory that it supports the child's best interests."⁶⁹ Thus, parental discipline must be analyzed with this imprecise limitation in mind.

D. The International Landscape

While corporal punishment remains legal in the United States, momentum has been building internationally—particularly in Europe—to ban the practice altogether. Worldwide, forty-nine nations have banned corporal punishment through legislation,⁷⁰ including twenty-eight members of the Council of Europe.⁷¹ The United Nations and Council of Europe have both ratified treaties that have been interpreted as categorically banning corporal punishment.⁷² These international trends have pressured observers here in the United States to reevaluate our own country's laws and norms.

Sweden's experience in particular provides a lens through which to view potential reform in America. In 1979, Sweden became the first nation to adopt a total ban on corporal punishment.⁷³ Although child abuse has abated in Sweden, the efficacy of this ban has been hotly debated and studied by sociologists. Much has been written on whether per se bans on all corporal punishment actually affect rates of child abuse, using Sweden as the primary case study.

The build-up to Sweden's affirmative ban was gradual. In 1949, Sweden amended its parental discipline defense, clarifying that although parents could "reprimand" their children, they could not "punish" them.⁷⁴ In 1957, Sweden completely retracted the parental discipline defense.⁷⁵ However, in spite of removing the

69. Ezer, *supra* note 62, at 15.

70. *States Which Have Prohibited All Corporal Punishment*, GLOBAL INITIATIVE TO END ALL CORPORAL PUNISHMENT: GLOBAL PROGRESS, <http://www.endcorporalpunishment.org/progress/prohibiting-states/> (last visited Apr. 10, 2016).

71. *Corporal Punishment: Progress Across Europe*, COUNCIL OF EUR.: CHILDREN, <http://www.coe.int/en/web/children/corporal-punishment> (last visited Apr. 10, 2016).

72. Susan H. Bitensky, *The United Nations Convention on the Rights of the Child and Corporal Punishment of Children: Ramifications for the United States*, 5 *Geo. J. ON FIGHTING POVERTY* 225, 227 (1998); *Corporal Punishment*, *Council of Europe*, <http://www.coe.int/en/web/children/corporal-punishment>.

73. Jonas Fredén, *First Ban On Smacking Children*, SWED.: SOCIETY, <https://sweden.se/society/smacking-banned-since-1979/> (last updated Dec. 14, 2015).

74. Dennis Alan Olsen, *The Swedish Ban of Corporal Punishment*, 1984 *BYU L. REV.* 447, 448 (1984).

75. *Id.*

affirmative defense, the Swedish courts continued to recognize parents' right to discipline their children by curtailing the prosecution and conviction of parents.⁷⁶

The tide turned further against corporal punishment in the 1970s. In a widely publicized case, a father was acquitted after inflicting a severe beating on his daughter, sparking public outrage.⁷⁷ By 1971, public opinion was shifting away from corporal punishment.⁷⁸ In response to a national survey asking whether corporal punishment by parents was "necessary," only thirty-five percent responded in the affirmative, and by 1978, that number had fallen to twenty-six percent.⁷⁹ In response, Swedish lawmakers passed a law in 1979 explicitly providing that children "may not be subject to physical punishment or other injurious or humiliating treatment."⁸⁰

Numerous studies have attempted to evaluate the efficacy of the ban, questioning whether it succeeded in reducing the rate of child abuse in Sweden,⁸¹ or whether it merely interfered with parental discipline and made Swedish children more unruly.⁸² In 1999, sociologists Robert Larzelere and Byron Johnson surveyed eight studies that looked into the effects of Sweden's spanking ban, which concluded that "available evidence does not indicate that the ban has reduced Sweden's rate of child abuse."⁸³ In fact, they found that criminal abuse of children under the age of seven actually increased 489 percent from 1981 to 1994. Larzelere and Johnson hypothesized that "the prohibition of all spanking [eliminated] a type of mild spanking that [would have prevented] further escalation of aggression within disciplinary incidents."⁸⁴ In 2005, however, psychologists Joan Durrant and Steffan Janson investigated whether Larzelere and Johnson's assessment was correct.⁸⁵

76. *Id.* at 450.

77. Joan E. Durrant, *The Swedish Ban on Corporal Punishment: Its History and Effect*, in *FAMILY VIOLENCE AGAINST CHILDREN: A CHALLENGE FOR SOCIETY* 21 (Detlev Frehsee et al. eds., 1996).

78. Olsen, *supra* note 74, at 450.

79. *Id.*; Joan Senzek Solheim, *A Cross-cultural Examination of Use of Corporal Punishment on Children: A Focus on Sweden and the United States*, 6 *CHILD ABUSE & NEGLECT* 147, 152 (1982).

80. Olsen, *supra* note 74, at 447.

81. Robert Larzelere & Byron Johnson, *Evaluations of the Effects of Sweden's Spanking Ban on Physical Child Abuse Rates: A Literature Review*, 85 *PSYCHOL. REP.* 381, 381-92 (1999), <http://www.amsciepub.com/doi/pdf/10.2466/pr0.1999.85.2.381>.

82. *See generally* Jason M. Fuller, *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, 264-68 (2009).

83. Larzelere & Johnson, *supra* note 81, at 390.

84. *Id.*

85. *See generally* Joan E. Durrant & Steffan Janson, *Law Reform, Corporal Punishment, and Child Abuse: The Case of Sweden*, 12 *INT'L REV. VICTIMOLOGY* 139 (2005).

After undertaking a similar survey of past studies, they concluded that “the prevalence, frequency and harshness of physical punishment have declined dramatically in Sweden over two generations.”⁸⁶

On the other hand, some commentators hypothesized that the ban may have actually *removed* a valuable tool from the parental toolkit, reducing parents’ ability to impose the kind of discipline that is beneficial for child development.⁸⁷ Some have blamed the 1979 ban for contributing to “a nation of ill-mannered brats.”⁸⁸ Critics argue that without spanking, more parents resort to “helpless, explosive, and counterproductive” methods of control, because they have “difficulty controlling their children without physical intervention.”⁸⁹ Others have observed anecdotally that, without a physical means of intervention, “most parents resorted to yelling and screaming at their children, and some believed this was equally, perhaps more, destructive.”⁹⁰

In sum, the combined scholarship on the effects of Sweden’s ban is inconclusive. It is impossible to control for the plethora of concurrent variables necessary to decipher what precipitates changes in behavior, including increased reporting of alleged abuse⁹¹ and economic and technological developments.⁹²

III. SOCIOLOGICAL RESEARCH ON CORPORAL PUNISHMENT

All twenty-five states examined in Part IV have codified a parent’s right to reasonably discipline her child as an affirmative defense to a charge of assault. Furthermore, all twenty-five statutes share an additional common thread: for a parent to invoke the defense, the parent’s action must have been undertaken to promote the child’s welfare. These defenses derive from the common assumption that reasonable parental discipline confers benefits on children that outweigh any resulting harm.⁹³

Before proceeding, it is crucial to consider whether this rationale has empirical support. If so, then the defense may be legitimate. If

86. *Id.* at 149.

87. See Richard Orange, *Swedish Parenting Has Created a Nation of Brats*, TELEGRAPH (Nov. 1, 2013, 7:54 PM), <http://www.telegraph.co.uk/news/worldnews/europe/sweden/10421246/Swedish-parenting-has-created-nation-of-brats.html>.

88. *Id.*

89. Fuller, *supra* note 82, at 266, 267.

90. *Id.* at 266.

91. See Larzelere & Johnson, *supra* note 81, at 389.

92. See *id.*

93. See, e.g., Kimberlie Young, *An Examination of Parental Discipline as a Defense of Justification*, 46 NAVAL L. REV. 1, 4–7 (1999).

not, then the primary justification for the defense lacks merit. This Part addresses this question by examining sociological research on parental discipline. Some prominent studies have found that physical discipline is often harmful to children, with few or no offsetting benefits. Other studies have taken a more nuanced approach, arguing that although moderate to severe forms of corporal punishment are harmful, milder forms, including spanking with an open hand, are harm-neutral or even beneficial for children. Because social science research has not conclusively shown that mild corporal punishment harms children, this Part argues that milder forms of corporal punishment should remain legal, and that states should amend their statutes so that only these mildest forms of punishment are permissible.

A. *Leading Research Cited Against Corporal Punishment*

Elizabeth Gershoff, a leading sociologist whose research focuses on how parental discipline affects child and youth development,⁹⁴ insists that even the mildest forms of parental discipline inflict more harm than good.⁹⁵ She defines corporal punishment as “non-injurious, open-handed hitting with the intention of modifying child behavior.”⁹⁶ Gershoff divides the putative benefits of corporal punishment into two categories: short-term compliance and long-term compliance. Short-term compliance occurs when the administration of discipline stops a child’s misbehavior in the immediate present.⁹⁷ Long-term compliance consists of “reducing the likelihood that the child will repeat the undesirable behavior and increasing the likelihood that the child will behave in socially acceptable ways.”⁹⁸

Gershoff’s case studies suggest that corporal punishment and a time-out in a locked room achieve the same short-term compliance benefits.⁹⁹ In other words, administering physical force does not confer any marginal disciplinary benefit over non-forceful techniques.

94. A brief biography and select list of Ms. Gershoff’s publications can be viewed on the University of Texas-Austin’s website, where she serves as an Associate Professor of Human Ecology: <http://www.utexas.edu/cola/prc/directory/faculty/ethomp>.

95. Elizabeth T. Gershoff, *More Harm than Good: A Summary of Scientific Research on the Intended and Unintended Effects of Corporal Punishment On Children*, 73 L. & CONTEMP. PROBS. 31, 47, 55–56 (2010).

96. *Id.* at 33.

97. *Id.* at 34–38.

98. *Id.* at 34.

99. *See id.* at 37.

Furthermore, she concludes that case studies of long-term compliance reflect poorly on corporal punishment. Thirteen out of fifteen studies found that “corporal punishment was significantly correlated with less long-term compliance and . . . pro-social behavior—in other words, corporal punishment was associated with worse rather than better child behavior.”¹⁰⁰ The remaining two studies reached a contrary result, finding that corporal punishment techniques were just as effective as non-physical techniques at achieving long-term compliance.¹⁰¹ Thus, Gershoff’s research shows that the two intended benefits of corporal punishment are either no more effective than non-physical alternatives, or actually harmful to children’s behavior.

Moreover, Gershoff and other sociologists describe a litany of negative, unintended consequences of corporal punishment. These include increased aggression; delinquent, criminal and anti-social behavior; lowered quality of the parent-child relationship; mental health issues; battered child syndrome; an increased likelihood the child will be a victim of physical abuse;¹⁰² and reduced cognitive ability.¹⁰³ In sum, Gershoff and others argue that “[o]n balance, the risk for harm from corporal punishment far outweighs any short-term good.”¹⁰⁴

B. Leading Research Cited in Support of Limited Corporal Punishment

Diana Baumrind¹⁰⁵ and Robert Larzelere,¹⁰⁶ psychologists who specialize in child behavioral research, have reached conflicting conclusions that both overlap with and diverge from Gershoff’s research. Baumrind’s study differentiated the frequency and intensity of corporal punishment, concluding that “frequent physical punishment with at least some intensity” correlates to detrimental child outcomes.¹⁰⁷ Likewise, Larzelere acknowledges

100. *Id.* at 37.

101. *Id.*

102. Elizabeth T. Gershoff, *Corporal Punishment by Parents and Associated Child Behaviors & Experiences: A Meta-Analytic and Theoretical Review*, 128 *PSYCHOL. BULL.* 539, 544 (2002).

103. *See id.* at 545–47.

104. Gershoff, *supra* note 95, at 56.

105. A biography of Mrs. Baumrind, a former professor at the University of California-Berkeley, can be found on the American Psychiatric Association website: <http://www.apadivisions.org/division-35/about/heritage/diana-baumrind-biography.aspx>.

106. A brief biography and select list of Mr. Larzelere’s publications can be viewed on the website of Oklahoma State University, where he serves as an Associate Professor of Human Development and Family Science: <http://humansciences.okstate.edu/facultystaff/faculty-profile.php?FacID=241>.

107. Baumrind, *supra* note 12, at 5.

that physical punishment that surpasses a certain threshold of severity is often detrimental, including whipping, punching, kicking, hitting, or attempting to injure someone when frustrated.¹⁰⁸

Once such cases are removed from consideration and other confounding variables are controlled for, both Baumrind and Larzelere conclude that mild corporal punishment—spanking, in particular—is not detrimental, and in many cases is a successful parenting strategy that benefits children in both the short- and long-term.¹⁰⁹ Baumrind defines spanking as “striking the child on the buttocks or extremities with an open hand without inflicting physical injury with the intention to modify behavior.”¹¹⁰ Additionally, Larzelere provides guidelines that are “characteristic of effective spanking”:

1. Not severe enough to cause more than a moderate level of distress;
2. Under control and planned, not impulsive;
3. Preferably between ages 2 and 6 and phased out as soon as possible between the ages of 7 and 12;
4. Used in conjunction with reasoning and explanation;
5. Used privately;
6. Motivated by child-oriented and not parent-oriented concern;
7. Used after a single warning to enforce a directive of time-out;
8. Used flexibly with recourse to other disciplinary tactics, rather than increasing the intensity of spanking.¹¹¹

In addition to differentiating between beneficial and harmful spanking, Baumrind critiques the methodology of sociologists who have concluded that all spanking is empirically detrimental, accusing them of confirmation bias.¹¹² She also notes that some surveys that conclude all corporal punishment is harmful fail to sufficiently differentiate between the frequency and severity of punishment, and thus use skewed results to support unfounded conclusions that even the mildest forms of correction are harmful.¹¹³

108. Larzelere, *supra* note 10, at 209.

109. *See id.* at 215 (expounding on the difference between effective and counter-productive physical punishment).

110. Baumrind, *supra* note 12, at 1.

111. Larzelere, *supra* note 10, at 215–16.

112. Baumrind, *supra* note 12, at 11–12.

113. *Id.* at 11.

IV. A COMPARATIVE ANALYSIS OF STATUTORY PARENTAL DISCIPLINE DEFENSES

A state-by-state analysis of parental discipline defenses reveals that most state statutes are so open-ended that a jury could find that moderate or severe forms of corporal punishment are legally justified. A side-along analysis of the twenty-five state statutes demonstrates that these defenses share certain characteristics in common. To raise parental discipline as an affirmative defense to assault, three criteria must be met: (1) physical force must be inflicted for a specific purpose (*e.g.*, discipline, child welfare), (2) the force employed must have a reasonable relationship to the purpose of discipline, and (3) the force must have fallen short of producing certain types of harm. Based on these three criteria, this Part proposes statutory reforms that states could employ to narrow the scope of justifiable discipline to the mildest forms of corporal punishment that research indicates may be harm-neutral.

A. Purpose

In all twenty-five of the states with parental discipline statutes, a parent or eligible guardian may not raise the defense unless she used force to discipline or to promote the child's welfare. This requirement precludes a parent from raising the defense if she acted with malign intent or her actions were not directed toward a corrective purpose, such as inflicting pain out of anger. The Model Penal Code provides an example of this requirement in context: A parent may only raise the defense if "force is used for the purpose of *safe-guarding or promoting the welfare* of the minor, including the *prevention or punishment of his misconduct*."¹¹⁴

While each state surveyed requires an approved parental purpose, the stated purposes are phrased in seven different, but overlapping, ways. Most states identify "welfare" and/or "discipline" as purposes required to invoke the defense.

114. MODEL PENAL CODE § 3.08 (AM. LAW INST. 2015) (emphasis added).

PURPOSES¹¹⁵

PURPOSE	STATES	TOTAL
Welfare or Discipline	Alabama, Colorado, Arkansas, Connecticut, New York, Oregon, Texas	7
Discipline	Arizona, Georgia, Louisiana, Utah, Washington	5
Safeguarding or Promoting Welfare, <i>including the prevention or punishment of misconduct</i>	Delaware, Hawaii, Nebraska, North Dakota, Pennsylvania MPC 3.08	5
Restrain or Correct	Montana, South Dakota, Washington	4
Welfare	Alaska, Kentucky, Missouri	3
Prevent or Punish Misconduct	New Hampshire	1
Care, supervision, discipline or safety	New Jersey	1

B. Reasonable Relationship Requirement

Twenty-three states place reasonableness limitations on the type of force that may be used. The force must have been “reasonable,” “appropriate,” or “necessary under the circumstances.” Additionally, the force must have been applied to serve one of the valid purposes named in the statute (e.g., discipline). For example, Kentucky requires that “the defendant believes that the force used is necessary to promote the welfare of a minor.”¹¹⁶ Three states—Delaware, Hawaii, and Washington—additionally require consideration of the punished child’s physical characteristics, including the child’s size, age, condition, strength, and the location and duration of force.¹¹⁷

Notably, MPC 3.08 does require a reasonable relationship between force and purpose. Only Pennsylvania and Nebraska—which have adopted the MPC verbatim—do not tie the use of force to reasonableness, appropriateness, or necessity.¹¹⁸

115. Citations for all statutes as well as their full content are located in the statutory appendix on file with author.

116. KY. REV. STAT. ANN. § 503.110 (West 2015).

117. DEL. CODE ANN. tit. 11, § 468 (West 2015); HAW. REV. STAT. ANN. § 709-906 (West 2015); WASH. REV. CODE ANN. § 9A.16.100 (West 2015).

118. See MODEL PENAL CODE § 3.08 (AM. LAW INST. 2015); NEB. REV. STAT. ANN. § 28-1413 (West 2015); 18 PA. CONS. STAT. AND CONS. STAT. ANN. § 509 (West 2015).

REASONABLE RELATIONSHIP¹¹⁹

RELATIONSHIP		STATES	TOTAL
Reasonably Necessary		Connecticut, Kentucky, Missouri, Montana, New Hampshire, New York, Oregon, Texas	8
Reasonable		Georgia, Hawaii, Louisiana, North Dakota, Wisconsin	6
Reasonably Necessary and Appropriate		Alaska, Alabama, Colorado, Arizona, Arkansas	5
Reasonable and Moderate		Delaware, South Dakota, Washington	3
Necessary		New Jersey, South Dakota, Utah	3
Child-specific considerations	Size	Delaware, Hawaii, Washington	3
	Age	Delaware, Hawaii, Washington	3
	Condition of child	Delaware, Washington	2
	Location of force	Delaware, Washington	2
	Strength	Delaware	1
	Duration	Delaware	1

C. Prohibitory Limitations

Thirteen states¹²⁰ categorically preclude a parent from using certain types of force and/or causing certain injuries to the child. Unlike reasonable relationship requirements, which examine the reasonableness of force in context, prohibitory limitations are context-independent. Regardless of the parent's purpose or intentions, she may not claim the parental discipline defense if she used any of the specified types of force or inflicted any of the specified injuries.

The specificity of these prohibitory limitations widely varies. For example, the Nebraska and Pennsylvania statutes contain very vague limitations, disqualifying the use of force when it causes "a substantial risk of causing death, serious bodily [injury], disfigurement, extreme pain or mental distress[,] or gross degradation."¹²¹ In contrast, Delaware, Hawaii, Washington, and Utah forbid very

119. Citations for all statutes as well as their full content are located in the statutory appendix on file with author.

120. Alaska, Delaware, Kentucky, Hawaii, Missouri, Nebraska, New Jersey, North Dakota, Pennsylvania, Texas, Utah, and Washington.

121. MODEL PENAL CODE § 3.08 (AM. LAW INST. 2015); NEB. REV. STAT. ANN. § 28-1413 (West 2015); 18 PA. CONS. STAT. AND CONS. STAT. ANN. § 509 (West 2015). *See also* UTAH CODE ANN. § 76-2-401 (West 2015) ("[Justification as a defense] is not available if the offense

specific acts and results, including interfering with breathing (all), striking with a closed fist (Delaware and Hawaii), biting (Hawaii), and causing bone fracture or intracranial bleeding (Utah).¹²²

PROHIBITORY LIMITATIONS¹²³

LIMITATION		STATES	TOTAL
MPC 3.08	Serious bodily harm/physical injury	Delaware, Kentucky, Missouri, North Dakota, Penn, *Utah, Washington, Nebraska	7
	Disfigurement	Delaware, Kentucky, Missouri, North Dakota, Penn, Utah, Nebraska	6
	Substantial risk of death	Kentucky, Missouri, North Dakota, Penn, Utah, Nebraska	5
	Gross degradation	Delaware, North Dakota, Penn, Nebraska	3
	Extreme Pain	Kentucky, Missouri, Penn, Nebraska	3
	Extreme mental/emotional distress	Kentucky, Missouri, Penn, Utah, Nebraska	4
Deadly Force		Alaska, Delaware, New Jersey, New York, Texas	5
Burning		Delaware, Hawaii, Utah, Washington	4
Interfering with breathing		Delaware, Hawaii, Utah, Washington	4
Use/threatened use of deadly weapon		Delaware, Hawaii, Utah, Washington	4
Throwing		Delaware, Hawaii, Washington	3
Kicking		Delaware, Hawaii, Washington	3
Cutting		Delaware, Hawaii, Washington	3
Striking with closed fist		Delaware, Hawaii	2
Shaking minor under 3		Hawaii, Washington	2
Prolonged deprivation of sustenance or medication		Delaware, Utah	2
Biting		Hawaii	1
Physical Torture		Utah	1
Impairs child's health		Utah	1
Fracture Bones		Utah	1
Intracranial Bleeding		Utah	1
Internal Organ Damages		Utah	1
Developmental/intellectual disability		Utah	1
"Impairment of the child's ability to function' "		Utah	1
Impairment to functioning of a limb		Utah	1
Not dangerous to the child		Washington	1

charged involves serious bodily injury . . . serious physical injury . . . or the death of the minor.”).

122. See DEL. CODE ANN. tit. 11, § 468 (West 2015); HAW. REV. STAT. ANN. § 709-906 (West 2015); WASH. REV. CODE ANN. § 9A.16.100 (West 2015); Utah Code Ann § 76-5-109 (West 2015).

123. Citations for all statutes as well as their full content are located in the statutory appendix on file with author.

V. SUGGESTED GUIDELINES TO REVAMP THE PARENTAL DISCIPLINE
DEFENSE TO BETTER PROTECT CHILDREN

Some legal commentators have suggested that the United States should amend its criminal law to ban all forms of parental corporal punishments in all situations.¹²⁴ For support, they cite, *inter alia*, the international momentum to ban such practices, the campaign in Sweden, and research indicating that non-forceful parenting practices are equally as effective as force. While international examples can suggest methods for implementing a ban and the feasibility of doing so, the issue ultimately boils down to whether corporal punishment is more harmful than beneficial to children, and therefore whether a total ban is advisable.

A. *The Parental Discipline Defense Should be Revised, Not Eliminated*

As discussed above, sociologists generally agree that moderate to severe forms of corporal punishment—indicated by frequency, severity, and method—do more harm than good for the child. This Part argues that techniques that surpass this threshold do not deserve statutory protection because their net effects are generally harmful to children, and therefore the basic rationale behind lawful corporal punishment—promotion of child welfare—does not apply. This Part will then suggest how state legislators should rewrite their statutes to prohibit these harsher, more frequently recognized as unacceptable forms of punishment.

However, milder corporal punishment techniques present more difficult questions, given the conflicting social research regarding their effectiveness. To break this tie, legislators should retain the defense for spanking and other mild forms of corporal punishment for three reasons. First, a ban would have a disproportionate impact on African American communities who report using corporal punishment more than any other distinct group. Second, a ban could interfere with the free exercise of religion. Finally, a categorical ban would be too socially disruptive, in light of the widespread public support for corporal punishment.

First, corporal punishment is more prevalent in African American culture than in European American culture.¹²⁵ In a 2014 study, eighty-one percent of black women and eighty percent of black

124. See Pollard, *supra* note 8, at 575.

125. E.g., Jennifer E. Lansford, The Special Problem or Cultural Differences in Effects of Corporal Punishment, 73 L. & CONTEMP. PROBS. 89, 100–02 (2010).

men “agree[d] with the statement that it is sometimes necessary to discipline a child with a ‘good, hard spanking.’”¹²⁶ FiveThirtyEight, a prominent statistical analytics blog, found that eighty-two percent of black Americans approved of spanking compared to just seventy-one percent of white Americans.¹²⁷ Many African Americans perceive spanking as a “cultural reminder of who they are,”¹²⁸ and a “core feature of black identity, quality parenting and social responsibility.”¹²⁹ A total ban would therefore abruptly criminalize a centuries-old practice which is still considered part of the cultural bedrock of many African American communities. The effects of criminalization, including the stigma effects, would be disproportionately absorbed by the black community.

Second, banning corporal punishment would arguably interfere with the ability of Christian Americans to exercise their religious freedom. A recent Pew poll found that seventy-percent of adult Americans identify as Christian and twenty-five percent of Americans identify as Evangelical.¹³⁰ Evangelicals, in particular, believe the Bible directs them to discipline their children for their own developmental benefit. To be sure, the free exercise of religion has its legal limits.¹³¹ But criminalizing spanking and other mild forms of punishment without conclusive evidence that such practices harm children would uproot centuries-old traditions of child-rearing and unnecessarily make criminals of their adherents.

Finally, instituting an outright ban would be unwise, given substantial public support for corporal punishment across racial and ethnic lines. While many have suggested that the United States could follow Sweden’s trajectory, the differences in public opinion between Sweden in 1979 and the United States in 2015 are vast. In 1978, a year before the ban, only twenty-six percent of Swedes believed that parental corporal punishment was “necessary.”¹³² This stands in stark contrast to the estimated sixty-five to eighty-five percent of parents who use corporal punishment in America today,

126. *Attitudes Toward Spanking*, CHILD TRENDS DATABANK 8, 10 (2015), http://www.childtrends.org/wp-content/uploads/2012/10/51_Attitudes_Toward_Spanking.pdf.

127. See Enten, *supra* note 57.

128. LaShaun Williams, *Spanking is Part of Black Culture*, N.Y. TIMES: OPINION (Aug. 14, 2011, 7:00 PM), <http://www.nytimes.com/roomfordebate/2011/08/14/is-spanking-a-black-and-white-issue/spanking-is-part-of-black-culture>.

129. Stacey Patton, *Understanding Black America and the Spanking Debate*, BBC: NEWS MAGAZINE (Sep. 21, 2014), <http://www.bbc.com/news/magazine-29261462>.

130. *America’s Changing Religious Landscape*, PEW RESEARCH CENTER 4 (2015), <http://www.pewforum.org/files/2015/05/RLS-08-26-full-report.pdf>.

131. See, e.g., Zak Lutz, *Limits of Religious Freedom*, HARV. POL. REV. (May 27, 2013, 11:25 PM), <http://harvardpolitics.com/covers/limits-of-religious-freedom/>.

132. Solheim, *supra* note 79, at 152.

even though their numbers appear to be declining.¹³³ Moreover, Sweden introduced a public education campaign in concert with the 1979 ban on corporal punishment. As a result, the country experienced a smooth transition to a no-tolerance policy, and by 1994, close to ninety percent of Swedes supported the ban.¹³⁴

These popular attitudes mean that an outright ban would not be as palatable in America today as it was in Sweden in 1979. Instead, states should amend their criminal laws incrementally. This would help shape the public debate, and could affect public opinion on the subject. Changes in public opinion could eventually pave the way for further limitations or a complete prohibition of corporal punishment in the future.

B. Implementing Reform: Working Within Current State Practice

The range of justifiable parental behavior is astonishingly broad in most of the states that codify the defense. Georgia's statute is one of the shortest and broadest, requiring only that the force used be "reasonable" ("reasonable relationship requirement").¹³⁵ The current slate of statutory defenses, as a whole, provides grossly inadequate protection for children. State laws must be rewritten to limit to the universe of criminally acceptable force to the mildest forms of corporal punishment—namely, those that peer-reviewed research has shown can be either beneficial or harm-neutral. Such revisions are needed in order to strike the appropriate balance between the state's interest in child welfare and parental rights.

The previous Part identified a common three-element framework shared by most state parental discipline defense statutes. This Section proposes the following guidelines for reforming state parental discipline statutes, grouped according to the three elements of the framework described above.

133. Stephanie Hanes, *To Spank or Not to Spank: Corporal Punishment in the US*, CHRISTIAN SCI. MONITOR, (Oct. 19, 2014), <http://www.csmonitor.com/USA/Society/2014/1019/To-spank-or-not-to-spank-Corporal-punishment-in-the-US>.

134. See Pollard, *supra* note 8, at 588.

135. GA. CODE ANN. § 16-3-20 (West 2015) ("The defense of justification can be claimed . . . [w]hen the person's conduct is the reasonable discipline of a minor by his parent or a person in loco parentis . . .").

1. Purpose

All the surveyed states listed some combination of welfare and discipline as justifiable purposes for corporal punishment. While some states listed only welfare, others listed only discipline, and a handful of states listed *either* welfare or discipline. In this view, properly applied corporal punishment is a forward-looking, behavior-changing tool, meant to abate outbursts in the short-term as well as change behavior over the long-term. Focus on the Family's spanking guide, an Evangelical publication, artfully characterizes this distinction, explaining that corporal punishment should be administered "to train for correction and maturity" (forward-looking), and never to "to inflict a penalty for an offense" (backward-looking).¹³⁶ To the extent that this distinction can be reflected in statute, it should be incorporated.

2. Reasonable Relationship

Corporal punishment should always be reasonable under the circumstances and should serve the purposes contemplated in the defense. However, states should clarify that the reasonableness of corporal punishment is to be measured objectively. In other words, the trier of fact should determine whether a parent acts reasonably compared to a hypothetical ordinary person. This reasonableness standard is more protective than a subjective standard, which would hinge on whether the parent *believed* their actions were reasonable. Grounding the defense in an objective standard would curtail further propagation of corporal punishment as a manifestation of battered-child syndrome,¹³⁷ where parents use excessive force against their children because they themselves were subjected to excessive force during childhood.

136. Ingram, *supra* note 28.

137. See generally MARY McNULTY, *Battered Child Syndrome*, in THE GALE ENCYCLOPEDIA OF PSYCHOLOGY 66–67 (Bonnie Strickland ed., 2nd ed. 2001). Battered child syndrome can result when a child is a victim of long-term physical violence. Children suffering from the disorder are at risk of various behavioral problems as adults, including becoming abusive themselves.

3. Permissive Actions on Punishment Technique and Prohibitory Limitations on Results

Statutes surveyed used two types of prohibitory limitations. Some statutes limited punishment *techniques* by listing methods of inflicting discipline that, if exercised, disqualified a parent from claiming the defense.¹³⁸ Other statutes foreclosed the defense if a parent's discipline inflicted certain physical *injuries* on the child.¹³⁹ Instead of *proscribing* certain techniques, statutes should *prescribe* which techniques parents may use. Enumerating which punishment techniques must have been used before a parent can claim the defense would restrict the range of justifiable parental discipline to techniques that have been demonstrated to be harm-neutral or beneficial to children. For example, a statute could specify that only wrist-slapping or an open-handed spanking would qualify for the defense. Such a statute could also establish a rebuttable presumption that disciplinary techniques not prescribed are unjustified. The parent would have the burden of showing that a particular technique was appropriate under the circumstances. This scheme would narrow the range of permissible punishment tactics, while building in flexibility for a parent who employed a technique that was not per se justified.

Additionally, states should disqualify parents from claiming the defense if their discipline is per se too severe, as evidenced by resulting injuries to their child. Utah, Washington, Hawaii, and Delaware have taken this approach by foreclosing the defense if a child suffers, *inter alia*, fractured bones, internal organ damage, or intracranial bleeding.¹⁴⁰ By listing permissible forms of punishment and foreclosing the defense if certain injuries result, statutes would restrict both the acceptable means and ends of corporal punishment.

VI. CONCLUSION

It is unclear whether criminalizing moderate to severe corporal punishment would have a tangible effect on child welfare. Even if

138. *E.g.*, DEL. CODE ANN. tit. 11, § 468 (West 2016) (prohibiting throwing, kicking, cutting, and striking with a closed fist).

139. *E.g.*, UTAH CODE ANN. § 76-2-401 (West 2015) (prohibiting corporal punishment that results in "serious physical injury," the definition of which includes fractured bones, intracranial bleeding, and internal organ damage (*id.* § 76-5-109)).

140. *See* DEL. CODE ANN. tit. 11, § 468 (West 2015); HAW. REV. STAT. ANN. § 709-906 (West 2015); WASH. REV. CODE ANN. § 9A.16.100 (West 2015); UTAH CODE ANN. § 76-2-401 (West 2015).

the proposed reforms were enacted, it would fall to prosecutors to decide whether to bring charges for offenses that were formerly justified.¹⁴¹ But regardless of the immediate tangible effects on children, amending the parental discipline defense would have symbolic value that would help redefine morals and change parental behavior. For instance, in future high profile corporal punishment cases, the media coverage may focus on whether the perpetrator broke the law, not whether she crossed the “grey” line between socially acceptable and unacceptable discipline. Drawing clearer lines between permissible and impermissible forms of parental corporal punishment will hopefully steer the conversation away from what is socially acceptable to what, if any, forms of corporal punishment are appropriate for child welfare outcomes.

Amending the parental discipline defense to reflect the suggestions above would increase the scope of criminal parental behavior. Such a shift would raise important questions about the interplay between criminal law and the child welfare system, and would require rethinking punishments for more moderate forms of child abuse. Because these reforms would be intended to advance the interests of children, they would need to be evaluated in light of their potential side effects, including increasing the rate of child removal from the home and stigmatizing formerly acceptable parental conduct. Such issues are worthy of further study.

141. See Edwards, *supra* note 45, at 1006.