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REDEFINING PARENTAL RIGHTS: THE CASE OF CORPORAL PUNISHMENT

*Cynthia Godsoe**

INTRODUCTION

Discussions of the constitutional elements of family law have almost exclusively focused on marriage and adult intimate relationships, particularly recently.¹ In contrast, scholars and reformers alike have given parenthood short shrift.² Yet parenthood, not marriage, was the first family relationship found to be constitutionally significant. The United States Supreme Court has repeatedly expressed a parent's fundamental right to raise her child as she sees fit.³ This line of cases has been used to support significant parental choice in education, medical care, and other aspects of child rearing.⁴ Parental autonomy is in large part

* Associate Professor of Law, Brooklyn Law School. I appreciate the helpful comments and suggestions of Jill Hasday, the excellent research assistance of Lauren Rayner Davis and Neeti Sachdev, and the thoughtful editing of Tom Boyle.

1. Jill Hasday has pointed out that scholars have paid less attention to family law than other areas of law. See Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 828 (2004) ("Academic theorists have devoted much less attention to family law than they have spent on thoroughly examining legal subjects like constitutional law."). Within family law, parenthood receives still less attention. I have previously examined the focus on marriage over parenthood in the context of same-sex marriage. See Cynthia Godsoe, *Adopting the Gay Family*, 90 TUL. L. REV. 311 (2015); Cynthia Godsoe, *Perfect Plaintiffs*, 125 YALE L.J.F. 136 (2015), <http://www.yalelawjournal.org/forum/perfect-plaintiffs>.

2. There are of course exceptions including, significantly, the work of Doug NeJaime in this symposium issue and elsewhere. See, e.g., Doug NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CAL. L. REV. 87 (2014).

3. See *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (holding that parents may choose to have their children taught a language in addition to English in school); *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 535 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (recognizing a parent's right to raise her children as she sees fit as "perhaps the oldest of the fundamental liberty interests").

4. Parental rights in the medical care context, however, have increasingly been limited by state courts. See, e.g., *In re Sampson*, 278 N.E.2d 918, 919 (N.Y. 1972) (per

based on a presumption that parents' and children's interests accord, that "natural bonds of affection lead parents to act in the best interests of their children."⁵ It is also animated by the privacy and liberty of choice about intimate relations at the heart of constitutional family law.⁶

In this Article, I argue that this thick conception of parental rights shields significant intrafamilial harms, specifically parental corporal punishment.⁷ Since Blackstone's time, the parental discipline privilege has condoned parental assault on children in the name of discipline.⁸ Every state has such a privilege. Many are very broad, permitting any caregiver of the child to administer corporal punishment bringing physical injury that stops short of "severe bodily injury or death."⁹ Parental corporal punishment continues to be widely practiced,¹⁰ despite the overwhelming

curiam) (affirming lower court's order of medical treatment despite the parents' religious objections even though the child's life was not in imminent danger).

5. Parham v. J.R., 442 U.S. 584, 602 (1979).

6. See *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Obergefell v. Hodges*, 135 S.Ct. 2071 (2015). See also Melissa Murray, *Rights and Regulation: The Evolution of Sexual Regulation*, 116 COLUM. L. REV. 573, 577 (2016).

7. I adopt the widely accepted sociological definition of corporal punishment to mean any physical punishment, including spanking with or without objects, such as belts. See, e.g., Benjamin Shmueli, *Corporal Punishment in the Educational System Versus Corporal Punishment by Parents: A Comparative View*, 73 L. & CONTEMP. PROBS. 281, 282 (2010) (outlining definitions).

8. I use here the terminology employed in most states, the parental discipline privilege, to mean exemption of certain adults from criminal liability for acts that would otherwise be assault or battery. As noted below, this usually takes the form of an affirmative defense.

9. MODEL PENAL CODE § 3.08(1) (A.L.I. 2015).

10. Most states codify this by statute; a few do so by judicial decision. Studies show that almost half of parents have corporally punished their children, with rates ranging from 77 percent to 13 percent depending upon the child's age and sex. Murray A. Straus, *Prevalence, Societal Causes, and Trends in Corporal Punishment and Parents in World Perspective*, 3 LAW & CONTEMP. PROBLEMS 1, 3–6 (2010). A majority of Americans continue to support parental corporal punishment. *Id.* at 15–16. This view is declining, however, from over 90 percent in 1968 to 65–70 percent in 2005. See Stephanie Hanes, *To Spank or Not to Spank, Corporal Punishment in the U.S.*, CS MONITOR (Oct. 19, 2014), <http://www.csmonitor.com/USA/Society/2014/1019/To-spank-or-not-to-spank-Corporal-punishment-in-the-US> (reporting on the research of Straus and other experts). See also Child Trends Databank, *Attitudes Towards Spanking: Indicators of Child and Youth Well-Being* 3 (Figure 1) (Nov. 2015) https://www.childtrends.org/wp-content/uploads/2015/11/51_Attitudes_Toward_Spanking.pdf (compiling GSS data to conclude that "[b]etween 1986 and 2014, the proportion of women who agreed or strongly agreed that it is sometimes necessary to give a child a 'good, hard spanking' dropped by 22 percent (from 82 to 65 percent). While approval among men dropped seven percent between 1986 and 1991 (from 84 to 78 percent), it has since remained steady, and was at 76 percent in 2014."). This number has remained roughly consistent to date, although there are significant variations

research demonstrating that it is ineffective at discipline and has significant negative effects on children's behavior and socialization.¹¹ These include a greater propensity for future violence, and increased risk of mental health and cognitive outcomes.¹² These empirically proven harms are coupled with injuries to personhood that perpetuate hierarchies along gendered and racialized lines. Indeed, one expert recently argued that corporal punishment, which is disproportionately high in Black families, is a vestige of slavery that continues to operate to subjugate and traumatize Black children and youth.¹³

No rationale supports this forgiveness of significant harm to society's most vulnerable members. A majority of states are silent as to the rationale. Although the Court has never enumerated corporal punishment as a parental right, a number of state and federal courts have found it to be within a parent's childrearing prerogative.¹⁴ The main justifications commentators and judges give include tradition and personal beliefs about childrearing. One court recently acquitted a father for choking his teenaged daughter, emphasizing her "strong belief" that juveniles should be subject to physical discipline, and demonstrating willful blindness to the research and documented injuries in that case.¹⁵ Another recent decision relied heavily on a pre-Civil War case to reverse

by region, gender, race, and religion. See, e.g., Cathaleen Chen, *Can You Spank Kids And Be Foster Parent? Mass. High Court Says No*, CHR. SCI. MONITOR (Jan. 8, 2016) (using GSS data). Finally, approval ratings vary significantly depending upon the terminology used in describing it. See Chloe Kerr, *Mind Your Language*, THE SUN (Jan. 6, 2017), <https://www.thesun.co.uk/news/2547037/word-spank-should-be-replaced-with-assault-because-it-legitimises-violence-against-children-say-psychologists> (reporting research that people's approval of corporal punishment decreases significantly when the words hit, beat, etc., are used instead of "spank").

11. See discussion *infra* notes 69–72.

12. See *infra* notes 70–74.

13. See Stacey Patton, *Stop Beating Black Children*, N.Y. TIMES (Mar. 10, 2017), available at <https://www.nytimes.com/2017/03/10/opinion/sunday/stop-beating-black-children.html> (discussing her book SPARE THE KIDS: WHY WHUPPING CHILDREN WON'T SAVE BLACK AMERICA (2017)).

14. Compare *Doe v. Heck*, 327 F.3d 492, 523 (7th Cir. 2003) (“[T]he [] parents’ liberty interest in directing the upbringing and education of their children includes the right to discipline them by using reasonable, nonexcessive corporal punishment, and to delegate that parental authority to private school officials.”), with *Sweaney v. Ada County*, 119 F.3d 1385, 1389 (1997) (concluding that the *Meyer* line of cases does not give parents the right to “strike a child with a belt without being” investigated and potentially prosecuted).

15. *Carter v. Indiana*, 67 N.E.3d 1041 (Ind. Ct. App. 2016).

the conviction of a father who severely beat his son with a paddle after the boy refused to eat his dinner.¹⁶

Attempts to cabin parental corporal punishment via a *mens rea* of truly disciplinary purpose or the like have not sufficiently limited it. Instead, the expert consensus against it, and the threats and cursing that often accompany it, reveal that parental corporal punishment is at best a very misinformed attempt at discipline and at worst a use of children as literal “whipping posts” for frustration and rage.¹⁷ Accordingly, I argue that the parental discipline privilege should be abolished as have all other categorical status exceptions to a violent crime.¹⁸

Parental corporal punishment has been surprisingly ignored in legal scholarship and policy reform. High-profile cases, such as the recent prosecution of NFL star Adrian Peterson for disciplining his five-year-old son with a tree branch, have prompted significant discussion in the media and popular forums.¹⁹ Social scientists have written extensively about the harms of corporal punishments and recommended changed terminology and other reforms.²⁰ Advocates have succeeded in banning corporal punishment in almost all other settings including daycares and most schools. Yet scholars and reformers have failed to examine the parental discipline privilege, despite its anomalous nature.²¹

16. See *infra* note 66 (discussing a 2017 North Carolina Court of Appeals decision).

17. For instance, the father in the case described in note 16 was cursing and screaming at his son as he whipped him.

18. Other historic status exceptions, such as the ‘discipline’ of wives and apprentices have long been abolished and crimes against these parties criminalized. See, e.g., Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973 (1991).

19. For just two examples, see Susan Perry, *Adrian Peterson Case Brings Corporal Punishment Back into the Spotlight*, MINNPOST (Sept. 17, 2014), <https://www.minnpost.com/second-opinion/2014/09/adrian-peterson-case-brings-corporal-punishment-back-spotlight>; Anthony Zurcher, *Adrian Peterson: Parenting, Punishment and Race*, BBC NEWS (Sept. 15, 2014), <http://www.bbc.com/news/blogs-echochambers-29186080>.

20. Elizabeth T. Gershoff & Andrew Grogan-Kaylor, *Spanking and Child Outcomes: Old Controversies and New Meta-Analyses*, 30 J. FAM. PSYCHOL. 13 (2016). See also *infra* notes 69-72. Scholars from other fields are also beginning to examine corporal punishment. For instance, a scholar of African-American history recently published a book on corporal punishment in the Black community. See Patton, *supra* note 13.

21. The scant treatment of corporal punishment by legal scholars approaches it from a children’s rights perspective. See, e.g., Deanna A. Pollard, *Banning Corporal Punishment: A Constitutional Analysis*, 52 AM. U.L. REV. 447 (2003). This analysis is consonant with mine, but fails to fully consider the parental rights justification for corporal punishment. But see James G. Dwyer, *Parental Entitlement and Corporal Punishment*, 73 L. & CONTEMP. PROBS. 189 (2010). Dwyer does distinguish parental rights in this context from

This is a particularly propitious time for an examination of the parental discipline privilege. The constitutional analysis of family status and privacy in the context of marriage and adult intimacy has changed significantly in recent years to recognize new equality norms.²² The constitutional analysis of parenthood should similarly adapt to new empirical data and evolving social norms against the exculpation of intrafamilial harms. I argue that the forgiveness of parental corporal punishment is not just bad policy, but is also an overreading of the parental rights jurisprudence. Parental rights are not infinite; the state *parens patriae* duty to protect children is a significant limitation on parental choice. Indeed, state and children's interests render parental rights more flexible and context-specific than other family constitutional rights.²³ Abolishing the parental discipline privilege is consistent both with this framework and a more inclusive reading of family privacy.²⁴

I begin this Article by delineating the constitutional framework of parental rights to raise children, highlighting the soft nature of these rights and their inextricable connection with a duty of care. In Part II, I chart the breadth of the parental discipline privilege exculpating parental assaults on children. None of the rationales for this ongoing status exculpation are sufficient in light of the social science literature on corporal punishment's extensive harms. Turning to the normative, I argue in Part III that evolving standards of child rearing, and the flexible nature of parental rights, militate towards abolishing the parental discipline privilege. The conclusion flags lessons this examination of the parental discipline privilege has for other parental decisions and conduct.

I. SOFT PARENTAL RIGHTS

Parental rights were the first family privacy rights to be expressly defined. In a line of cases concerning a parent's right to

the core examples of education and medical care. Nonetheless, he stops short of arguing that parental rights do not support corporal punishment.

22. Several examples include same-sex marriage, as well as the criminalization of intimate partner violence and marital rape. See Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1406 (2000); Schneider, *supra* note 18, at 976; Cynthia Godsoe, *Redrawing the Boundaries of Relational Crime*, 68 ALA. L. REV. (forthcoming 2017); Obergefell v. Hodges, 135 S.Ct. 2071 (2015).

23. See discussion *infra* Part I.

24. See *infra* notes 115-118.

choose their children's education, the Supreme Court has repeatedly confirmed that "[the] primary role of parents in the upbringing of their children is . . . an enduring American tradition."²⁵ Recently, the Court again emphasized a broad swath of parental discretion, holding that parents may decide who may visit their children, including barring other relatives from doing so.²⁶ Parental rights are based on family privacy, the recognition of a diversity of families, and the parental ability to best care for and nurture future citizens.²⁷ The last rationale—the presumption that parents act with their children's best interests in mind—is particularly important.²⁸ As the Court has stated, a parent's "natural bonds of affection lead [her] to act in the best interests of [her] children."²⁹ Even the early cases remain salient today; *Meyer v. Nebraska* was cited in *Obergefell v. Hodges* to support a right to same-sex marriage.³⁰ Parental control is much stronger in the American legal canon than in other Western countries, a prerogative that I and other scholars have critiqued.³¹

Despite the rhetoric infusing the parental rights opinions, however, parental rights are more limited than other privacy-based fundamental rights. Tellingly, the Court has declined to apply strict scrutiny to state regulation of parental rights, arguably rendering these rights quasi-fundamental, if that.³² In *Troxel v.*

25. *Yoder*, 406 U.S. at 232; *see also Meyer*, 262 U.S. at 401 (holding that parents may choose to have their children taught a language in addition to English in school); *Pierce*, 268 U.S. at 535; *Yoder*, 406 U.S. at 205.

26. *Troxel*, 530 U.S. at 65 (recognizing a parent's right to raise her children as she sees fit as "perhaps the oldest of the fundamental liberty interests").

27. *Id.*

28. The presumption is not, however, absolute. Rather, the Court has cautioned that "experience and reality may rebut what the law accepts as a starting point." *Parham*, 442 U.S. at 602.

29. *Id.*

30. *Obergefell*, 576 U.S. at 14–15.

31. Cynthia Godsoe, *Parsing Parenthood*, 17 LEWIS & CLARK L. REV. 113 (2013); Barbara Bennett Woodhouse, "Who Owns The Child?": *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 997 (1992) (arguing that the right of parental control, although termed a liberty interest, seems to posit children as parental property).

32. In *Troxel*, the Court articulated a presumption in favor of a fit parent's choices rather than a strict scrutiny standard. Shulman further points out that the plurality opinion in *Troxel* uses the term fundamental rights numerous times, but does not address the claim at issue as a true fundamental right. *See* JEFFREY SHULMAN, *THE CONSTITUTIONAL PARENT: RIGHTS, RESPONSIBILITIES, AND THE ENFRANCHISEMENT OF THE CHILD* 126–27 (2014); *see also* Jeffrey Shulman, *Does the Constitution Protect A Fundamental Right to Parent?*, CONST. DAILY (July 8, 2014), <http://blog.constitutioncenter.org/2014/07/does-the-constitution-protect-a-fundamental-right-to-parent> ("The Supreme Court has echoed the popular assumption that the right of parents to make decisions concerning the care,

Granville, its most recent opinion, the Court outlined a presumption that a fit parent's choices cannot be second-guessed by the state—significantly less than a fully protected right. It also explicitly limited the strongest case of parental rights, *Wisconsin v. Yoder*, to its unusual facts, involving the insular and self-reliant Amish community.³³ Indeed, courts have clarified that harm is not required for intervention into the parent-child relationship; in contrast, the state may “reasonably” regulate children's education, health, and general care.³⁴ Even the early cases described parental liberty both as a right and an obligation, “the right, coupled with the high duty, to recognize and prepare [a child] for [his] additional obligations.”³⁵

Parental rights are further limited by the state's *parens patriae* duty to protect children. In *Prince v. Massachusetts*, the Court limited parental discretion. Proclaiming that the “state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare,” the Court upheld a child labor law prohibiting a Jehovah's Witness from taking her ten-year-old ward to proselytize with her on the street.³⁶ Protection is necessary not only for the child's sake but also for society's, given its need for “the healthy, well-rounded growth of young people into full maturity as citizens[.]”³⁷

Several prescient scholars have highlighted the “tenuous” and relative nature of parental rights.³⁸ In a recent history of the parental rights cases, Jeffrey Shulman demonstrates that, contrary

custody, and nurture of their children is a deeply rooted one But no Supreme Court case has held that the right of parents to make such choices is a fundamental one.”). Several state courts, however, have applied strict scrutiny, at least as to the rights of “fit parents” (a somewhat circular inquiry). *See, e.g., In re Custody of BMH*, 315 P.3d 470, 487 (Wash. 2013).

33. *Yoder*, 406 U.S. at 232 (predicting that “few other religious groups or sects” could make the necessary showing). Shulman aptly describes this case as “idiosyncratic . . . [i]ts reasoning is a strange brew of romantic projection and conscious self-deception, something akin to infatuation [with the Amish way of life] from a court old enough to know better.” SHULMAN, *supra* note 32, at 110.

34. The Court also notes the lack of harm in cases upholding parental rights. *See, e.g., Yoder*, 406 U.S. at 230 (finding no evidence of “any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare”).

35. *Pierce*, 268 U.S. at 535.

36. *Prince*, 321 U.S. at 167.

37. *Id.* at 168.

38. SHULMAN, *supra* note 32, at 8; *see also* SHAWN FRANCIS PETERS, THE YODER CASE: RELIGIOUS FREEDOM, EDUCATION, AND PARENTAL RIGHTS 175 (2003) (noting that *Yoder*'s “constitutional legacy did not prove to be especially durable”).

to popular belief, parental rights have always been limited in the name of societal interests and enlightened childrearing. He quotes nineteenth-century Justice Joseph Story critiquing absolute parental rights as uncivilized and opining that the state has the power “to control the conduct of the [parent] in the education of his children.”³⁹ Similarly, constitutional scholar David Meyer concludes that modern jurisprudence establishes parental rights as “essentially soft” and merely presumptive based on the need to accommodate societal and children’s interests.⁴⁰

As noted above, the Court has never considered whether parental control includes a parental right to corporal punishment. Most statutes which codify the parental discipline privilege likewise never explicitly mention parental rights.⁴¹ Lower courts considering the issue have gone both ways, but the majority have found a narrow right to parental corporal punishment. For instance, the Supreme Judicial Court in Massachusetts recently reversed a parent’s assault and battery conviction for briefly spanking a three-year-old with his hand.⁴² The Court noted the delicate balance “between protecting children from punishment that is excessive in nature, while at the same time permitting parents to use limited physical force in disciplining their children without incurring criminal sanction.”⁴³ Similarly, several other state and federal courts have expressed a parent’s right to use “reasonable” corporal punishment.⁴⁴ Others, however, have

39. *Id.* at 3.

40. DAVID D. MEYER, FAMILY DIVERSITY AND THE RIGHTS OF PARENTHOOD, *in* WHAT IS PARENTHOOD?: CONTEMPORARY DEBATES ABOUT THE FAMILY 124 (Linda C. McClain & Daniel Cere eds., 2013). As discussed further below, scholars have posited a trustee rather than ownership-based notion of constitutional parenthood, consistent with the soft nature of parental rights.

41. Indeed, almost half the states do not specify any rationale for the parental discipline privilege. Several state laws, however, arguably imply parental rights in legally authorizing reasonable parental corporal punishment. *See, e.g.*, AS. STAT. § 11.81.430 (prescribing that parent or person in loco parentis has the “authority” to discipline).

42. *Commonwealth v. Dorvil*, 32 N.E.3d 861, 861 (Mass. 2015).

43. *Id.* at 868.

44. *See, e.g.*, *Doe v. Heck*, 327 F.3d 492, 523 (7th Cir. 2003) (“[T]he [] parents’ liberty interest in directing the upbringing and education of their children includes the right to discipline them by using reasonable, nonexcessive corporal punishment, and to delegate that parental authority to private school officials.”); *State v. Wilder*, 748 A.2d 444, 449 (Me. 2000) (holding that a parent has the fundamental right to “use [] reasonable or moderate force to control behavior” and this finds expression in the parental discipline privilege codified in Maine law); *State v. Rosa*, 6 N.E.3d 57, 59 (Ohio Ct. App. 2013) (noting “a parent’s fundamental constitutional right to child-rearing, which includes a right to impose reasonable discipline, including the use of corporal punishment”).

concluded that striking a child with a belt is not protected under the parental privilege.⁴⁵

Those courts recognizing a constitutional element to the parental discipline privilege rely both on parents' rights cases and on a more general right to family privacy.⁴⁶ These courts, however, clarify that this activity is limited; as one bluntly put it: "child abuse is not constitutionally protected activity."⁴⁷ Courts have also been careful to note the competing interests of family autonomy and child protection—a balancing that is much less explicit in the Supreme Court parental rights cases involving education. For instance, one federal court cautioned that corporal punishment cases raise "an inherent tension between the privacy and sanctity of the family, including the freedom to raise children as parents see fit, and the interest of the state in the safety and well-being of children."⁴⁸ Similarly, the Massachusetts high court noted its "deep mindful[ness] of the dual important interests implicated in the defense: the welfare of children requiring protection against abuse, on the one hand, and, on the other, the avoidance of unnecessary State interference in parental autonomy as it concerns child rearing."⁴⁹ These courts' depiction of parental rights is not robust. Indeed, all of these opinions focus considerably more on tradition and practicality than parental rights, rationales I argue below are not legitimate grounds for forgiving assault and battery.⁵⁰

45. See *Sweaney*, 119 F.3d at 1389 (concluding that the *Meyer* line of cases does not give parents the right to "strike a child with a belt without being" investigated and potentially prosecuted).

46. See, e.g., *State v. Sinica*, 372 N.W.2d 445, 447 (Neb. 1985) (citing cases including *Griswold*, *Meyer*, *Pierce*). In a number of these cases, the parents hit their children in a public place. For instance, the mother in *Sweaney* hit her child at school in front of teachers. See *Sweaney*, 119 F.3d at 1387. The father in *Dorvil* spanked and allegedly kicked his child on the street, witnessed by two police officers. See 32 N.E.3d at 864. As discussed further below—see *infra* notes 104-108—some courts seem to consider this significant in adjudicating the permissibility of the punishment, although I argue this distinction is not relevant.

47. *Sinica*, 372 N.W.2d at 449 (articulating rights to familial privacy and parental choices in child-rearing).

48. *United States v. Rivera*, 54 M.J. 489, 491 (C.A.A.F. 2001).

49. *Dorvil*, 32 N.E.3d at 863. Shortly after its decision in *Dorvil*, the Massachusetts high court forbade foster parents from engaging in corporal punishment. See *Magazu v. Dep't of Children & Families*, 42 N.E.3d 1107 (Mass. 2016).

50. *Dorvil*, 32 N.E.3d at 866-67 (discussing history).

II. THE PARENTAL DISCIPLINE PRIVILEGE

This Part charts the broad scope of the parental discipline privilege—a scope not supported by contemporary readings of parental rights. It then turns to the harms of this exception to criminal assault law, detailing the overwhelming research consensus that even mild corporal punishment brings a risk of significant developmental consequences. It concludes by documenting the growing domestic consensus which have led to the abolition of corporal punishment in other settings and, internationally, even in the home.

A. PARENTAL DISCIPLINE PRIVILEGE

Every state grants parents the right to physically punish their children with no criminal liability for assault and battery. Most jurisdictions have codified the parental discipline privilege either as an affirmative defense to prosecution or as part of the statutory definition of child abuse; others have recognized the privilege judicially.⁵¹ It is framed as a justification, not an excuse, meaning that the conduct itself is deemed innocent.⁵² The parental discipline privilege is the only remaining status-based exculpation for assault; others such as intimate partner violence and the beating of apprentices and students, have long been abolished. Accordingly, as Jill Hasday points out, the parental discipline privilege contradicts the family law “progress narrative” that children’s wellbeing has been increasingly protected.⁵³

51. See, e.g., N.Y. PENAL LAW § 35.10(1) (McKinneys 2015) (“The use of physical force upon another person which would otherwise constitute an offense is justifiable and not criminal [when] . . . 1. A parent, guardian or other person entrusted with the care and supervision of a person under the age of twenty-one . . . may use physical force, but not deadly physical force, upon such person when and to the extent that he reasonably believes it necessary to maintain discipline or to promote the welfare of such person.”); MICH. COMP. LAWS § 750.136b(9) (2015) (“This section does not prohibit a parent or guardian, or other person permitted by law or authorized by the parent or guardian, from taking steps to reasonably discipline a child, including the use of reasonable force.”); 11 R.I. GEN. LAWS § 11-9-5.3(d) (2015) (“For the purpose of this section, ‘other physical injury’ is defined as any injury, other than a serious bodily injury, which arises other than from the imposition of nonexcessive corporal punishment.”).

52. See, e.g., ALASKA PENAL CODE 11.81.430 (2016); WIS. STAT. § 939.45(5) (2017); *Dorvil*, 32 N.E.3d at 870.

53. JILL ELAINE HASDAY, *FAMILY LAW REIMAGINED* 133–35, 147–48 (2014) (theorizing that “stories about the triumph of children’s best interests can divert attention from examining how family law actually regulates the parent-child relationship and from considering the normative question. . . . Where should family law prioritize parental prerogatives, and where, how, and to what extent does family law’s continued deference to parental rights over children’s interests need to be reformed?”).

The privilege historically attached only to fathers, but has since been extended to all legal parents and guardians.⁵⁴ Most states also allow custodians or persons acting as a parent to assert the privilege.⁵⁵ Accordingly, it has a very broad scope; a significant number of people without a legal relationship to a child, such as a mother's boyfriend, are permitted to corporally punish that child with no criminal liability.⁵⁶

All states forgive parental assault that brings some harm, allowing, for instance, corporal punishment on even very young children and condoning hitting them with objects, such as a wooden spoon or leather belt.⁵⁷ Accordingly, the scope of permissible physical punishment goes well beyond the oft-raised example of a parent grabbing a toddler to keep her from running into the street. Every state permits some physical harm and non-severe mental or emotional injury.⁵⁸ Numerous states, and the

54. The Massachusetts Stubborn Child Statute permitted fathers to kill misbehaving children. Some states still limit it to these categories. LA. STAT. ANN. § 14:18 (2015) (“This defense of justification can be claimed . . . (4) When the offender’s conduct is reasonable discipline of minors by their parents”); WIS. STAT. § 939.45(5)(a)(3), (5)(b) (2017) (stating the defense of privilege can be claimed “[w]hen the actor’s conduct is reasonable discipline of a child by a person responsible for the child’s welfare” and explaining “[p]erson responsible for the child’s welfare’ includes the child’s parent, stepparent, or guardian”).

55. Forty states allow custodians to assert the privilege, thirty-four go even further, allowing adults in loco parentis to do so. *See, e.g.*, O.R.C. § 2151.031(C) (2015) (defining child abuse but excluding “a child exhibiting evidence of corporal punishment or other physical disciplinary measure by a parent, guardian, custodian, person having custody or control, or person in loco parentis” if the discipline satisfies the standard codified elsewhere); *J.C. v. Dep’t of Children & Families*, 773 So. 2d 1220 (Fla. Dist. Ct. App. 2000) (finding that an 11-year-old child was not abused when the stepfather, acting in loco parentis, used a belt to spank the child on the buttocks, which produced bruising).

56. The extremely broad, functional definition in the corporal punishment context stands in sharp contrast to other definitions of parents in the criminal and family law. *See* Godsoe, *Relational Crime*, *supra* note 22. I note this primarily to emphasize the sweep of the harm of corporal punishment, since many cases involve non-parents whose physical discipline is excused under the parental discipline privilege.

57. In determining the reasonableness of punishment, courts look at a variety of factors including the child’s age, gender, the form, amount, and bodily location of the hitting, and the “totality of the circumstances.” *See, e.g., Dorvil*, 32 N.E.3d at 870.

58. *See, e.g.*, HI REV. STAT. § 703-309 (2011) (“The force used [must] not intentionally, knowingly, recklessly, or negligently create a risk of causing substantial bodily injury, disfigurement, extreme pain or mental distress, or neurological damage.”). Some statutes attempt to limit harm inflicted by providing categorical exclusions of certain children (i.e., below a certain age such as “nonaccidental injury to a child under the age of 18 months” or “shaking a minor under three years of age”) or particular types of acts (e.g., throwing, kicking, burning, biting, cutting, striking with a closed fist, interfering with breathing, or threatening with a deadly weapon) from the parental privilege. D.C. CODE § 16-2301 (2016); 11 DEL. CODE § 468 (2016); HI REV. STAT. § 703-309 (2011); RCW §

Model Penal Code, go quite a bit further, and explicitly permit a wide swath of parental discipline as long as it does not risk “severe bodily injury or death.”⁵⁹ Corporal punishment is still widely practiced, with over half of American adults engaging in it.⁶⁰ Parents in the South, fundamentalist Christian parents and Black parents are significantly more likely to use physical discipline.⁶¹

The most common rationales offered for the parental discipline privilege are historic or personal, neither of which justifies the broad exculpation of assault against children.⁶² The reliance on tradition rather than empirics or deliberate policy is evident in the fact that about half of states do not cite any rationale for this anachronistic exemption, while those that do cite

9A.16.100 (2012) (prescribing that harm must not be “greater than transient pain or minor temporary marks”).

59. Parental privilege applies when “(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.” MODEL PENAL CODE § 3.08(1) (A.L.I. 2015). This standard does not require that the force be reasonable or that the parent reasonably believes the use of force is appropriate. *See id.* § 3.08 cmt. 2.

60. *See* Straus, *supra* note 10, at 3–6. Rates are particularly high among babies and toddlers. *See* Elizabeth T. Gershoff & Susan H. Bitensky, *The Case Against Corporal Punishment of Children: Converging Evidence From Social Science Research and International Human Rights Law and Implications for U.S. Public Policy*, 13 *PSYCHOL., PUB. POL’Y & L.* 231, 232 (2007). As to public opinion, *see* Steve Hendrix, *The End of Spanking?*, *WASH. POST MAG.* (Jan. 3, 2013), https://www.washingtonpost.com/lifestyle/magazine/the-end-of-spanking/2013/01/02/d328cf1e-3273-11e2-bb9b-288a310849ee_story.html (reporting that 65 to 75 percent of people believe that “it is okay to occasionally spank a child”). In recent years, support for corporal punishment has declined modestly. *Attitudes Towards Spanking*, *CHILDTRENDS.ORG* (2015), <http://www.childtrends.org/indicators/attitudes-toward-spanking> (using biannual GSS data).

61. This was the topic of one episode of the popular television show *black-ish*. *See* James Poniewozik, *black-ish Whips Up a Conversation About Spanking*, *TIME* (Oct. 23, 2014), <http://time.com/3534219/review-blackish-spanking>; *see also* Harry Enten, *Americans’ Opinions on Spanking Vary By Party, Race, Region and Religion*, *FIVETHIRTYEIGHT* (Sept. 15, 2014, 4:49 PM), <https://fivethirtyeight.com/datalab/american-s-opinions-on-spanking-vary-by-party-race-region-and-religion/> (using data from 1986-2010 to demonstrate the “large gaps” in opinion between evangelical Christians and other Americans, reporting that African-Americans are 11 percent more likely to support corporal punishment than whites including Hispanics, and showing that people in the South are 17 percent more likely to support spanking than those in the Northeast).

62. *See* Godsoe, *Relational Crime*, *supra* note 22; *see also* Dwyer, *supra* note 21, at 192 (noting that “parental-entitlement claim[s], although once common and certainly sometimes still expressed, [are] not especially prominent in debates concerning corporal punishment today”).

a rationale usually do so in vague and conclusory terms.⁶³ Courts continue to cite Blackstone's centuries-old statement of a parent's power to "lawfully correct his child. . . in a reasonable manner; for . . . the benefit of his education."⁶⁴ These historic rationales are sometimes coupled with religious justifications. "Spare the rod and spoil the child" remains a frequently, if incorrectly, cited Biblical passage and, tellingly, fundamentalist Christians are significantly more likely than other Americans to support and use corporal punishment.⁶⁵

One recent case before the North Carolina Supreme Court demonstrates the problems with depending on tradition alone to demarcate the boundaries of the privilege. Dean Michael Varner, angered by his ten-year-old son's "picky eating," beat him with a paddle on his legs and feet. He cursed and yelled at the child while doing so, and the assault resulted in "bruising from [the boy's] knee to his waist," pain and several days of impaired walking. The jury acquitted Varner of felony child abuse, but convicted him of a misdemeanor. In reversing Varner's conviction and granting him a new trial, the appellate court relied heavily on a 180-year-old case. That case outlined the "sacred duties of parents to train up and qualify their children, for becoming useful and virtuous members of society. . . to command obedience, to control stubbornness, . . . and to reform bad habits."⁶⁶ Reliance on a precedent from a time when slavery, marital rape, and the physical punishment of apprentices were still allowed permits a

63. See Walter E. Williams, *Making a Case for Corporal Punishment*, INSIGHT ON THE NEWS (Sept. 13, 1999), <https://www.questia.com/magazine/1G1-55821653/making-a-case-for-corporal-punishment>.

64. 1 WILLIAM BLACKSTONE, COMMENTARIES *440; see also 3 WILLIAM BLACKSTONE, COMMENTARIES *120 (positing parental discipline as an exception to battery: "battery is, in some cases, justifiable or lawful; as where one who hath authority, a parent or master, gives moderate correction to his child, his scholar, or his apprentice.").

65. See MURRAY A. STRAUS & DENISE A. DONNELLY, BEATING THE DEVIL OUT OF THEM: CORPORAL PUNISHMENT IN AMERICAN FAMILIES AND ITS EFFECTS ON CHILDREN 183–84 (1994) (detailing the relationship between religion and corporal punishment and noting that this passage refers to a shepherd guiding or redirecting his flock of sheep, not striking them); see also *Magazu*, 473 Mass. at 431 (arguing that because physical discipline is an integral aspect of their Christian faith, the department's decision to deny their license as foster parents impermissibly infringes on their constitutional right to the free exercise of religion).

66. The Sanford Herald, *Guest Editorial: N.C. Spanking Case Raises Questions on Parental Rights*, WILSON TIMES (March 19, 2017, 7:50 PM), available at <http://www.wilsontimes.com/stories/guest-editorial-nc-spanking-case-raises-questions-on-parental-rights,82322>.

distortion of the parental role and obscures the significant harms of corporal punishment.

In support of corporal punishment, commentators frequently cite their own experiences growing up or their beliefs about child rearing, even though they are contradicted by all the child development research. Typical is this advocate, arguing that “[r]egardless of what the experts preach, the undeniable fact is the ‘uncivilized’ practice of whipping children produced more civilized young people. . . .”⁶⁷ Another explicitly disregards the empirical data: “While some studies have shown the negative effects of spanking, today’s disrespectful youth have shown what happens when necessary spanking is forgone. . . . Some kids need it, period. When time-out, talking and taking away toys doesn’t work, you have to get that butt.”⁶⁸ Adherents range from parents who want to instill fear in children for obedience,⁶⁹ to others who are concerned that their children are already at a disadvantage, as with African-American boys, and thus need to be firmly, i.e. physically, disciplined at home or they will suffer in society.⁷⁰

This sentiment has even been expressed by courts. One trial court judge expressed a lot of sympathy for a father who had choked and used a belt to beat his teenaged daughter for disobeying him and texting photographs of herself wearing her underwear to friends:

[N]ot only do I believe that you um, had cause[] to discipline her, I do. I also strongly believe that—that kids should be subject to discipline punishment under certain circumstances, I do. I have boys myself. If I had a girl who was posing half necked [sic] on social media, I would also be wearing orange [in jail] because you would not be able to hold me back from her. So, I totally understand why you were as angry as you

67. Williams, *supra* note 63.

68. See L. Nicole Williams, *8 Reasons to Spank Your Kids*, MADAMENOIRE (Feb. 8, 2011), <http://madamenoire.com/40373/8-reasons-to-spank-your-kids>.

69. See *id.* (“To be feared (in the sense of reverence) is to be respected. Your children should be weary [sic] of going against your rules. It also teaches them to submit to authority regardless of whether or not they agree.”).

70. See Bill Briggs, *Adrian Peterson Case: Some Parents Say Spankings Improved Them*, NBC NEWS (Sept. 19, 2014, 12:18 PM), <http://www.nbcnews.com/storyline/nfl-controversy/adrian-peterson-case-some-parents-say-spankings-improved-them-n206516>; Patton, *supra* note 13 (“Today, black parents are still about twice as likely as white and Latino families to use corporal punishment on their children. I’ve heard many black people attribute their successes, or the fact that they weren’t in jail, on drugs or dead, to the beatings they received as children.”).

were, and why you did what you did. Because I'm assuming you were trying to prevent her from living a life you don't want her to live. Which is, getting pregnant at a young age, dropping out of school, getting her[]self physical[ly] assaulted, things like that. I assumed why you did what you did. Um, *unfortunately*, I think we're in this universe now, where parents don't just get to do whatever they want.⁷¹

Not surprisingly in light of this discourse, the judge acquitted the father on the most serious charges.

Courts look at whether the parent reasonably believed that physical discipline was necessary or appropriate.⁷² In this way, the *mens rea* of the discipline privilege incorporates the parental role. The *mens rea* analysis often explicitly assesses the reason for the discipline, such as what type of misbehavior the child engaged in and how serious it was, as well as the related questions of the parent's frequency of corporal punishment, and other disciplinary methods he or she has tried. Others examine whether the punishment "safeguarded" or "promoted" the child's welfare.⁷³ The reasonableness requirement built into these tests demonstrates that parental discipline must comport with some standards of efficacy. Problematically, however, the parental *mens rea* transforms corporal punishment from assault to parental care; demonstrating this, one court distinguished physical violence from "disciplinary spankings" to reverse a finding of child abuse against the child's mother.⁷⁴

71. *Carter v. Indiana*, 67 N.E.3d 1041 (emphasis added).

72. *See, e.g.*, N.H. REV. STAT. § 627:6 (2016) ("[W]hen and to the extent that he [or she] reasonably believes it necessary to prevent or punish such minor's misconduct . . .").

73. *See, e.g.*, 11 DEL. CODE § 468 (2016) (allowing for two justifications, either when the "force is used for the purpose of safeguarding or promoting the welfare of the child" or when the "force used is intended to benefit the child"); *see also* ALASKA PENAL CODE § 11.81.430 (2016) ("[T]o promote the welfare of the child . . ."); ARKANSAS CODE § 5-2-605 (2010) ("[T]o promote the welfare of the minor . . ."); C.R.S. § 18-1-703 (2009); C.G.S.A. § 53a-18 (2011) ("[T]o promote the welfare of such minor . . ."); KRS § 503.110 ("[T]o promote the welfare of a minor . . ."); NEB. REV. STAT. § 28-1413 (1975) ("[F]or the purpose of safeguarding or promoting the welfare of the minor . . ."); N.D.C.C. § 12.1-05-05 (2013) ("[F]or the purpose of safeguarding or promoting the minor's welfare, including prevention and punishment of the minor's misconduct, and the maintenance of proper discipline . . ."); N.Y. PENAL LAW § 35.10 (McKinney's 2015) ("[T]o promote the welfare . . ."); O.R.S. § 161.205 (2015) ("[T]o promote the welfare of the minor . . ."); 18 PA. C.S.A. § 509 (1992) ("[T]he force is used for the purpose of safeguarding or promoting the welfare of the minor . . ."); V.A.M.S. 563.061 (1978) ("[T]o promote the welfare of a minor . . .").

74. *Gonzalez v. Santa Clara County Dep't of Soc. Servs.*, 223 Cal.App.4th 72 (6th Cir. 2014).

B. HARMS OF CORPORAL PUNISHMENT

Medical and psychological expertise almost unanimously confirm that corporal punishment, even moderate, is not effective at teaching children and is in fact harmful.⁷⁵ In addition to physical injury, corporal punishment is correlated with increased risk of thirteen detrimental mental health, behavioral, and cognitive outcomes.⁷⁶ As a result, professional organizations such as the American Academy of Pediatrics have issued strong statements against its use.⁷⁷ Significantly, experts have found a correlation between corporal punishment and more serious parental violence against children.⁷⁸ The difficulty in delineating between appropriate, non-harmful corporal punishment and abuse is especially problematic, leading one court to recently conclude that: “The [state interest in protecting children] is particularly powerful in the context of corporal punishment, given the risk that the parental privilege defense will be used as a cover for instances of child abuse.”⁷⁹

These empirical harms are coupled with more intangible harms to personhood. Being beaten, particularly by someone entrusted to care for you, is humiliating. Society’s condoning of this assault conveys problematic lessons about obedience, power, and physical force. It is not surprising that children who are physically disciplined are significantly more likely to be violent with their spouses or their own children as adults.⁸⁰ Indeed, the entrenched hierarchy of parental corporal punishment is so problematic that one scholar recently analogized it to slavery. Stacey Patton also opines that slavery likely contributed to its ongoing disproportionate use in Black families. In a “kick the dog” fashion, adult slaves “who endured the trauma of their own

75. See Elizabeth T. Gershoff & Susan H. Bitensky, *The Case Against Corporal Punishment of Children*, 13 PSYCH., PUB. POL’Y & L. 231, 238–41 (2007) (cataloguing research on the harms).

76. See Gershoff & Grogan-Kaylor, *supra* note 20 (meta-analysis of over 100 studies on corporal punishment).

77. See American Academy of Pediatrics Committee on Psychosocial Aspects of Child and Family Health, *Guidance for Effective Discipline*, 101 PEDIATRICS 723 (1998) (“Corporal punishment is of limited effectiveness and has potentially deleterious side effects. The American Academy of Pediatrics recommends that parents be encouraged and assisted in the development of methods other than spanking for managing undesired behavior.”).

78. Pollard, *supra* note 21, at 621.

79. *Dorvil*, 32 N.E.3d at 868.

80. See Gershoff & Bitensky, *supra* note 77.

beatings, inherited their oppressors' violence and, for centuries, passed down these parenting beliefs." Patton terms this pattern:

one of the saddest untold stories in American history—the way in which the victims of racist oppression and violence have hurt the bodies of their own children in an effort to protect them from a hostile society. . . The truth is that white supremacy has done a masterful job of getting Black people to continue its trauma work and call it “love.”⁸¹

Patton critiques the Black leaders who continue to support corporal punishment and bemoans the many Black parents who beat their children in the name of discipline and/or permit them to be “paddled” at school in the states that allow parents to make this choice. She calls for the Black community to stop using corporal punishment because it erodes children’s humanity and teaches them blind obedience. These are problematic for all communities, but particularly Black children, who need to learn to object to their victimization and resist violence, particularly racialized violence.

The recognition of these harms has led to the banning of corporal punishment in most other settings, including prisons, day cares, and mental health facilities.⁸² The use of corporal punishment in schools has also been severely curtailed in recent decades. Until the 1980s, corporal punishment of students by teachers and administrators was legally permissible and routinely practiced nationwide. As of 2016, thirty-one states and the District of Columbia had banned corporal punishment in schools, largely driven by increased knowledge about both the harms of corporal punishment and the effectiveness of non-physical disciplinary methods.⁸³ Several of the states still permitting it only

81. Patton, *supra* note 13.

82. See Letter from John B. King, Jr. to Governors and Chief State School Officers (Nov. 22, 2016), <https://www2.ed.gov/policy/gen/guid/school-discipline/files/corporal-punishment-dcl-11-22-2016.pdf> (“Corporal punishment has also been banned in . . . U.S. prisons and U.S. military training facilities, and most juvenile detention facilities” and “[a] long list of education, medical, civil rights, disabilities, and child advocacy groups . . . have also been calling for a ban on this practice.”); see also Melinda D. Anderson, *Where Teachers Are Still Allowed to Spank Students: Corporal Punishment is Legal in 19 States*, THE ATLANTIC (Dec. 15, 2015), <http://www.theatlantic.com/education/archive/2015/12/corporalpunishment/420420>.

83. *State Laws*, GUNDERSEN CENTER FOR EFFECTIVE DISCIPLINE (2017), <http://www.gundersenhealth.org/ncptc/center-for-effective-discipline/discipline-and-the-law/state-laws>; Steve Hendrix, *End of Spanking?*, WASH. POST (Jan. 3, 2013) https://www.washingtonpost.com/lifestyle/magazine/the-end-of-spanking/2013/01/02/d328cf1e-3273-11e2-bb9b-288a310849ee_story.html.

allow teacher corporal punishment if parents give written permission,⁸⁴ and the vast majority of children “paddled” in schools live in just five states—Mississippi, Texas, Alabama, Arkansas, and Georgia.⁸⁵ Citing extensive data on the harms of physical punishment, the Secretary of Education called for a nationwide ban on educational corporal punishment in December 2016, and several jurisdictions are currently working towards this recommendation.⁸⁶

The data on its harms has also led to an international trend of banning parental corporal punishment. Sweden was the first country to do so in 1979, and recently France brought the total to 52 worldwide.⁸⁷ In doing so, these nations cited the psychological and expressive harms of permitting assault on society’s most vulnerable members, as well as international law equating corporal punishment with other physical assaults and torture.⁸⁸

In this Part, I have argued that the broad scope of the parental discipline privilege is unsupported by the offered rationales of personal experience and outdated tradition. In the next Part, I lay out a fuller argument for abolishing the parental discipline privilege, contending that its persistence in the face of its documented harms reflects both a criminal law anomaly and an overreading of parental rights.

84. Ohio, Utah, Texas, and North Carolina all allow parents to place their children on a “no-paddle list.” See Anderson, *supra* note 82.

85. See Anderson, *supra* note 82.

86. See Letter from King, *supra* note 82.

87. See Constance Gibbs, *France Says ‘Non!’ to Hitting Kids as It Bans Corporal Punishment*, NY DAILY NEWS (Jan. 4, 2017, 10:40 AM), <http://www.nydailynews.com/life-style/france-hitting-kids-bans-corporal-punishment-article-1.2934219> (detailing that 52 countries worldwide have now banned corporal punishment, including most of Europe); see also CNN, *Corporal Punishment Policies Around the World*, CNN.COM (Nov. 9, 2011, 4:05 PM), <http://www.cnn.com/2011/WORLD/asiapcf/11/08/country.comparisons.corporal.punishment/> (“Sweden, in 1979, was the first to make it illegal to strike a child as a form of discipline. Since then, many other countries in Europe have also instituted bans, as have New Zealand and some countries in Africa and the Americas.”).

88. See United Nations, Convention on the Rights of the Child, Res. 44/25, Art. 37(a) (Nov. 20 1989), <http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf> (“No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.”).

III. BANNING PARENTAL CORPORAL PUNISHMENT

I argue in this Part that the parental discipline privilege should be abolished. Constitutional norms are not a bar, and instead militate towards, this change. The malleable and more limited nature of parental rights, the empirical evidence of harm from corporal punishment, and an evolving consensus about appropriate childrearing conduct, all support abolition.

Parental rights, as noted above, are flexible and must take into account the interests of both the state and children. A primary rationale for them is that parents are in the best position to care for and raise children.⁸⁹ Because of this, parental rights are intertwined with duties.⁹⁰ Incorporating this vision of constitutional parenthood as a double-sided coin, scholars have posited parents as fiduciaries or trustees of their children, rather than owners or masters.⁹¹ In this framework, parents have no right to “control” their children; instead they have an obligation to nurture and raise them to be the best future citizens.⁹² When parents make choices that “compromise children’s developmental needs or the stability . . . of the polity, the state may justly intervene.”⁹³

The doctrinal requirement that adults exercise corporal punishment for the child’s welfare, or with a reasonable belief that it is necessary or appropriate, reflects this presumption. The growing consensus by medical professionals and research documenting the harmful effects of corporal punishment, however, demonstrate that it can no longer be justified in a child’s

89. See *supra* notes 27–29.

90. Prior to *Troxel*, in *Lehr v. Robertson* the Supreme Court noted that parental rights are “the counterpart of the responsibilities [parents] have assumed.” 463 U.S. 248, 257 (1983).

91. See, e.g., Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995). Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parent’s Rights*, 14 CARDOZO L. REV. 1746 (1993) (outlining a “generist” framework wherein parents are tasked with nurturing children, as trustees rather than owners). Shulman’s reading of the constitutional and family law doctrine provides historical support for this conception of parent as trustee. See SHULMAN, *supra* note 32, at 166–67. Consistent with this vision is a developmentally-based model of parental rights put forward by, among others, philosopher Shelley Burt. See Shelley Burt, *The Proper Scope of Parental Authority: Why We Don’t Owe Children an “Open Future,”* 44 CHILD, FAM. & ST. 243 (2003).

92. Burt, *supra* note 91, at 260 (describing “the sorts of goods that children must receive to grow, at a minimum, into socially competent, civically responsible, financially resourceful adults”).

93. *Id.* at 259–60.

interest. Put another way, it is no longer reasonable to believe that corporal punishment is truly for a child's welfare.⁹⁴ Stripped of this assumption, the real reasons behind much parental violence towards children are revealed—frustration and anger, perhaps coupled with antiquated notions of children as property.⁹⁵ These motivations against the child's interests, coupled with corporal punishment's documented harm, outweigh parental choice and any historic or personal rationales for this archaic exculpation. Like intimate partner violence, relational status should no longer exculpate anyone from assault.

New empirical evidence and evolving societal and international consensus have led to changing treatment of juveniles and the curtailment of parental rights in numerous other contexts. For instance, in the last decade, the Supreme Court has greatly limited the punishment of juveniles who have committed crimes. In prohibiting the death penalty, life without parole for non-homicide crimes, and automatic life without parole sentences, the Court relied heavily both on neurological evidence about brain development as well as changing international norms.⁹⁶

Specifically as to the parent-child relationship, courts and legislatures have limited parental choice in the two key areas of education⁹⁷ and medical treatment.⁹⁸ One recent example is

94. *C.f.* Jennifer M. Collins, *Crime and Parenthood: The Uneasy Case for Prosecuting Negligent Parents*, 100 Nw. U. L. REV. 807, 812 (2006) (arguing for more consistent and stringent prosecution of parents who negligently kill their children both because parents do not always act in their children's interests, and to reflect that parental rights also implicate duties of care); *see also* Jennifer M. Collins, *Lady Madonna, Children at Your Feet: The Criminal Justice System's Romanticization of the Parent-Child Relationship*, 93 IOWA L. REV. 131, 133-34 (2007) (arguing that the incidence of child abuse shows us that this is not always true, and that the law is too trusting in parental love).

95. *See* Straus, *supra* note 10. As to notions of children as property, *see* Woodhouse, *Who Owns the Child*, *supra* note 31.

96. As to the first, *see Roper v. Simmons*, 543 U.S. 551, 569 (2005) (citing "scientific and sociological studies" to confirm "a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young"). For the Court's reliance on changing international norms for its changed approach to the punishment of juveniles, *see id.* at 576 (citing the United Nations Convention on the Rights of the Child and "the overwhelming weight of international opinion against the juvenile death penalty" to "provide respected and significant confirmation for [its] own conclusions.").

97. *See* N.Y. EDU. LAW §§ 3204(2) & 3210(2)(d) (limiting and regulating homeschooling).

98. *See, e.g., In re Sampson*, 278 N.E.2d at 919; *In re Hofbauer*, 393 N.E.2d 1009 (N.Y. Ct. App. 1979).

mandatory vaccinations. In 2016, California enacted legislation eliminating all exemptions.⁹⁹ Scholars have persuasively argued that this mandate is constitutionally permissible, despite parental and religious objections, given the proven evidence of harm from non-vaccinating.¹⁰⁰ Indeed, Erwin Chemerinsky and Michelle Goodwin contend that children's uniquely vulnerable status make parental harms particularly problematic and subject to state regulation.¹⁰¹

Changed norms and, most importantly, scientific insights have led to these major shifts in the law governing juveniles. Like the rationales for curbing the punishment of minors, there is clear social science consensus about the harms of corporal punishment. Its abolition in other settings outside of the home, and even in certain kinds of homes such as foster homes, demonstrate this.¹⁰² Similarly to non-vaccination, the widespread societal consequences of parental corporal punishment can be seen as a public health concern. The personhood injuries described above compound the empirically proven harms of corporal punishment, particularly for children already marginalized by race. Further supporting a ban is the growing international consensus that assault against children should not be condoned, even when, or maybe particularly when, committed by parents. The line of abuse has moved, and now includes beating and hitting that was permitted during earlier times.¹⁰³ Accordingly, we can no longer exculpate in the name of children's best interests.

99. CAL. HEALTH & SAFETY CODE § 120335(b) (effective as of Jan. 1, 2016) (West Supp. 2017) ("The governing authority shall not unconditionally admit any person as a pupil of any private or public elementary or secondary school, child care center, day nursery, nursery school, family day care home, or development center, unless, prior to his or her first admission to that institution, he or she has been fully immunized.")

100. See Erwin Chemerinsky & Michele Goodwin, *Compulsory Vaccination Laws Are Constitutional*, 110 NW. U. L. REV. 589, 594, 603-05 (2016) (arguing that a compulsory vaccination law can withstand challenges based on parental rights and religious beliefs, and describing courts' consistent rejection of constitutional challenges to compulsory vaccination laws).

101. See Erwin Chemerinsky & Michele Goodwin, *Religion Is Not a Basis for Harming Others: Review Essay of Paul A. Offit's Bad Faith: When Religious Belief Undermines Modern Medicine*, 104 GEO. L.J. 1111, 1128-31 (2016) (arguing against parents' ability to deny children medical care on the basis of their religious, or other philosophical, beliefs).

102. See *supra* notes 82-86, 49 (discussing the abolition of corporal punishment in daycares, schools, etc. and the *Magazu* case).

103. There are no other remaining exceptions to criminal liability. In Blackstone's time, for instance, the discipline of wives, apprentices and students also constituted exceptions to assault and battery laws. See, e.g., 3 WILLIAM BLACKSTONE,

A word on privacy. Family privacy, as noted above, is intertwined with parental rights and other family constitutional rights.¹⁰⁴ Whether the corporal punishment occurs in a public or private place also appears to influence judicial determinations of its legitimacy. For instance, the court in *Sweaney* noted that the mother hit her child at school in front of teachers.¹⁰⁵ The father in *Dorvil* spanked his child on the street, witnessed by two police officers. Yet the public nature of the discipline did not just make it more likely to be prosecuted.¹⁰⁶ Instead, courts seem to consider it part of the analysis distinguishing between acceptable parental discipline and criminal assault. Tellingly, the trial court judge explicitly noted the public nature of Dorvil’s corporal punishment in finding him guilty, declaring “[i]f you’re in public with your kids, it’s not appropriate to discipline in this fashion.”¹⁰⁷ This statement problematically implies that harm perpetuated in the home is beyond the scope of state intervention.¹⁰⁸

Assaults on children should be seen as a public problem, no matter the location.¹⁰⁹ Feminist scholars have presented a robust critique of privacy as cover for intrafamilial harms and the perpetuation of illegitimate hierarchies.¹¹⁰ They have persuasively demonstrated that the private/public line is malleable and subject

COMMENTARIES *120. All of these have since been abolished. See Godsoe, *Relational Crime*, *supra* note 22.

104. See *supra* note 27.

105. See *Sweaney*, 119 F.3d at 1387.

106. Presumably public assaults, particularly in front of mandated reporters, are also more likely to result in prosecution.

107. Commonwealth v. Dorvil, 32 N.E.3d 861, 865–66 (Mass. 2015) (emphasis added) (quoting trial court transcript at 99–100, which contains the remarks at sentencing by Julie J. Bernard, J.). The Supreme Judicial Court of Massachusetts reversed the Appeals Court of Massachusetts, which had affirmed the trial court’s decision. See Dorvil, 32 N.E.3d at 872 (reasoning that “[i]t is understandable that parents would be angry at a child whose misbehavior necessitates punishment, and we see no reason why such anger should render otherwise reasonable uses of force impermissible”).

108. Cf. *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189 (1989) and critique by Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359 (1992) (arguing that treating children like parental property is unconstitutional).

109. See Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665 (1990).

110. See, e.g., Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2118 (1996) (demonstrating how “protect[ion of] the privacy of the family and promot[ion of] ‘domestic harmony’” served to immunize men who beat their wives from criminal sanctions); see also Schneider, *supra* note 18, at 976, 979 (arguing that although “[t]he law claims to be absent in the private sphere[.]” it is very much present in defining the family and instituting a hierarchy of “male [and adult] dominance”).

to manipulation, protecting only certain types of families or particular persons within families, usually not women and children.¹¹¹ As Frances Olson put it, “all private action can be made to look public and vice versa.”¹¹² Characterizing something as private legitimizes it and precludes state intervention that would limit power imbalances and harm.¹¹³ In the intimate partner violence context, however, privacy is no longer an acceptable justification for assault. Similarly, whether the child is in the home or in a public place should not determine the legitimacy of corporal punishment.

This is not to say that privacy is an unadulterated harm; indeed, state intervention to regulate parental corporal punishment is fraught with risks of disproportionality and the policing of parenthood choices that should be protected.¹¹⁴ This is particularly true of low-income women of color, who are over-regulated and punished in both the child welfare and criminal systems.¹¹⁵ These concerns, however, already exist since currently we distinguish between justified parental corporal punishment and unreasonable corporal punishment to mitigate them further; moreover, privacy could be reenvisioned in an egalitarian fashion, to protect all families against unwarranted state intrusion, while simultaneously shielding all family members against intrafamilial abuse.¹¹⁶ Consistent with this reimagined family privacy are

111. See, e.g., Schneider, *supra* note 18, at 978 (“Definitions of ‘private’ and ‘public’ in any particular legal context can and do constantly shift.”). As to privacy’s strategic use against more marginalized families, see Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1470 (1991) (noting “the contradictory meaning of the private sphere for women of color” in describing their disproportionate punishment for actions during pregnancy); Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 U.C. IRVINE L. REV. 297 (2013); see also Khiara M. Bridges, *Privacy Rights and Public Families*, 34 HARV. J.L. & GENDER 113, 116 (2011) (detailing ethnographic research from an obstetrics clinic demonstrating “gross and substantial intrusion by the government into poor, pregnant women’s private lives”).

112. Frances Olson, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 CONST. COMM. 319, 322 (1993).

113. *Id.* at 321 (including child abuse in the protected harmful conduct).

114. I further elaborate and address these concerns elsewhere. See Godsoe, *Relational Crime*, *supra* note 22.

115. For a thoughtful analysis of this problem, see Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474 (2012).

116. See, e.g., Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 745 (1999) (imagining an “egalitarian privacy” framework which would protect all family members, a scheme under which both domestic violence “and parents batter[ing] their children” would be “no longer acceptable”); see also Roberts, *Punishing Drug Addicts*, *supra* note 111, at 1465 (positing a right of privacy which “seeks to protect intimate or

theories of parental rights as developmentally-based, and of parents as trustees rather than owners or masters.¹¹⁷

CONCLUSION

I have argued here for the abolition of the parental disciplinary privilege—a proposal that should not be radical, but nonetheless is. There is widespread medical consensus that the practice is ineffective, and often harmful. This scientific reality negates the presumption of aligned parental and children’s interests. Corporal punishment is often driven by parental frustration, anger, or tradition; criminal assault and battery should not fall within permissible child rearing methods. And yet, because we largely ignore the treatment of children and overread parental rights, widespread corporal punishment persists.

Although this Article addresses just one, albeit widespread, harmful parenting practice, it has broader implications. This analysis militates towards a narrower and more context-specific reading of parental rights. As such, it supports revisiting other parenting practices as we gain new empirical evidence and as societal norms shift. Should parents be permitted to send their children to unregulated “boot camps” with spotty safety records?¹¹⁸ Require them to participate in religious activities that promulgate racist or sexist hierarchies?¹¹⁹ Deny adolescents mental health treatment because of personal disdain for psychiatry or,¹²⁰ conversely, force them to undergo ‘conversion

personal affairs [of all types of families] that are fundamental to an individual’s identity and moral personhood from unjustified government intrusion”).

117. See *supra* notes 90–93 (describing the theoretical model).

118. See Cynthia Godsoe, *All in the Family: Towards a New Representational Model for Parents and Children*, 24 *GEO. J. LEGAL ETHICS* 303 (2011).

119. See, e.g., *The Remarkable Journey of Orthodox Jewish Woman Cast Out Into A Life of Poverty by Her Family After Buying a Tight Sweater at 17... Who Then Went on to Graduate Harvard*, *DAILY MAIL* (Jan. 26, 2014), <http://www.dailymail.co.uk/news/article-2546290/Orthodox-Jewish-woman-shunned-family-age-17-graduates-Harvard.html> (discussing the case of Leah Vincent); see also Leo Hohmann, *Islam Quiz Has U.S. Parents Outraged*, *WND.COM* (Sept. 29, 2015, 8:01 PM) (describing how teaching some basic facts about Islam in a Georgia public school led thousands of parents and “concerned citizens” to protest and petition for curricular change). Parents objected that only they should be teaching children about religion, and that learning about Islam “goes against [their] religion [Christianity] completely.” The teachers responded that they were merely trying to teach children that the religions and communities were “equal.” *Id.*

120. See Judith Warner, *The Denial of Mental Illness is Alive and Well*, *TIME* (Sept. 14, 2012) (discussing one such case); see also Jennifer O’Neill, *Parents ‘In Denial’ About Teen’s Depression and Anxiety*, *YAHOO PARENTING* (April 29, 2015),

therapy' if they are gay, transgender or gender non-conforming?¹²¹ These and a range of other questions merit the attention of family law scholars and reformers in order to ensure the best balance between parental choice and children's safety and best interests.

<https://www.yahoo.com/news/parents-in-denial-about-teens-depression-and-117195820377.html>.

121. All but a handful of states still permit parents to mandate this therapy, which has resulted in trauma and, in some cases, suicide. See Julie Laemmle, *California's Conversion: A Ban on Minor Conversion Therapy and the Effect on Other States*, 2 IND. J.L. & SOC. EQUALITY 248 (2013); Jody L. Herman, *Parents of Transgender Children Need to Look at the Research*, N.Y. TIMES (Jan. 8, 2015) (discussing the Leelah Alcorn case), <http://www.nytimes.com/roomfordebate/2015/01/08/is-it-child-abuse-to-make-a-trans-child-change/parents-of-transgender-children-need-to-look-at-the-research>. Some commentators have criticized bans on conversion therapy for infringing on parental rights. See, e.g., Lynn Wardle, *Anti-Gay Conversion Therapy Laws Infringe Parental Rights*, CNS NEWS (Aug. 14, 2015, 3:52 PM), <http://www.cnsnews.com/commentary/lynn-wardle/anti-gay-conversion-therapy-laws-infringe-parental-rights> ("The anti-SOCE laws also appear to seriously infringe parental rights, which long have long been deemed protected as fundamental rights under the Constitution of the United States Perhaps the most disturbing aspect of the anti-SOCE laws is their disregard for and denial of parental rights to act in the best interests of their own children. That strikes a blow that harms not only the parents who support SOCE treatment for their children, but ALL parents and children The pursuit of political correctness is no justification for interference with the constitutional rights of parents.").