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Reining in the Parental-Discipline Defense: Addressing the Need for Standards that Work to Protect Indiana's Children

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REINING IN THE PARENTAL-DISCIPLINE DEFENSE: ADDRESSING THE NEED FOR STANDARDS THAT WORK TO PROTECT INDIANA'S CHILDREN

I. INTRODUCTION

As ten-year-old William sits in his chair at school, he finds it difficult to concentrate on the words the teacher is writing on the board. William continuously shifts from side to side, putting weight on the right side of his thigh and then on his left. He teeters on the edge of the chair. He dare not completely sit down because the pain would be too much to handle. His teacher, Mrs. Smith, notices that William is not taking notes like everyone else and has been inattentive all day long. Before recess, Mrs. Smith asks William to meet with her. William explains that he cannot sit in his chair because of the pain. He hurts because last night his mother spanked him twelve times with an electrical cord for lying to her. Alarmed, Mrs. Smith takes William to the guidance counselor, who calls Child Protective Services. Child Protective Services interviews William and his family. His mother states that she has tried grounding William but cannot get through to him, so spanking him with a cord was the only way to discipline him. She is tired of William's continual misbehavior and cannot take it any longer. Ultimately, Child Protective Services determines that William is no longer safe to remain with his mother. William is removed from his home, placed in foster care, and forced to meet with several strangers known as case workers and therapists. Eventually, William's mother is charged with battery, but is later exonerated on criminal charges. She is set free because her purpose for beating William was to punish him for his history of trouble-making and to deter him from doing it again. While William's mother's criminal trial was going on, William's father filed for custody modification, and the court ordered William to move hundreds of miles away from his family and friends to a place he has never lived in order to ensure his safety.[1] All of this raises the question of who pays for child abuse—the parent or the child? The parental-discipline defense is used to justify a parent's battery against a child when the parent has participated in reasonable discipline of the child.[2] Without the defense, a parent may be

[1] Facts are loosely based upon the circumstances surrounding Willis v. Indiana, 888 N.E.2d 170 (Ind. 2008).

[2] *See* Deana Pollard, *Banning Child Corporal Punishment*, 77 TUL. L. REV. 575, 634–35 (2003) (arguing for a ban on corporal punishment because of its negative impact on children and, in turn, society). Pollard notes that the United States uses violence against children more than any other industrialized nation. *Id*. at 577. Pollard advocates banning

subject to civil and criminal liability for battery, including other repercussions such as removal of the child from the home, protective orders, and custody orders.[3] A parent, however, may escape civil and criminal liability if he or she successfully raises the parental-discipline defense.[4] Every state allows corporal punishment in some form, and almost thirty states have codified the parental-discipline defense.[5] The

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corporal punishment in the United States because of its negative impact on children, parents, and society. *Id*. at 577–78. She states that corporal punishment increases a "child's aggression level, decrease[s] [his or her] cognitive functioning, and increase[s] psychological and physical ailments." *Id*. at 577. For parents, it increases guilt and deteriorates the parent-child bond. *Id*. at 577–78. Pollard notes that child abuse jurisprudence is parent-centered, and she recommends a change to a child-centered approach. *Id*. at 645–46. Furthermore, she wishes to raise awareness that corporal punishment, even in the absence of physical injury, can cause emotional harm. *Id*. at 648–50. *See generally infra* note 91 (providing the Model Penal Code's model legislation to the parental-discipline defense); *infra* note 115 (providing the Restatement (Second) of Torts' factors for a court to consider when determining whether a parent's conduct is justified). The American Academy of Pediatrics ("AAP") defines corporal punishment as the application of force so as to cause physical pain in response to an undesirable behavior. Comm. on Psychosocial Aspects of Child and Family Health, Am. Acad. of Pediatrics, *Guidance for Effective Discipline*, 101 PEDIATRICS 723, 725 (1998). The AAP recommends that parents use forms of discipline other than physical discipline. *Id*. at 726. The AAP promotes this viewpoint because of the danger to health that corporal punishment creates and lack of efficacy corporal punishment has compared to using other strategies, such as time-out or removal of privileges. *Id*.

[3] Jennifer A. Brobst, *The Parental Discipline Defense in New Zealand: The Potential Impact of Reform in Civil Proceedings*, 27 N.C. CENT. L.J. 178, 178–79 (2005). Brobst makes a comparative analysis of the parental-discipline defense across countries. *Id*. at 178–82. In the United States, parents who participate in physical punishment of their child that fits the statutory definition of abuse may be subject to civil and criminal liability. *Id*. at 179–80. The parental-discipline defense is a full justification defense available in every state. *Id*. Thus, if a person is successful in raising the defense, he or she will be exonerated. *Id*. at 180; 1 JOHN E.B. MYERS, MYERS ON EVIDENCE IN CHILD, DOMESTIC, AND ELDER ABUSE CASES 210–11, 301–02 (2005) (describing the use of the parental-discipline defense); 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 144 (1984), *available at* 2 CRLDEF § 144 (West, Westlaw Current through 2009 Update) (discussing the parental-discipline defense as applied throughout the United States).

[4] *See* MYERS, *supra* note 3, at 210, 216 (stating that American law allows parents to raise the defense that they were engaging in reasonable corporal punishment). Myers provides a treatise on child abuse that provides an in-depth perspective on how the legal system deals with child abuse. *Id*. *See also* ROBINSON, *supra* note 3, § 144 (stating that the parent's actions will be justified even though the force is otherwise unlawful).

[5] *See* Pollard, *supra* note 2, at 577 (discussing that American law protects parents who use physical violence against a child in all fifty states); Common Law Approaches and Statutes, *infra* notes 19–20 (illustrating the variety of approaches to the parental-discipline defense in the United States). Pollard goes onto contrast this phenomenon with what is going on elsewhere in the world. *Id*. at 587–92. She noted that Sweden, Finland, Austria, Norway, Cyprus, Croatia, Denmark, and Latvia have banned corporal punishment via legislative action, while Italy outlawed it via court order. *Id*. at 589–91. Pollard noted that

defense is justified by its ability to preserve a parent's right to the upbringing of his or her child as a means to promote good citizenry and family harmony.[6] Research, however, contradicts this belief by suggusting that physical discipline undermines the goals of good citizenship and family harmony.[7] Children who are physically disciplined are more likely to suffer from depression, anxiety, and fear.[8] In addition, they are less likely to comply with authority over a long-term period of time.[9] Finally, the use of physical force negatively impacts the parent-child bond.[10] Such research erodes the principle justification for the parental-discipline defense.[11] Nevertheless, despite

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the European Court of Human Rights effectively banned physical punishment in the United Kingdom. *Id*. at 590–91.

6 *See infra* Part II.B (discussing the rationale the courts have provided for the parental-discipline defense, including the need to promote morality and family harmony).

7 *See infra* Part II.D (illustrating that corporal punishment does not promote family harmony or moral behavior, but instead negatively affects the growth and development of the child and parent-child bond).

8 MURRAY A. STRAUS, BEATING THE DEVIL OUT OF THEM: CORPORAL PUNISHMENT IN AMERICAN FAMILIES 165–66 (1994). The author also notes other social problems children experience when corporal punishment is used, such as the person is likely to hit other children and adults, to experience less rapid cognitive development, to be suicidal, to be violent towards their children or spouse, to engage in other violent behaviors, to develop a drinking problem, to receive a lower occupation and income, and to participate in masochistic sexual conduct. *Id*. *Compare id*., *with* Judith G. McMullen, *"You Can't Make Me!": How Expectations of Parental Control over Adolescents Influence the Law*, 35 LOY. U. CHI. L.J. 603, 604–05 (2004). Judith McMullen advocates punishing parents for their children's misbehavior for three reasons: doing so makes parents more attune and accountable for taking constructive action to affect their children's behavior, constitutes a kind of retribution against those persons perceived as responsible for a generation, and may serve as a deterrent to recalcitrant children who take advantage of lenient parenting. *Id*.

9 STRAUS, *supra* note 8, at 153. The author states:

> Hitting a child to stop misbehavior may be the easy way in the short run, but in the slightly longer run, it makes the job of being a parent more difficult. This is because spanking reduces the ability of parents to influence their children, especially in adolescence when they are too big to control by physical force. Children are more likely to do what the parents want if there is a strong bond of affection with the parent. In short, being able to influence a child depends in considerable part on the bond between parent and child.

Id.

10 Murray A. Straus, *Children Should Never, Ever, Be Spanked No Matter What the Circumstances, in* CURRENT CONTROVERSIES ON FAMILY VIOLENCE 137, 146 (Donileen R. Loseke, Richard J. Gelles & Mary M. Cavanaugh eds., 2d ed. 2005).

11 *See* Part II.D (discussing the negative impact of corporal punishment on children). *Compare* Robert E. Larzelere, *A Review of the Outcomes of Parental Use of Nonabusive or Customary Physical Punishment*, 98 PEDIATRICS 824–28 (1996) (theorizing that corporal punishment studies are not conclusive and that banning corporal punishment would be irresponsible until we know more about the impact of corporal punishment on children). Larzelere updated his research in 2000 and found that overly frequent use of physical

research suggesting that corporal punishment harms children, the parental-discipline defense continues to exist.[12] Erasing the presumption that parental discipline seeks to promote or protect a child's welfare would better facilitate a discussion as to whether a justification defense is appropriate.[13] This Note discusses how Indiana's current law prioritizes parental rights over children's rights and advocates that the parental-discipline defense should be modified to require a prohibition of child abuse and a showing of necessity and proportionality in order to better protect children.[14]

Part II of this Note addresses the historical and cultural occurrences that led to the formation of the parental-discipline defense.[15] Part III analyzes the strengths and weaknesses of the approaches taken by states based on their use of the Model Penal Code or the Restatement (Second) of Torts.[16] Part IV suggests that the current approach to the parental-discipline defense fails to adequately protect children; therefore, the legal

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punishment had detrimental outcomes. Robert E. Larzelere, *Child Outcomes of Nonabusive and Customary Physical Punishment by Parents: An Updated Literature Review*, 3 CLINICAL CHILD & FAM. PSYCHOL. REV. 199 (2000).

12 Patricia E. Weidler, *Parental Physical Discipline in Maine and New Hampshire: An Analysis of Two States' Approaches to Protecting Children from Parental Violence*, 3 WHITTIER J. CHILD & FAM. ADVOC. 77, 86–88 (2003). Four primary reasons support the existence of the defense: (i) religious beliefs; (ii) the social history of people who were spanked and spank their own children; (iii) a legal presumption that a parent disciplines in order to promote or protect a child's welfare, and (iv) privacy rights. *Id*. *But see* Dan Markel, Jennifer M. Collins & Ethan J. Leib, *Criminal Justice and the Challenge of Family Ties*, 2007 U. ILL. L. REV. 1147, 1187–88 (discussing the reasons why states offer the parental-discipline defense and arguing that they should not). Markel, Collins, and Leib state:

> Moreover, without extending benefits and immunities to the family, the state risks losing compliance from its citizens; some benefits may be necessary to establish and maintain the state's legitimacy. Indeed, while the benefits may seem inappropriate in the context of the criminal justice system, they might be viewed as a net benefit for inducing general compliance with a legal regime.

Id. at 1188.

13 ROBINSON, *supra* note 3, § 144. Recall that a justification defense exists in order to excuse the actor's conduct because the harm the actor seeks to prevent through physical force is of greater risk of harm to the child or to the public than the use of physical force itself. *Id*. *See* Kandice K. Johnson, *Crime or Punishment: The Parental Corporal Punishment Defense – Reasonable and Necessary, or Excused Abuse?*, 1998 U. ILL. L. REV. 413, 417–18 (stating that the parental defense is classified as a justification defense).

14 *See infra* Part IV (advocating legal reform of child abuse and criminal law in order to address the need to protect children from abusive parents).

15 *Infra* Part II (addressing the history leading up to the creation of the parental-discipline defense).

16 *Infra* Part III (discussing the Model Penal Code § 3.08(1) and Restatement (Second) of Torts § 150 approaches to parental-discipline defense).

defense should be legislatively reformed to include a definition of child abuse and necessity and proportionality standards.[17]

II. BACKGROUND: THE EVOLUTION OF THE PARENTAL-DISCIPLINE DEFENSE

In the United States, every state has some form of a parental-discipline defense.[18] Some states developed the defense through common law.[19] Others have done so by enacting a statute.[20] The

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17 *Infra* Part IV (analyzing the opportunities for improving Indiana's approach to the parental-discipline defense).

18 ROBINSON, *supra* note 3, § 144. Robinson discusses the parental-discipline defense and offers an interpretation of the Model Penal Code and Restatement (Second) of Torts approaches. *Id*.

19 Fletcher v. People, 52 Ill. 395, 395 (1869) (holding that wanton and needless cruelty is barred and requires parental authority to be exercised within the bounds of "reason and humanity"); Willis v. State, 888 N.E.2d 177 (Ind. 2008) (affirming Smith v. State, 489 N.E.2d 140 (Ind. 1986) and implementing the RESTATEMENT (SECOND) OF TORTS § 150 standards to determine whether punishment was reasonable); State v. Comeaux, 319 So. 2d 897 (La. 1975) (holding conduct is justified if it is reasonable); Moore v. State, 291 A.2d 73, 77 (Md. Ct. Spec. App. 1972) (holding a requirement that punishment "must not exceed that properly required for disciplinary purposes and must not be excessive or cruel"); *In re* Rodney C., 398 N.Y.S.2d 511 (Fam. Ct. 1977) (adopting RESTATEMENT (SECOND) OF TORTS § 150 and holding that physical force justified only so far as it is reasonably necessary to promote the child's welfare or to maintain discipline, noting that this test is subjective yet cannot exceed bounds of reasonableness, thus adding an objective standard as well); Harbaugh v. Commonwealth, 167 S.E.2d 329 (Va. 1969) (holding punishment must not be unreasonable or excessive); State v. McDonie, 123 S.E. 405 (W. Va. 1924) (holding that the defense requires showing of malice by the parent); State v. Spiegel, 270 P. 1064 (Wyo. 1924) (holding that a parent in punishing his children must act in good faith with parental affection, must not exceed the bounds of moderation, and must not be cruel or merciless, and that any act of punishment in excess of such limits is unlawful). *See* ROBINSON, *supra* note 3, § 144 (citing some of the previously-mentioned cases that implement the common law parental-discipline defense in each respective state).

20 ALA. CODE § 13A-3-24(1) (LexisNexis 2005) (reasonable force when reasonably necessary and appropriate); ALASKA STAT. § 11.81.430(a)(1) (2008) (reasonably necessary and appropriate to promote a child's welfare so long as force is reasonable, appropriate, and non-deadly); ARIZ. REV. STAT. ANN. § 13-403(1) (2001) (reasonable and appropriate force when reasonably necessary to maintain discipline); ARK. STAT. ANN. § 5-2-605(1) (2006 & Supp. 2009) (may use reasonable force to the extent reasonably necessary to discipline or promote welfare); COLO. REV. STAT. § 18-1-703(1)(a) (West 2004 & Supp. 2008) (may use reasonable force to the extent reasonably necessary to discipline or promote welfare); CONN. GEN. STAT. ANN. § 53a-18(1) (West 2007) (may use reasonable force to the extent reasonably necessary to discipline or promote welfare); DEL. CODE ANN. tit. 11, § 468(1) (2007) (may use reasonable and moderate force excluding: "[t]hrowing the child, kicking, burning, cutting, striking with a closed fist, interfering with breathing, use of or threatened use of a deadly weapon, prolonged deprivation of sustenance or medication, or doing any other act that is likely to cause or does cause physical injury, disfigurement, mental distress, unnecessary degradation or substantial risk of serious physical injury or death") GA. CODE ANN. § 16-3-20(3) (2007) (may use reasonable discipline); HAW. REV. STAT. § 703-309(1) (West, Westlaw through 2009 1st Spec. Sess.) (adopting verbatim the

parental-discipline defense justifies a person's use of physical force on a child in order to promote the child's welfare as long as the purpose of the force is to prevent or punish the child for misconduct.[21] The defense

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Model Penal Code standards); KY. REV. STAT. ANN. § 503.110(1) (West 2006) (force may be used when promoting minor's welfare and the force is not known to cause a substantial risk of death, serious bodily injury, disfigurement, extreme pain, or extreme mental distress); LA. REV. STAT. ANN. § 14:18(4) (2007) (allowing reasonable discipline); ME. REV. STAT. ANN. tit. 17-A, § 106(1) (2006 & Supp. 2008) (justifying a reasonable use of force to the extent the person reasonably believes it necessary to prevent or punish other person's misconduct); MINN. STAT. § 609.06(6) (West 2009) (in exercise of lawful authority); MO. ANN. STAT. § 563.061(1) (West 1999) (actor must reasonably believe that the force is necessary to promote the child's welfare and cannot cause death, serious physical injury, disfigurement, extreme pain or emotional distress); MONT. CODE ANN. § 45-3-107 (2009) (may use reasonable and necessary force to restrain a child); NEB. REV. STAT. ANN. § 28-1413(1) (LexisNexis 2008) (uses the Model Penal Code but adds gross degradation); NEV. REV. STAT. § 200.180(1)(b) (LexisNexis 2006); N.H. REV. STAT. ANN. § 627:6(I) (LexisNexis 2009) (when and to the extent that he reasonably believes it necessary to prevent or punish such minor's misconduct.); N.J. STAT. ANN. § 2C:3-8 (West 2005) (force must be for the purpose and to the extent necessary to further that responsibility); N.Y. PENAL LAW § 35.10(1) (McKinney 2009) (may use physical force to the extent that he reasonably believes it necessary to maintain discipline or to promote the welfare of such person); N.D. CENT. CODE § 12.1-05-05(1) (1997 & Supp. 2009) (may use reasonable force even if it is not necessary); OKLA. STAT. ANN. tit. 21, § 643(4) (West 2002) (provided restraint or correction has been rendered necessary by the misconduct of such child and must be reasonable in manner and moderate in degree); OR. REV. STAT. § 161.205(1) (2007) (can use reasonable force when and to extent the person reasonably believes it is necessary to promote a child's welfare); 18 PA. CONS. STAT. ANN. § 509(1) (West 1998) (adopts the Model Penal Code approach but adds no protection for gross degradation); S.D. CODIFIED LAWS ANN. § 22-18-5 (2006) (punishment may be rendered necessary and if so the parent may engage in reasonable and moderate discipline); TEX. PENAL CODE ANN. tit. 2, § 9.61 (Vernon 2003) (person engaging in reasonable discipline that they believe is reasonably necessary); UTAH CODE ANN. § 76-2-401(3) (2008) (stating one may use reasonable discipline so long as it does not cause death, serious physical injury or serious bodily injury); WIS. STAT. ANN. § 939.45(5) (West 2005) (allowing reasonable discipline).

[21] ROBINSON, *supra* note 3, § 144(a) (summarizing the parental-discipline defense). While this Note will not consider the use of force by teachers, many judicial decisions have addressed this issue. *See* Ingraham v. Wright, 430 U.S. 651 (1977) (holding that corporal punishment used on students at school does not violate a child's constitutional rights). In *Ingraham*, the Court considered whether the Eighth Amendment Cruel and Unusual Punishment Clauses apply to corporal punishment in school. *Id.* at 659, 664–71. Florida junior high students brought a claim that their constitutional rights had been violated by being subjected to disciplinary corporal punishment. *Id.* at 653. The Court held that teachers may impose reasonable force to discipline a child. *Id.* at 671. Notably, the decision showed a division in the Court with a 5-4 split. *Id.* at 653, 683, 700. *See also* Pollard, *supra* note 2, at 586. Generally, teachers are no longer allowed to use corporal punishment to discipline students. *Id.* Twenty-seven states and the District of Columbia have banned spanking in schools. *Id.* For a chart summarizing the state-by-state policies, see GLOBAL INITIATIVE TO END ALL CORPORAL PUNISHMENT OF CHILDREN, PROGRESS TOWARDS PROHIBITING ALL CORPORAL PUNISHMENT IN NORTH AMERICA, http://www.endcorporalpunishment.org/pages/pdfs/charts/Chart-NorthAmerica.pdf (last visited on Sept. 25, 2009). For a table that provides which states allow corporal punishment in public schools

is available to protect or further any legally protected interest.[22] The defense is not available to everyone, but is usually limited to a situation where a parent or guardian uses physical force to protect a child or to promote the child's welfare.[23] For an act to be justified, typically the conduct must be necessary to protect or further the protected interest, and it must cause harm that is proportional or reasonable in relation to the harm threatened.[24] The defense is not uniform, which leads to inconsistent interpretation and application across state lines.[25] A historical review of the parental-discipline defense requires consideration of parental rights in the civil and criminal justice systems as well as the increasing involvement of the government in protecting children.[26] In order to properly understand the parental-discipline

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across the United States, 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 from U.S. Public Policy*, 13 PSYCHOL., PUB. POL'Y, & L. 231, 258 (2007). Similarly, commentators argue that parents should not be able to use physical punishment either. *See generally* Tamar Ezer, *A Positive Right to Protection for Children*, 7 YALE HUM. RTS. & DEV. L.J. 1 (2004) (discussing the need for children's right to live free from abuse should trump parental rights); Pollard, *supra* note 2, at 49, 645–54 (noting that corporal punishment, even when it does not lead to physical injury, causes emotional harm that is damaging to children, parents, and society). Ezer promotes a positive right for children. Ezer, *supra*, at 13. In his work, he notes that the *Deshaney* case, discussed further in this Note, stands for the proposition that American jurisprudence has said that children do not have a right to protection from harm. *Id*. He supports a change in our laws to provide positive rights for children. *Id*. at 13. Positive rights are things that people may demand from their government, such as children may demand protection from the government. *Id*. at 9. *But see* Johnson, *supra* note 13, at 483, who believes that parents should be able to defend themselves so long as the child's right to live free from abuse is paramount.

22 *See* ROBINSON, *supra* note 3, § 121(a) (discussing the justification defenses' requirement that the actor seek to promote a legally protected interest when he or she uses physical force against another). Robinson clarifies that the primary interest is in preserving the unique authority of parents to rear their children. *Id*. § 144(a).

23 *See* MODEL PENAL CODE § 3.08 (1985) (describing the model definition of whom may obtain protection under the law); RESTATEMENT (SECOND) OF TORTS § 150 (1965) (same). While every state that has the defense offers it to a parent, the texts of the Model Penal Code and Restatement (Second) of Torts promote protection of others serving *in loco parentis*. *Id*. *See also* BLACK'S LAW DICTIONARY 856 (9th ed. 2009) (defining *in loco parentis* as acting in the place of the parent).

24 *Compare* ROBINSON, *supra* note 3, § 121(a)(2) (discussing the notion that the MODEL PENAL CODE § 3.08(1) and RESTATEMENT (SECOND) OF TORTS § 150 provide for necessity and proportionality), *with* ROBINSON, *supra* note 3, § 144(d) (asserting that necessity is not part of the equation).

25 *See, e.g.*, statutes cited *supra* note 20 (providing an overview of the various statutes covering the parental-discipline defense).

26 *See infra* Part II (providing an analysis of the parental-discipline defense as well as implications for child welfare).

defense, this Note focuses on the development of the defense.[27] Part II.A examines the historical and cultural forces that have created the tension between parents' and children's rights in regard to corporal punishment.[28] Part II.B discusses the common law and Model Penal Code approaches to the parental-discipline defense.[29] Part II.C reflects on Indiana's approach to the parental-discipline defense to illustrate how the child's best interest is not protected.[30] Part II.D discusses the negative impact of the parental-discipline defense on children and society, thus illustrating the need for legislative reform of the parental-discipline defense.[31]

A. Historical and Cultural Reasoning behind the Parental-Discipline Defense

1. Parental Right to Use Physical Force

It is a long-held belief that parents have broad authority to protect, educate, and generally raise their children as they see fit.[32] The practice of parental control over one's children has been recorded as far back as biblical times.[33] In the Roman Empire, civil law provided a father with

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[27] *See infra* Part II (discussing the evolution of the parental-discipline and parental immunity defenses and how they led to the Model Penal Code and Restatement approaches).

[28] *See infra* Part II.A (discussing the history of the parental-discipline defense).

[29] *See infra* Part II.B (discussing the Model Penal Code and Restatement (Second) of Torts positions on the parental-discipline defense).

[30] *See infra* Part II.C (discussing Indiana's adoption of the Restatement standards and case law regarding the parental-discipline defense).

[31] *See infra* Part II.D (discussing studies on corporal punishment's impact on children and society).

[32] *See* Pollard, *supra* note 2, at 579–80 (discussing the historical context of corporal punishment). Pollard asserts that physical discipline of a child was documented in biblical times. *Id*. at 579. In ancient Greece, parents could sell or murder their own child. *Id*. at 580. In English common law, a father had the right to his child's labor and services. *Id*. at 580. Beating children was seen as necessary to make children respectable citizens. *Id*. *See also* Howard Davidson, *The Legal Aspects of Corporal Punishment in the Home: When Does Physical Discipline Cross the Line to Become Child Abuse?*, 17 CHILD. LEGAL RTS. J. 18, 18 (1997) (stating that American law does not give the "life or death" power like the Bible); Judge Leonard P. Edwards, *Corporal Punishment and the Legal System*, 36 SANTA CLARA L. REV. 983, 983 (1996) (offering a biblical verse that advocates beating a child "with the rod" in order to deliver "his soul from hell"); Harold G. Grasmick, Carolyn Stout Morgan & Mary Baldwin Kennedy, *Support for Corporal Punishment in the Schools: A Comparison of the Effects of Socioeconomic Status and Religion*, 73 SOC. SCI. Q. 177 (1992) (discussing a study in support of corporal punishment and finding that those who designated themselves Protestant Fundamentalists supported the use of corporal punishment in schools more so than "non-fundamentalist," "Catholics," or "non-affiliateds").

[33] *See* Edwards, *supra* note 32, at 983 (discussing biblical support of corporal punishment); Pollard, *supra* note 2, at 580 (discussing biblical history advocating the use of corporal punishment).

ultimate authority over the family.[34] Fathers were able to make life or death decisions regarding their children.[35] The father could whip a child, sell him into slavery, and even kill him for not obeying his father's commands.[36] Thus, the father had the ability to determine a child's life or death.[37] Many have pointed to the biblical references mandating that parents not only care for their children, but also use physical force in order to discipline them.[38] Similarly, American common law followed in the tradition of patrimonial control over children.[39] Children were

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[34] *See* Edwards, *supra* note 32, at 983; Mason P. Thomas, Jr., *Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C. L. REV. 293, 295 (1972) (providing an overview of the history of corporal punishment, including the history of a Roman father's right to make decisions about a child's life or death).

[35] Pollard, *supra* note 2, at 580; Thomas, *supra* note 34, at 295.

[36] Markel, Collins & Leib, *supra* note 12, at 1190 (stating that violence in the family has been accepted as a form of social control); Weidler, *supra* note 12, at 80–82 (describing the history of parental authority in the United States as deeply entrenched). Weidler compares New Hampshire's and Maine's approaches to the parental-discipline defense. *Id*. at 91–106. She opens her piece by discussing that the Puritans enacted the first laws in the world limiting parental force. *Id*. at 82. Some states enacted laws in the 1800s that limited the lawful use of a switch to one no wider than a man's thumb and that caused no permanent damage. *Id*. at 82–83. By the end of the nineteenth century, child abuse was identified as a social problem. *Id*. at 83. In the 1960s, legislators had to provide a parental physical discipline defense in order to gain enough support for child protection acts. *Id*. at 84.

[37] Davidson, *supra* note 32, at 18.

[38] *See* Weidler, *supra* note 12, at 80–81 (drawing attention to how people have used religion to justify physical punishment). Weidler discusses that some religious parents believe the notion of "spare the rod, and spoil the child" justifies physical discipline. *Id*. at 87. By physically disciplining a child, a parent is aiding a child's moral and spiritual development by humbling him or her. *Id*. at 87. *See* Johnson, *supra* note 13, at 415 (providing a comparison between Old and New Testament thoughts on child-rearing). Johnson points out that the Old Testament promoted the use of physical force to raise one's child, while the New Testament called parents to guide and educate children in the ways of the Lord. *Id. See also Proverbs* 22:6 (New Int'l Version). The biblical text states different approaches to the upbringing of a child. In the Old Testament, Proverbs states that it is the parent's duty to train a child in the way he should go. *Id.* The text goes onto say that "[h]e who spares the rod hates his son, but he who loves him is careful to discipline him." *Proverbs* 13:24 (New Int'l Version). Compare to the New Testament which states in Ephesians, "[a]nd, ye fathers, provoke not your children to wrath: but bring them up in the nurture and admonition of the Lord." *Ephesians* 6:4 (King James Version). For a perspective on rethinking of the biblical terms, see Child Rights Information Network, Norway: Church Supports Bible Rethink on Corporal Punishment, http://www.crin.org/resources/infoDetail.asp?ID=16217 (last viewed on Oct. 11, 2008).

[39] LYNNE CURRY, THE *DESHANEY* CASE: CHILD ABUSE, FAMILY RIGHTS, AND THE DILEMMA OF STATE INTERVENTION 5 (2007). This tradition was also followed in English common law, yet, this rule was not previously formally adopted in England. Weidler, *supra* note 12; Dale R. Zimmerman, *Abrogation of the Parent-Child Immunity Doctrine*, 12 S.D. L. REV. 364 (1967). Nonetheless, British common law nations have adopted the parental-discipline defense. Brobst, *supra* note 3, at 178.

deemed property.[40] And, once again, the decision of life or death was in the hands of the parents.[41] Puritan culture rarely sanctioned spousal or child abuse as it placed a premium on family preservation over protection of victims of physical abuse.[42] Control extended so far as to allow parents to testify before the court in order to have a rebellious child put to death.[43] Indeed, children did not have a right to determine what happened to their own bodies.[44]

Meyer v. Nebraska, the first parental rights case considered by the United States Supreme Court, addressed the right of parents to control the upbringing of their children.[45] While the initial challenge invalidated a Nebraska law involving teaching any language other than English in public school, *Meyer* supported the concept that parents have a right to make decisions for their children.[46] In fact, the Court later ruled that parents have a fundamental right to control the upbringing of their children.[47] This includes the use of corporal punishment.[48] However, the Court has also found that this right may be limited.[49]

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[40] *See supra* notes 32–37 and accompanying text (discussing a general history of the parental authority in ancient Rome). *See also* CURRY, *supra* note 39, at 5. Some legal scholars have argued that by treating children as property, the law has not functioned in the interest of children. *Id.*

[41] Weidler, *supra* note 12, at 81–82.

[42] Markel, Collins & Leib, *supra* note 12, at 1192. The authors argue that family ties impact judicial decisions in regards to parental control over children. *Id*. They report that one value of the Puritan culture was maintenance of the family unit, which led courts to disregard child abuse in some cases. *Id*. *But see* Weidler, *supra* note 12, at 81–82 (stating that the Puritans also led the movement to disallow cruel or humane treatment of children).

[43] Weidler, *supra* note 12, at 82.

[44] *Id*. Lynne Curry acknowledges that historically several other groups of people did not have control over their bodies. CURRY, *supra* note 39, at 88. Slaves, for example, were considered chattel of their owners and enjoyed no protection for their bodies under the law. *Id.* Under the doctrine of covertures, women did not possess a right to make decisions about their bodies. *Id.*

[45] 262 U.S. 390 (1923). In *Meyer*, a teacher taught a ten-year-old child how to read in German, although teaching a language other than English was illegal under Nebraska law. *Id*. at 396. The Court found that the Liberty Clause of the Fourteenth Amendment established a right for a person to raise his or her child as he or she sees fit, amongst other fundamental rights, such as the right to be free from bodily restraint, to marry, and to worship God. *Id*. at 399. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 809 (3d ed. 2006) (stating that in *Meyer*, the Court recognized the fundamental right of a parent to raise children). Furthermore, Illinois has held that a parent's right to spank his or her child derived from the constitutional right to privacy. *See also In re* J.P., 692 N.E.2d 338 (Ill App. Ct. 1998) (holding Illinois constitution's right to privacy creates the right to corporally discipline one's child). *But see* State v. Singleton, 705 P.2d 825 (Wash. Ct. App. 1985) (holding that the law's focus is on a child's welfare, not a parent's rights).

[46] CHEMERINSKY, *supra* note 45, at 809. *See Meyer*, 262 U.S. at 399 (holding that parents have a due process right to the upbringing of their child).

[47] Prince v. Massachusetts, 321 U.S. 158, 165 (1944). In *Prince*, Massachusetts brought a child labor law action against the guardian of a nine-year-old girl who was distributing

In *Prince v. Massachusetts*, the Court explained that the family life is a private realm that the government cannot enter.[50] Nevertheless, the Court found that public interest may necessitate regulation of the parent-child relationship.[51] The government may infringe a parent's fundamental right to raise his or her child when it is necessary to protect a child from care or control that harms the child's well-being.[52] The Court further defined the outer limits of *parens patriae* in *Wisconsin v. Yoder*, holding that the government may enter into the private realm of the family when a parent threatens a child's health, well-being, or life.

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literature and soliciting voluntary contributions for Jehovah's Witnesses. *Id*. at 171. The Court found that the state could regulate children engaging in selling literature because of the concern for children's welfare and labor standards. *Id*. at 174. The Court held that parental authority is not absolute and can be restricted if it is in the best interests of the child. *Id*. The Court found that the child's activity was religious, not commercial. *Id*. Thus, the State could not infringe on her constitutional right to freedom of religion. *Id*. at 171. The Court reasoned that there was evidence of parental control while the child was distributing literature, and that the activity did not harm the child's welfare. *Id*. at 174–75. *See* Parham v. J.R., 442 U.S. 584 (1979) (holding parents retain a dominant role in the decision-making of a child's institutionalization absent abuse and neglect); Stanley v. Illinois, 405 U.S. 645 (1972) (holding the rights to conceive and to raise a child are fundamental and custody, care, and nurturing are responsibilities of the parent that the state cannot provide or hinder); Wisconsin v. Yoder, 406 U.S. 205, 213–14 (1972) (holding that parents have a right to determine a child's upbringing). *See also* CURRY, *supra* note 39, at 5 (stating that the underlying assumption of parental rights "has been that children will be best served when the law protects their parents' liberties").

48 Edwards, *supra* note 32, at 983. Edwards defined corporal punishment as "the intentional infliction of physical force by a parent or parent figure upon a child with the purpose of correcting the child's behavior." *Id.* Corporal punishment may be broken down into two forms: excessive or improper. *Id.* at 985; MYERS, *supra* note 3, at 211. Excessive punishment occurs when there is a proper purpose, but the punishment is perhaps unreasonable. Edwards, *supra* note 32, at 985. Improper punishment occurs when a parent uses physical force for an improper purpose. MYERS, *supra* note 3, at 211. Distinguishing between the two may be difficult for some courts. *Id*. The Florida Supreme Court recognized that drawing the line between abuse and permissible corporal punishment is difficult. *Id*. (citing Raford v. State, 828 So. 2d 1012, 1020–21 (Fla. 2002).

49 *See Prince*, 321 U.S. at 174–75 (limiting the parental authority in the face of child's best interest).

50 *Id.* at 166 (relying on precedent established in *Meyer*, 262 U.S. 390).

51 *Id*. (noting that the state may interfere with parental rights when the parent's conduct is not in the child's best interest).

52 *Id.* at 174–75 (noting the court can intervene in situations where the child's welfare is compromised but, in this case, the court found that religious activity was not detrimental to the child's welfare). This holding illustrates the philosophy of *parens patriae*, or "parent of his or her country[,]" which is when the government stands as the guardian of children or mentally impaired persons. BLACK'S LAW DICTIONARY 1221 (9th ed. 2009).

2. Children's Rights to Live Free from Abuse or Neglect

During the nineteenth century, society began to view children as deserving protection from cruel and inhumane treatment.[53] Courts limited parental rights to discipline their children by requiring that the punishment be reasonable.[54] Some courts defined reasonable discipline as any form of discipline, so long as it was not cruel and inhumane.[55] Courts and legislatures, however, thwarted attempts to criminalize other forms of abusive parental conduct because they wanted parents to have legal protection to perform their parental responsibilities in the privacy of their homes without government intrusion.[56] Nevertheless, the momentum building toward finding a legal right for children to live free from abuse and neglect continued through the judiciary.[57] *In re Mary Ellen* was the first judicial acknowledgement of the right of children to

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[53] Weidler, *supra* note 12, at 82. *See generally* ERIC A. SHELMAN & STEPHEN LAZORITZ, THE MARY ELLEN WILSON CHILD ABUSE CASE AND THE BEGINNING OF CHILDREN'S RIGHTS IN 19TH CENTURY AMERICA 213 (2005) (providing a history of children's rights during the nineteenth century). Some scholars have called for a full ban on the parental-discipline defense. See MYERS, *supra* note 3, at 207–08 (discussing the cultural, political, and legal issues with a full ban on parental-discipline). This Notewriter does not find this a politically practical path for most states. Of primary concern, a ban or a repeal of the law would require legislative action. Legislators represent the will of the public, and most Americans would not support a complete ban on corporal punishment. Edwards, *supra* note 32, at 984. In general, ninety-percent of parents use physical force to discipline their children. *Id*. *But see* Patricia Donovan, *The Colorado Parental Rights Amendment: How and Why It Failed*, 29 FAM. PLAN. PERSPS. 187 (1997) (discussing that a proposed change to Colorado's constitution to give parents the right to direct and control the discipline, education, and upbringing of their children was defeated by a large margin).

[54] Fletcher v. People, 52 Ill. 395 (1869). In *Fletcher*, a father attempted to remove vermin from his blind son by covering the boy in kerosene and locking him in a damp basement for several days during mid-winter. *Id*. The court recognized that parents are given large discretion in parenting, but this discretion is limited to treatment that is reasonable and humane, and the law punishes parents who engage in wanton and needless cruelty. *Id*. The court held that parents' conduct could not be cruel or excessive, but if it was, then the parents would be held criminally liable. *Id*. *See also* Hornbeck v. State, 45 N.E. 620 (Ind. Ct. App. 1896) (prohibiting cruel, unreasonable, or inhumane cruel treatment). In *Hornbeck*, a father whipped his thirteen-year-old son with a buggy whip. *Id.* at 620. The court stated that while a parent has a right to punish a child, that punishment will not be protected if it is excessive, unreasonable, or cruel. *Id*. The father was found criminally liable based on the evidence. *Id*.

[55] *See Hornbeck*, 45 N.E. at 620 (limiting the description of child abuse to cruel or inhumane treatment); State v. Jones, 95 N.C. 588 (1886) (holding that child abuse is treatment that is cruel or inhumane).

[56] *See* Weidler, *supra* note 12, at 80–85 (discussing the evolution of the defense).

[57] *See generally* SHELMAN & LAZORITZ, *supra* note 53 (providing a historical account of child abuse and neglect laws). Through *In re Mary Ellen*, the case prompting the formation of the Cruelty Against Children Society, the authors chronicle the beginning of the child welfare system in New York and the United States during the mid-1800s case. *Id*.

live free from abuse in the United States.[58] The New York appellate court sentenced the guardians of nine-year-old Mary Ellen Wilson to one year in prison, plus hard labor, for physical abuse and neglect.[59] This case, along with the social response of child protection organizations, led to child abuse becoming a recognized concept in U.S. law.[60] Following *In re Mary Ellen*, there was a definitive tension in handling child abuse situations without excessive governmental encroachment into the family domain.[61] The tension was a product of the shift in thought about children's rights.[62] By the 1970s, the federal government and several states sought to enact child protection laws under the Child Abuse Prevention and Treatment Act.[63] However, advocating the parental right to use force in child discipline and the governmental desire to ensure child safety created tension in the law.[64] In order to strike a balance, state legislatures enacted parental-discipline defenses with child protection laws to ensure passage of the child welfare reform measures.[65]

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[58] *Id*. *See* Sallie A. Watkins, *The Mary Ellen Myth: Correcting Child Welfare History*, 35 SOC. WORK 500 (1990) (discussing the history and importance of *In re Mary Ellen* in child protection). Prior to *In re Mary Ellen*, cruelty to children was not recognized by New York law even though cruelty to animals was recognized. American Humane, Mary Ellen Wilson: How One Girl's Plight Started the Child-Protection Movement, http://www.americanhumane.org/about-us/who-we-are/history/mary-ellen.html (last visited on Jan. 12, 2009).

[59] SHELMAN & LAZORITZ, *supra* note 53, at 94.

[60] *Id*.; American Humane, *supra* note 58. The court sentenced Mary Ellen's guardians to two years in jail for their neglect and abuse of her. SHELMAN & LAZORITZ, *supra* note 53, at 94.

[61] *See* State v. Washington, 29 So. 55 (La. 1900) (discussing that a jury did not have to rely upon the parent's subjective interpretation of the events, which was a change in the law toward a more subjective standard of reasonableness).

[62] CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVS., ABOUT CAPTA: A LEGISLATIVE HISTORY 1 (2004), http://www.childwelfare.gov/pubs/factsheets/about.pdf (discussing the legislative history of the Child Abuse Prevention and Treatment Act ("CAPTA")). CAPTA sought to fund and guide government efforts at reducing child abuse and neglect. 42 U.S.C. §§ 5101–5106 (2006). CAPTA defined child abuse as, "*at a minimum*, any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation, or an act or failure to act which presents an imminent risk of serious harm." *Id.* § 5106(g) (emphasis added).

[63] CHILD WELFARE INFO. GATEWAY, *supra* note 62, at 1.

[64] Susan Vivian Manigold, *Transgressing the Border Between Protection and Empowerment for Domestic Violence Victims and Older Children: Empowerment as Protection in the Foster Care System*, 36 NEW ENG. L. REV. 69, 90–91 (2001) (stating that the state's desire to provide for parental rights and children's rights created a two-part system in which one may participate in a separate criminal and child welfare cases for the same act of child abuse). *See* Pollard, *supra* note 2, at 644 (discussing two separate systems used to deal with corporal punishment cases).

[65] *See* cases cited *supra* note 19 (providing the parental-discipline defenses available in common law); statutes cited *supra* note 20 (listing the parental-discipline defenses available

States slowly implemented standards that would balance child welfare with family autonomy.[66] During this process, the law continued to transform in order to provide for more protection of children from abuse.[67] For example, the North Carolina Supreme Court held that the government will not interfere in family affairs by punishing a parent who has corrected his or her child unless the punishment produces permanent injury or is inflicted with malice.[68] However, some states added an objective element to reduce the subjective element of the defense.[69] A century after the initial children's rights movement in the United States, the same concerns over children's rights and the sanctity of the privacy of the home are being litigated in American courts.[70] In *DeShaney v. Winnebago County Department of Social Services*, the Court considered whether children have a constitutional right to live free from abuse.[71] The Supreme Court sidestepped the issue of children's rights by

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in statutory form). *See also* Weidler, *supra* note 12, at 83 (discussing the evolution of child protection laws). After many states passed child protection laws, "the Supreme Court reaffirmed constitutional protection for parental autonomy in deciding how to raise children." *Id.* at 84. *See also* Ingraham v. Wright, 430 U.S. 651, 738 (1977) (holding that the Eighth Amendment does not provide a positive right from corporal punishment).

66 *See, e.g.*, cases cited *supra* note 19 (providing common law approaches to the adoption of a parental-discipline defense).

67 *See* statutes cited *supra* note 20 (providing the statutes and thus illustrating that the statutes' passage dates range from the mid 1950s through the 1980s).

68 *See, e.g.*, State v. Jones, 95 N.C. 588 (1886) (providing a ruling that malice is required for a parent's conduct to be unjustified).

69 MODEL PENAL CODE § 3.08(1) commentary (1979). Reasonableness will be based upon standards articulated in state law. *Id*. The code holds that ambiguities in the evidence must be decided in favor of the defendant. *Id*. *See supra* notes 10–11.

70 SHELMAN & LAZORITZ, *supra* note 53, at 213 (reflecting on the impact of *In re Mary Ellen* and discussing that states are still considering how to address child abuse whilealso ensuring parental rights). *See* CHEMERINSKY, *supra* note 45, at 810 (stating that following *Parham* and *Yoder*, there is a strong argument that the Court has undervalued the importance of protecting children and that it is quite willing to defer to parental decisions).

71 489 U.S. 189 (1989). The case of Joshua DeShaney depicts the failure of Wisconsin's child welfare system to protect Joshua from continued abusive acts perpetrated by his father. In *DeShaney*, the Court considered whether the failure of Winnebago County's Department of Social Services to protect Joshua from his father violated the child's constitutional rights under the Fourteenth Amendment. CURRY, *supra* note 39, at 3. Joshua was beaten on several occasions by his father, leading to hospitalization on two occasions. *Id.* at 146. Eventually, the child welfare system took custody of Joshua, only to give custody back to his father the next day after he agreed to participate in services. *Id.* Throughout the case with the family, the social worker noted several physical injuries to Joshua, and on the last home visit, she did not see the child. *Id.* Joshua ended up in the hospital again, but this time permanently injured. *Id.* The Court held that there was no state action conferring liability. *Id. See* Ezer, *supra* note 21, at 3 (stating that the *DeShaney* holding meant that children have no right to protection even if the government is involved in their family).

finding that the Constitution only guaranteed the right of the child to live free from governmental harm.[72]

One thing is clear—there is no constitutional right for a parent to use physical force on a child that reaches abusive levels.[73] Some states have allowed courts to define whether the privilege is available, and if so, what standards must be met to gain protection.[74] In other states, the legislatures have enacted statutes covering the defense.[75] An examination of the common law and the Model Penal Code approaches to the parental-discipline defense reveals that the line between reasonable punishment and abuse is elusive because of the failure to define child abuse within the context of the criminal case for physical abuse on a minor.[76] But as more research highlights the negative impact of corporal punishment, scholars and child advocates are calling for a reform in law and practice to make the rule either more clear or to ban it in its entirety.[77]

B. Legal Responses to the Parental-Discipline Defense: The Model Penal Code and Restatement (Second) of Torts Approaches to the Parental-Discipline Defense

The parental-discipline defense has a varied history among the states.[78] In some states, the court and/or legislature adopted the common law approach while others have adopted some form of the Model Penal Code.[79] All states recognize a parent's right to use corporal

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72 CURRY, *supra* note 39, at 146. The negative right the government provides is simply the right to be free from government harm to a child. *Id*. Furthermore, critics believe that the result of *DeShaney* is greater protection for social workers than for children. *See generally id*. at 140–44 (discussing that the *DeShaney* decision helps other parties more than children).

73 Wisconsin v. Yoder, 406 U.S. 205, 230 (1971) (limiting parental authority to actions that do not harm a child's welfare).

74 *See* cases cited *supra* note 19.

75 *See* statutes cited *supra* note 20.

76 MYERS, *supra* note 3, at 211. Myers discusses the elusiveness of the line between abuse and punishment. *Id*. *See also* Brobst, *supra* note 3, at 179 (noting how courts have had difficulty in obtaining a consistent approach to child abuse when they must interpret the reasonableness of the use of force).

77 *See infra* Part II.B (discussing the negative impact on children of corporal punishment).

78 *See supra* notes 19–20 (providing the statutory and common law approaches to the parental-discipline defense).

79 *Id*. *See* ROBINSON, *supra* note 3, § 144 (showing the approaches taken by different states to address the parental-discipline defense). *See also* WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 10.3 (West, Westlaw through 2007 Update) (noting that statutes differ on the matter of reasonableness of force to the point that there are four categories under which most statutes fall: force must be reasonable, force must be reasonable and necessary, force must be reasonable and appropriate, or force must be something other than deadly force).

punishment in the home, but not all states recognize the parental-discipline defense.[80]

The parental-discipline defense is one type of justification defense.[81] Justification defenses are affirmative defenses that vindicate certain acts when performed in the course of one's duty.[82] While the harm created by the actor is illegal, his conduct may be justified because the circumstances of the situation are such that acting illegally prevents a greater public harm.[83] Thus, competing interests are weighed by the fact-finder to determine whether the defendant's conduct was vindicated.[84]

The parental-discipline defense justifies the use of physical force by a parent on one's child in order to promote the child's safety or well-being.[85] The defense is typically limited to parents or those acting *in loco parentis*.[86] The defense may be raised by a parent who uses physical force against a child under the age of eighteen.[87] Most, but not all, laws require that the force is used to promote a child's welfare.[88] In absence of this defense, the parent's conduct would be statutory battery.[89] Most states recognize these general principles; therefore, the difference among

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[80] *See supra* notes 19–20 (providing statutory and common law recognition of parental right to use force). Some argue that Minnesota does not recognize a right to corporal punishment. GLOBAL INITIATIVE TO END ALL CORPORAL PUNISHMENT OF CHILDREN, *supra* note 21. Jennifer Brobst notes that it is the trend in Europe to prohibit corporal punishment. Brobst, *supra* note 3, at 180. Thus far, Sweden, Finland, Norway, Austria, Cyprus, Italy, Denmark, Latvia, Portugal, Croatia, Germany, Israel, Belgium, Iceland, Ukraine, and Romania have legally prohibited corporal punishment. *Id.* at 180 n.6. *See also* GLOBAL INITIATIVE TO END ALL CORPORAL PUNISHMENT OF CHILDREN, *supra* note 21.

[81] Maj. Barham, *Sparing the Rod: The Parental Discipline Defense In the Military*, ARMY LAW., Aug. 1993, at 40, 41.

[82] ROBINSON, *supra* note 3, § 121(a)(1). First, there must be a triggering condition before an actor may act under a claim of justification. *Id.* at 3–7; Barham, *supra* note 81, at 41. A justification defense requires that the action must be necessary and proportional to the force. Barham, *supra* note 81, at 41. As long as these requirements are met, an actor's conduct may be excused because the actor's conduct's benefits outweigh the harm of the offense. *Id*.

[83] Kimberlie Young, *An Examination of Parental Discipline as a Defense of Justification: It's Time for a Kindlier, Gentler Approach*, 46 NAVAL L. REV. 1, 4 (1999).

[84] *See id* at 4–6 (illustrating the considerations a judge may have when presented with a parental-discipline defense that utilizes the Restatement (Second) of Torts § 150).

[85] *See* MODEL PENAL CODE § 3.08(1) (1985); RESTATEMENT (SECOND) OF TORTS § 150 (1965); statutes cited *supra* note 20.

[86] Ingraham v. Wright, 430 U.S. 651, 676 (1977).

[87] *See* statutes cited *supra* note 20. However, New Jersey allows a parent to use force until the age of twenty-one. N.J. STAT. ANN. § 2C:3-8 (West 2005).

[88] *See* cases cited *supra* note 19; statutes cited *supra* note 20. This goal is known as the triggering event for the parental-discipline defense. Young, *supra* note 83, at 7.

[89] *See* Pollard, *supra* note 2, at 640. *See also* statute cited *infra* note 130 (providing the elements of battery in Indiana).

states depends on the adaptation of statutory or common law practices.[90] These views are encompassed by the Model Penal Code or Restatement (Second) of Torts, although some states have made distinctive departures from these as well.[91]

1. Model Penal Code

Many states have adopted the Model Penal Code Section 3.08(1) standard for parental privilege.[92] The provisions of Section 3.08(1) focus on the type of force used and the parent's justification for the use of force.[93] Section 3.08(1) limits the actor's conduct to that which is not designed or known to create a "'substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation.'"[94] Furthermore, it permits parental use of force to promote or safeguard the welfare of a child.[95]

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[90] *See* MODEL PENAL CODE § 3.08(1); RESTATEMENT (SECOND) OF TORTS § 150; statutes cited *supra* note 20.

[91] *See* cases cited *supra* note 19 (providing the common law approaches to the defense); statutes cited *supra* note 20 (providing statutory approaches to the parental-discipline defense). West Virginia requires malice. State v. McDonie, 123 S.E. 405 (W. Va. 1924).

[92] MODEL PENAL CODE § 3.08(1) (1985). This section states:

> The use of force upon or toward the person of another is justifiable if:
>
> > (1) the actor is the parent or guardian or other person similarly responsible for the general care and supervision of a minor or a person acting at the request of such parent, guardian or other responsible person and:
> >
> > > (a) the force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his misconduct; and
> > >
> > > (b) the force used is not designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation.

Id. Furthermore, the American Law Institute's records show that the privilege arose from the need of states to delicately weigh parents' fundamental right to raise their children against the state's obligation to protect children from abuse. MODEL PENAL CODE § 3.08 cmt. 71 (Tentative Draft No. 8, 1958).

[93] Young, *supra* note 83, at 11. *See* MODEL PENAL CODE § 3.08(1); RESTATEMENT (SECOND) OF TORTS § 150.

[94] Davidson, *supra* note 32, at 21 (discussing and citing MODEL PENAL CODE § 3.08(1)).

[95] MODEL PENAL CODE § 3.08(1)(a) (a parent may use force when it is used for the purpose of safeguarding or promoting a child's welfare and this includes prevention or punishment of misconduct).

Unlike other justification defenses, the Model Penal Code does not require reasonableness.[96] The Model Penal Code requires that the defendant does not knowingly use force that creates "a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation."[97] The drafters of the code indicated that it does not demand the force to be reasonable.[98]

2 Restatement (Second) of Torts Approach to Parental-Discipline Defense

The Restatement (Second) of Torts position has been historically tracked through three civil tort cases between a parent and a child: *Hewellette v. George*, *McKelvey v. McKelvey*, and *Roller v. Roller*.[99] State court jurisprudence created parental immunity, which was originally adopted to address torts between a parent and a child, as a way to maintain family harmony.[100] The defense first appeared in 1890 in Mississippi.[101] In *Hewellette v. George*, the Mississippi Supreme Court held that a minor child did not have the right to assert a civil liability claim against a parent for injuries suffered at the hands of that parent.[102] The court reasoned that a child should not be able to do so because of the

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96 Barham, *supra* note 81, at 42 (discussing whether reasonableness is required).

97 MODEL PENAL CODE § 3.08(1)(b); Barham, *supra* note 81, at 42.

98 MODEL PENAL CODE § 3.08(1)(a),n(g). Proportional and reasonable are often interchangeable in this context. *Id.*; Young, *supra* note 83, at 12.

99 Gail D. Hollister, *Parent-Child Immunity: A Doctrine In Search of Justification*, 50 FORDHAM L. REV. 489, 494–96 (1982); (providing the history of the parental-discipline defense); Caroline E. Johnson, *A Cry for Help: An Argument for Abrogation of the Parent-Child Tort Immunity Doctrine in Child Abuse and Incest Cases*, 21 FLA. ST. U. L. REV. 617, 622–24 (1993) (same). Hollister notes that there are many articles discussing the trilogy of cases known for articulating the parental-discipline defense, but that the author relied upon those previously cited. Hollister, *supra*, at 494-96. *See, e.g.,* Hewellette v. George, 9 So. 885 (Miss. 1891); McKelvey v. McKelvey, 77 S.W. 664 (Tenn. 1903); Roller v. Roller, 79 P. 788 (Wash. 1905).

100 *See* RESTATEMENT (SECOND) OF TORTS § 150 (1965) (reflecting common law concerns represented in *Hewellette*, *McKelvey*, and *Roller*); *Hewellette*, 9 So. at 885 (holding that a child could not maintain an intentional tort action against a parent because of the need for family harmony, the role of families in developing children, and other public policy reasons); *McKelvey*, 77 S.W. at 664 (holding that a child could not maintain a tort action against a person standing in loco parentis); *Roller*, 79 P. at 788 (holding that family peace and harmony trumped the child's interest in maintaining a tort action against a parent).

101 *See Hewellette*, 9 So. at 885 (standing for the initial proposition that a parent could be immune from a tort action brought by a child).

102 *Id*. at 887. In *Hewellette*, a child attempted to sue her parents for the suffering she incurred while in an insane asylum. *Id*. The Court held that a child, and likewise parents, could not sue for tortious conduct because of the unique role of the members of a family. *Id*. Namely, a child's role to obey his or her parents and the parent's role to protect, care for, and control a child prohibited such conduct. *Id*.

need for peace and families in society, and for sound public policy reasons.[103] By 1905, Tennessee and Washington followed Mississippi by creating immunity for parents in a tort action.[104]

In *McKelvey v. McKelvey*, the Tennessee Supreme Court adhered to the policy of the Mississippi court and held that a child could not sustain a tort action against his stepmother for cruel and inhumane treatment.[105] The court noted that the stepmother had been given permission by the child's father to inflict punishment upon the child.[106] The court reasoned that, like the court in *Hewellette*, public policy reasons, such as family harmony, discouraged the child from suing his stepmother.[107] *McKelvey* subsequently limited the parental immunity defense to parents or those acting *in loco parentis*.[108]

In *Roller v. Roller*, the state of Washington confirmed the existence of parental immunity.[109] The Washington Supreme Court, confronted with a tort claim by a daughter who claimed she was raped by her father, held that the law prohibited suits between parents and children.[110] The court

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[103] *Id.* at 887; *see* James K. Brooker, Comment, *A Proposed Modification of the Parental Immunity Doctrine*, 23 OHIO ST. L.J. 339, 340-41, 347 (1962) (discussing the history of parental immunity and the public policy reasons surrounding it, including reasoning that the defense promoted parental authority, family peace, and unity); Susan J. Wirt, Note, Turner v. Turner*: Abrogation of the Parental Immunity Doctrine*, 27 S.D. L. REV. 171, 173 (1982).

[104] *See McKelvey*, 77 S.W. at 665 (holding that parents have immunity from a child's tort claim in Tennessee); *Roller*, 79 P. at 789 (holding that a child cannot sue a parent for a tort because of the need to maintain family harmony).

[105] *McKelvey*, 77 S.W. at 665. A child initiated a lawsuit against her father and stepmother seeking damages for cruel and inhumane treatment. *Id*. at 664. The court found that the claim was properly dismissed by the lower court because a father has the right control the upbringing of hischild. *Id*. at 664–65. These rights could only be forfeited through "gross misconduct." *Id*. at 664. The court proclaimed that no court in the nation had questioned this rule and no such action had been maintained in the Tennessee courts. *Id.*

[106] *Id.* at 664–65.

[107] *Id.* at 664. The court continued to compare the situation to that of a husband and wife action for tort liability. *Id.* The court stated that a wife could not sue her husband for injury during covertures. *Id.* at 665. It is based upon the unity by virtue of the marriage relation and upon the respective rights and duties involved in that relation. *Id.* Interestingly enough, the court also concluded that the child's remedy would be found in the criminal system. *Id.*

[108] *Id*. Opponents of the parental-discipline defense note that the defense's protection has been further limited to only parents and in rare circumstances, foster parents. *See, e.g.*, State v. West, 515 N.W.2d 484 (Wis. Ct. App. 1994) (providing an example of a statute that privileges foster parents). Many states have chipped away at the category of those who may invoke the defense by excluding teachers and foster parents. Gershoff & Bitensky, *supra* note 21, at 247.

[109] 79 P. at 788. In *Roller*, a fifteen-year old girl sued her father for rape. *Id*. The court reasoned that the welfare of the state depended on family harmony and that allowing tort actions between family members would work against this interest. *Id*. at 789. Thus, the court held that a child could not sue his or her parent. *Id*.

[110] *Id.* at 788–89.

reasoned that society had an interest in maintaining domestic harmony, as harmonious family relations build good citizenship, which in turn promotes the welfare of the state.[111] These three cases form the foundation of the states' parental immunity defense.[112] Over time, reasoning similar to the parental immunity doctrine was used to justify physical punishment in the criminal justice system.[113]

In 1965, the Restatement (Second) of Torts addressed civil liability of parents for torts committed against their children.[114] The Restatement stated that a parent is privileged to apply such reasonable force or to impose such reasonable confinement upon his or her child as he or she reasonably believes to be necessary for a child's proper control, training or education.[115] Because parents are in a unique position, charged with

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111 *Id.* at 789 (holding that a daughter's tort action against her father for rape could not stand).

112 Irene Hansen Saba, *Parental Immunity from Liability in Tort: Evolution of a Doctrine in Tennessee*, 36 U. MEM. L. REV. 829, 835 (2006). *Hewellette*, *Roller*, and *McKelvey* are viewed as the "trilogy" of cases forming the bedrock of the parental immunity defense and were concerned with preventing the destruction of family harmony and its subsequent effect on the state because the family is the basic unit through which good citizenship is sewn. *Id*. *See also* Zimmerman, *supra* note 39, at 367. *But see* Pollard, *supra* note 2, at 644–45 (arguing that our society would never allow an adult to use comparable force against another adult or someone else's child, thus bringing into question the moral validity of the defense); Zimmerman, *supra* note 39, at 366 (noting that other states, such as Minnesota and New Hampshire, have disallowed application of the parental-immunity doctrine in civil torts because there should be no lesser duty owed to members of a family than there is to a stranger and there should be a remedy available to the victim of the tort).

113 *See* Willis v. State, 888 N.E.2d 177, 182 (Ind. 2008) (holding that the proper analysis for the parental-discipline defense must utilize the RESTATEMENT (SECOND) OF TORTS § 150 factors). Some states have allowed parent-child tort lawsuits because of the rise in insurance coverage for such incidents, as is the case with car accidents. Wirt, *supra* note 103, at 173. *See also* Brobst, *supra* note 3, at 185 (noting that children appear to receive greater protection in civil protection order proceedings than in criminal trials where a parent invokes the defense). Recently, Indiana adopted the Restatement approach. *Willis*, 888 N.E.2d at 189.

114 RESTATEMENT (SECOND) OF TORTS § 150 (1965).

115 *Id.* § 147 ("A parent is privileged to apply such reasonable force or to impose such reasonable confinement upon his child as he reasonably believes to be necessary for its proper control, training, or education."). The Restatement further outlines the factors that may be considered when the trier of fact is determining if a parent's punishment of his or her child is reasonable, including:

> (a) whether the actor is a parent;
> (b) the age, sex, and physical and mental condition of the child;
> (c) (the nature of his offense and his apparent motive;
> (d) the influence of his example upon other children of the same family or group;
> (e) whether the force or confinement is reasonably necessary and appropriate to compel obedience to a proper command;
> (f) whether it is disproportionate to the offense, unnecessarily degrading, or likely to cause serious or permanent harm.

the responsibility to control, train, and educate a child, they are given the privilege to inflict physical punishment in order to reach these ends.[116] Others charged with similar responsibilities, such as teachers and foster parents, have also been given the privilege in some states.[117]

The Restatement Commentary suggests that the punishment must be proportional to the character of the offense and based on the characteristics of the child in order for a parent to be excused for battery of a child.[118] The Restatement considers the child's age, sex, physical and mental condition, the nature of the child's offense and his or her apparent motive, and the child's influence in the family.[119] Limitations on force are sometimes specific.[120] If the actor's response is unreasonable or untimely, the parent may be criminally liable for battery.[121]

The Restatement Commentary also states that the actor's conduct must also be reasonably necessary and appropriate to compel obedience to a command as well as to effect a promotion of welfare or a punishment for misconduct.[122] Arguably, state laws utilizing the Restatement position neither mention the necessity requirement nor expressly require it.[123] Furthermore, the requirement for proportionality

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Id. § 150.

116 *Id.* § 150 cmt. c.

117 *Supra* note 108 (discussing the extension of the privilege to foster parents and teachers). *See* StopHitting.com, The Center for Effective Discipline, U.S.: Corporal Punishment and Paddling Statistics by State and Race, http://www.stophitting.com/index.php?page=statesbanning (last visited on Nov. 10, 2008) (providing statistics on which states have banned corporal punishment, states that permit corporal punishment, and states where corporal punishment is allowed by law, but banned by more than one-half of the school districts).

118 RESTATEMENT (SECOND) OF TORTS § 150 cmt. c. Thus, a more severe punishment may be appropriate when the offense is a serious offense, when the child is a repeat offender, when the child persuades other children in the family to commit similar offenses, or when the child is older. *Id.*

119 *Id.* § 150.

120 *See* ROBINSON, *supra* note 3, §§ 121(a)(2)(B), 144(d). *See also* MINN. STAT. § 626.556(2) (West 2009) (listing conduct that is unjustifiable).

121 John Bourdeau, Stephen Lease, Kimberly Simmons & Eric Surrette, *Discipline: Corporal Punishment*, 67A C.J.S. *Parent and Child* § 51 (2008). Bourdeau, Lease, Simmons & Surrette provide a summary of case law about parental discipline across the United States; they state it must be reasonable and timely in order to be protected. *Id.* at 1.

122 RESTATEMENT (SECOND) OF TORTS § 150 cmt. d. The defense is limited to circumstances where the goal of the parent is to either promote the child's welfare or to punish the child in order to properly train or educate the child. *Id.* Unlike other justification defenses, the Restatement reduces the necessity requirement by stating that if the force is "reasonably" necessary, thus opening up the door for subjective arguments about reasonableness of the necessity to act. *Id.*

123 ROBINSON, *supra* note 3, § 144(d). *See* statutes cited *supra* note 20 (providing statutory parental-discipline defenses). Thus, parents may use force without showing necessity in most states. This places much weight in the parent's hands to determine if the triggering

is arguably not explicitly required within the text of the law.[124] In addition, the necessity for proportionality does not require the parent's conduct to be a lesser harm than the child's conduct.[125] While the comments following the Restatement note that proportionality is a sub-factor of reasonableness, one expert argues that the courts never intended for proportionality to be part of the defense.[126] Thus, there is considerable debate about whether the standards of necessity and proportionality can be inferred by the term reasonableness.[127]

C. Indiana's Approach to the Parental-Discipline Defense

In Indiana, when a parent uses physical force on a child, he commits battery.[128] Battery is defined by Indiana Code Section 35-42-2-1(a) as "a person who knowingly or intentionally touches another person in a rude, insolent, or angry manner."[129] The offense is "a Class D felony if it

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condition of the defense merited the use of force, thus reinforcing criticism that the parental-discipline defense is benevolent to parental rights to a fault. *See* ROBINSON, *supra* note 3, § 144(d).

124 *See* RESTATEMENT (SECOND) OF TORTS § 150. The Restatement considers whether the parent's conduct is disproportionate to the offense, unnecessarily degrading, *or* likely to cause serious or permanent harm. *Id*. (emphasis added).

125 *See id*.

126 *See id* § 150 cmt. d (stating that a parent should not be able to claim the defense if there was a less severe method that could be used that would have been equally effective). *See generally* ROBINSON, *supra* note 3, § 144(e)(2) (indicating that courts never intended for proportionality to be part of the equation because of the significant deference given to parents to safeguard and promote a child's welfare).

127 *See* MYERS, *supra* note 3 (stating that reasonableness is not provided for); Johnson, *supra* note 13, at 440–44 (stating that necessity and proportionality are not built into the current approaches of the Model Penal Code or the Restatement (Second) of Torts); *see also* ROBINSON, *supra* note 3, § 144(e)(2) (arguing that it is not clear whether reasonableness is built into the standard).

128 *See* IND. CODE § 35-42-2-1 (2008 & Supp. 2009); *infra* note 129 (providing the elements of battery). While a parent may be permitted to use physical force against a minor because of his unique role in raising a child, a parent would not be able to commit the same act on an adult unless he proved necessity, self-defense, or defense of property. Johnson, *supra* note 13, at 434.

129 IND. CODE § 35-42-2-1 . The statute states:

> (a) A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery, a Class B misdemeanor. However, the offense is:
> (1) a Class A misdemeanor if:
> (A) it results in bodily injury to any other person;
> . . .
> (2) a Class D felony if it results in bodily injury to:
> . . .
> (B) a person less than fourteen (14) years of age and is committed by a person at least eighteen (18) years of age;
> . . .

results in bodily injury to a person less than fourteen years of age and is committed by a person at least eighteen years of age," or it is a class B felony for children over the age of fourteen.[130] This conduct may be justified if the person has the legal authority to engage in physical force.[131]

The legal authority to use physical force against one's child was first mentioned in the commentary to the Code.[132] The commentary states that the defense includes the use of reasonable discipline by a parent on a child that would normally constitute battery.[133] However, it was not until 1986 that the Indiana Court of Appeals defined the limits of reasonableness for the use of the parental-discipline defense.[134] In *Smith v. State*, the court confirmed that Indiana Code Section 35-41-3-1 authorized parental discipline of a child.[135] However, the court sought to limit the reach of this authority.[136] Relying on case precedent from *Hinkle v. State* and *Hornbeck v. State*, the court reasoned that parental conduct could only be justified insofar as it was reasonable and not cruel or

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> (M) a family or household member (as defined in IC 35-41-1-10.6) if the person who committed the offense: (i) is at least eighteen (18) years of age; and (ii) committed the offense in the physical presence of a child less than sixteen (16) years of age, knowing that the child was present and might be able to see or hear the offense;
>
> . . .
>
> (3) a Class C felony if it results in serious bodily injury to any other person or if it is committed by means of a deadly weapon;
>
> (4) a Class B felony if it results in serious bodily injury to a person less than fourteen (14) years of age and is committed by a person at least eighteen (18) years of age;
>
> (5) a Class A felony if it results in the death of a person less than fourteen (14) years of age and is committed by a person at least eighteen (18) years of age . . . .

Id.

130 *Id.* § 35-42-2-1(a)(2)(b).

131 *Id.* § 35-43-2-1.

132 IND. CODE ANN. § 35-41-2-1 at cmt.165.

133 *Id.*

134 Smith v. State, 489 N.E.2d 140, 141 (Ind. Ct. App. 1986). In this case, the father of a fifteen-year-old girl beat her while she was trying to explain to him the reasons for failing grades on her report card. *Id.* The father pulled a belt out from a drawer, and hit the child on the face, ear, and arm. *Id.* The father ordered the child to disrobe, which she did. *Id.* He then continued to beat the child with a belt on her buttocks. *Id.* Noting that she was in incredible pain, the child put her hands and arms on her buttocks to protect them from the pain, but the father continued to hit the child. *Id.* The child sustained approximately fifteen blows that resulted in contusions and facial lacerations. *Id.*

135 *Id.*

136 *Id.* (holding that corporal punishment must be limited to reasonable and not cruel excessive punishment).

excessive.[137] The court concluded that the defendant's conduct was not protected because it was unreasonable and therefore beyond the defendant's legal authority.[138] Thus, the court recognized the existence of the parental-discipline defense in parent-child battery cases in Indiana, but confined its applicability to situations in which a parent uses force as a means of reasonable punishment.[139]

In 2008, the Indiana Supreme Court, in *Willis v. State*, defined reasonable punishment.[140] In *Willis*, the Indiana Supreme Court

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[137] *Id.* (citing Hinkle v. State, 26 N.E. 777 (Ind. 1891)); Hornbeck v. State, 45 N.E. 620 (Ind. Ct. App. 1896); *see supra* note 54 (discussing limitation of parental force to that which is not cruel or excessive).

[138] *Smith*, 489 N.E.2d at 141. The court concluded that the battery statute and the statute recognizing parental authority to discipline a child were not unconstitutionally vague. *Id.* at 142. The court stated that the law did not fail to advise the defendant about the limits of authorized punishment. *Id.* The court further provided that no person of ordinary intelligence would have had a problem determining that the defendant's conduct was excessive and not protected by parental discipline. *Id.* Similarly, in *Dyson v. State*, the court found that the statute recognizing a parent's authority to discipline a child permits a parent to engage in reasonable discipline of one's child, even if such conduct would otherwise constitute battery. 692 N.E.2d 1374, 1376 (Ind. Ct. App. 1998). The court refused to extend the defense to a parent who is prohibited from interacting with one's child without supervision and subsequently disciplines the child outside of supervised visitation. *Id.*

[139] *Smith*, 489 N.E.2d 140 (holding that parental-discipline defense is a valid justification defense and that it requires one to use reasonable and not cruel or inhumane punishment). *See* Mitchell v. State, 813 N.E.2d 422 (Ind. Ct. App. 2004) (citing IND. CODE. §§ 35-41-3-1, 35-42-2-1(a)(2)(B) (2008 & Supp. 2009)); Johnson v. State, 804 N.E.2d 255 (Ind. Ct. App. 2004) (upholding *Smith v. State* and discussing IND. CODE § 35-41-1-4 (bodily injury is "any impairment of physical condition, including physical pain")); *Dyson*, 692 N.E.2d 1374 (reaffirming the parental-discipline defense).

[140] 888 N.E.2d 177, 182 (Ind. 2008). In *Willis*, the Indiana Supreme Court considered whether the parental-discipline defense protected Sophia Willis from criminal prosecution. *Id.* at 179. Sophia was the single mother of her eleven-year-old son who had a history of stealing and lying. *Id.* Her son took a bag of her clothes to school and tried to exchange them. *Id.* The teacher informed her of the transaction. *Id.* The mother sent her son to her sister's house for two days. *Id.* at 179. When the child returned, his mother discussed the events with him, and she asked him to confess. *Id.* Instead, the child shifted blame. *Id.* In response, the mother told her son to pull down his pants and put his hands on the bed. *Id.* He complied, and from there his mother beat him with either a belt or an extension cord. *Id.* The implement was disputed to be a belt per the mother and an extension cord per the child. *Id.* at 182. She struck the child five to seven times, leaving several bruises on his buttocks, arms, and legs. *Id. at 179.* The child alleged that his mother was angry during the altercation, but the mother contended she was disappointed. *Id.* The trial court found Sophia Willis guilty of a Class A misdemeanor battery. *Id.* at 180. The Indiana Supreme Court reversed the lower court's decision and found that Sophia benefited from the parental-discipline defense. *Id.* Notably, after the incident, J.J.'s father, who resides in Georgia, gained custody of the child. Derrick Thomas, Woman Wants Conviction Overturned in Child-Whipping Case, Channel 6 News, http://www.theindychannel.com/news/14060769/detail.html (last visited on Nov. 12, 2008). *Compare Smith*, 489 N.E.2d 140 (holding that a father's act of hitting his fourteen-year-old child eleven times with an

considered the fine line between appropriate parental discipline of a child and criminal conduct.[141] In its reasoning the court adopted the Restatement (Second) of Torts Section 150(1) standards to guide its decision and hastily noted that the factors in the Restatement are not exhaustive.[142] Nevertheless, what one might characterize as child abuse was found not to be criminal conduct even after applying the Restatement analysis.[143]

The Restatement emphasizes the use of several factors to determine whether a parent's force was reasonable in order to protect or promote a child's welfare.[144] In Indiana, the factors considered include: the child's age, the nature of the child's offense and motive behind it, and whether the punishment was appropriate and reasonably necessary to compel obedience.[145] The court held that each case should be decided on a case-by-case basis.[146] However, the Restatement factors arguably allow a child to be abused and a parent to be found innocent of battery.[147]

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extension cord, resulting in contusions and lacerations to the child, was unreasonable and unjustified).

In 2009, the Indiana Court of Appeals considered a case involving the parental-discipline defense and thereby determined who could receive the protection of the defense. *See* McReynolds v. State, 901 N.E.2d 1149 (Ind. Ct. App. 2009) (holding that a person must be acting *in loco parentis* to use the justification defense *Willis* provides). In *McReynolds*, Jason McReynolds lived in Yavonne Wasson's home and exchanged with her childcare for a place to live. *Id.* at 1151. Her child, M.R., was exhibiting trouble with wetting his pants and in response, McReynolds spanked M.R. with a wooden clothes hanger with metal prongs. *Id.* M.R. was hospitalized for two days for his wounds, which still required bandages a week later. *Id.* McReynolds was convicted of Class B battery causing serious bodily injury on a child less than fourteen years of age. *Id.* McReynolds raised the parental-discipline defense. *Id.* at 1153. Nevertheless, the court rejected the applicability of this defense to his case, stating that he was not acting *in loco parentis*. *Id.* at 1154. The court further expounded that he was not acting *in loco parentis* because the defendant was not a parent of the child, did not act as a parent figure, did not participate in parenting decisions, and did not "'really ask questions'" about Wasson's parenting direction. *Id.* In short, he was a babysitter and could not be afforded the defense. *Id.*

141 *Willis*, 888 N.E.2d at 179.

142 *Id.* at 182.

143 *Id.*

144 RESTATEMENT (SECOND) OF TORTS § 150 (1965).

145 *Willis*, 888 N.E.2d at 182 (providing an overview of the parental authority factors).

146 *Id.* The court also continued to note that the defense is a complete defense just like self-defense. *Id.* When a defendant raises a claim of self-defense, he is required to show he had a reasonable fear of death or serious bodily harm and that the force used in response was based upon a reasonable belief that it was reasonable and necessary to deter the imminent harm. IND. CODE § 35-41-3-2(a) (2008); Hood v. State, 877 N.E.2d 492 (Ind. Ct. App. 2007). The parental-discipline defense does not require that the parent have a reasonable belief that the child or another would suffer future harm or that the force be necessary, and it is questionable as to whether it requires proportionality in every case. *See* RESTATEMENT (SECOND) OF TORTS § 150 (the factors that form the basis of Indiana law). However, compare IND. CODE § 35-41-3-2(a) with RESTATEMENT (SECOND) OF TORTS § 150;

D. Why the Excuses Should Stop: A Look at the Negative Impact of Child Abuse

In 2005, Indiana led the nation in child abuse deaths with twenty-four out of fifty-four of those fatalities because of the use of physical force on a child, thus raising concern about the use of physical punishment on children.[148] Children, and society as a whole, may be negatively impacted by corporal punishment.[149] Four primary concerns arise regarding the use of corporal punishment: (i) physical force's impact on a child's emotional and mental health development; (ii) physical force's impact on a child's socialization; (iii) physical force's likelihood to lead to child abuse; and (iv) physical force's subsequent impact on society.[150]

The emotional and mental health of a child may be affected by the use of corporal punishment.[151] Children subjected to corporal

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there are remarkable differences between the test for the parental-discipline defense and self-defense.

[147] *See Willis*, 888 N.E.2d at 180 (indicating that child suffered physical injury that would be considered abuse under guidelines of the Department of Child Services). For guidance on Indiana's definition of child abuse, see IND. CODE § 31-34-1-2 (2008) defining a child in need of services ("CHINS"):

> (a) A child is a child in need of services if before the child becomes eighteen (18) years of age:
> (1) the child's physical or mental health is seriously endangered due to injury by the act or omission of the child's parent, guardian or custodian; and
> (2)the child needs care, treatment, or rehabilitation that:
> (A) the child is not receiving; and
> (B) is unlikely to be provided or accepted without the coercive intervention of the court.

But see infra notes 226–27 (providing a discussion on how other states approach a definition of child abuse).

[148] *See* IND. DEP'T OF CHILD SERVS., CHILD ABUSE AND NEGLECT ANNUAL REPORT OF CHILD FATALITIES 2005, at 5 (2006), *available at* http://www.in.gov/dcs/files/childfatality reportsfy2005.pdf (providing statistics that show twenty-four fatalities occurred due to physical abuse); Riley Children's Hospital, *Riley's Leads Fight Against Child Abuse*, Apr. 3, 2007, http://www.rileykids.org/misc/newsread.asp?newsid=11&arch=0 (stating that Indiana leads the nation in child fatalities at a rate of over one death per week).

[149] *See* Pollard, *supra* note 2, at 576–78, 602–21 (offering a wide variety of reasons corporal punishment negatively impacts a child's physical, emotional, and mental health and comparing American violence with violence in other countries while noting that American culture is much more violent and tolerant of violence than European countries); Weidler, *supra* note 12, at 83 (discussing the physical and emotional impact of child abuse); Young, *supra* note 83, at 4 (stating that corporal punishment negatively impacts children and families).

[150] *See infra* notes 152–66 and accompanying text (providing the reasons why advocates believe corporal punishment should be banned).

[151] *See infra* notes 153–54, 161–63 and accompanying text (discussing the impact of abuse on a child's well-being).

punishment are more likely to experience depression, fear, repression of anger, indifference to suffering, and issues with logical problem-solving.[152] Even at low rates of corporal punishment, children experience psychological stress, which may provoke anxiety in children as young as one year of age.[153] These conditions can likely persist into adulthood.[154]

Also, states protect corporal punishment under the assumption that parents use physical force to deter a child from asocial behaviors, such as stealing or lying.[155] However, research indicates that physical punishment does not always promote positive values or behavior.[156] Physical punishment does not promote long-term compliance with parental orders because, instead of internalizing the reasons why the behavior is inappropriate, children behave in order to avoid punishment.[157] Also, studies indicate that children learn asocial behaviors from exposure to physical punishment.[158] Thus, the law's

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[152] Kathryn R. Urbonya, *Determining Reasonableness under the Fourth Amendment: Physical Force to Control and Punish Students*, 10 CORNELL J.L. & PUB. POL'Y 397, 437 (2001). Depression may lead to other problems, such as a propensity to commit suicide, aggression against others, and problems in the workplace. *Id*.; Gershoff & Bitensky, *supra* note 21, at 234–35. *See generally* STRAUS, *supra* note 8 (discussing the psychological and social problems associated with child abuse).

[153] Gershoff & Bitensky, *supra* note 21, at 239 (discussing psychological impact of corporal punishment).

[154] *Id.* (noting that psychological impact of corporal punishment extends into adulthood for some children).

[155] *See* Markel, Collins & Leib, *supra* note 12, at 1191 (discussing how this cultural assumption, validated by the Supreme Court, creates a culture of "relative indifference toward violence in the family, particularly against children"). *See also* Gershoff & Bitensky, *supra* note 21, at 245. Gershoff and Bitensky considered the legal and empirical evidence covering corporal punishment in order to determine the effectiveness of it. *Id*. Their research indicated that corporal punishment is ineffective discipline and can have an unintended negative impact on children, such as physical abuse. *Id*. at 233. They then discussed the United States' position on corporal punishment and compared it to international law and practices. *Id.* Sweden, which has banned corporal punishment, has had a reduction in child assaults, and fewer youth have participated in theft, drug use, and drug trafficking. *Id*. at 251. The authors concluded their article by advocating universal and explicit bans to corporal punishment in state law. *Id*. at 260.

[156] Gershoff & Bitensky, *supra* note 21, at 239. Children who are physically disciplined are more likely to hit a dating partner than a person who has not been physically punished as a child. *Id.*

[157] *Id.* at 234 (arguing that corporal punishment does not change a child's behavior so as to enhance their compliance with rules).

[158] Pollard, *supra* note 2, at 602–13. The parent-child relationship is one of the first relationships negatively impacted by corporal punishment. Gershoff & Bitensky, *supra* note 21, at 239. "Children are motivated to avoid painful experiences, and if they see their parents as sources of pain (as delivered via physical punishment), they will attempt to avoid their parents[,]which in turn will erode feelings of trust and closeness between parent and child." *Id*. (internal citations omitted).

assumption that corporal punishment promotes positive values may not be based on accurate information.[159]

In addition, what often starts as parental discipline turns into child abuse.[160] Physical punishment can lead to physical harm to the child, including contusions, lacerations, and tissue damage.[161] On occasion, parental use of physical force to discipline a child becomes excessive, even to the point of causing death or permanent injury to the child.[162]

Besides the negative impact child abuse has on children, it also negatively impacts society.[163] Children subjected to corporal punishment associate violence with loving relationships and have been found more likely to abuse a spouse or a child than those who did not experience corporal punishment.[164] Furthermore, when corporal

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[159] Gershoff & Bitensky, *supra* note 21, at 240 (noting that physical discipline leads children to hit others as an adult); Pollard, *supra* note 2, at 602–21 (arguing that corporal punishment leads to more violence, depression, and learning problems for children later in life).

[160] Gershoff & Bitensky, *supra* note 21, at 240. Gershoff and Bitensky state that children who have experienced corporal punishment are seven times more likely to undergo severe violence and are two times more likely to suffer an injury that requires medical attention than children who are not physically punished. *Id.* Gershoff and Bitensky suggest that it is possible that parents who do not have close relationships with their child are more likely to use physical punishment "out of frustration, resentment, or ill will," although no studies have been conducted in this area. *Id*. *See* STRAUS, *supra* note 8, at 81–98 (asserting that consistent corporal punishment often leads to child abuse).

[161] Comm. on Child Abuse & Neglect, Am. Acad. of Pediatrics, *When Inflicted Skin Injuries Constitute Child Abuse*, 110 PEDIATRICS 644–645 (2002), *available at* http://aappolicy.aappublications.org/cgi/reprint/pediatrics;110/3/644.pdf.

[162] *Id.* Parents have tried to use the parental-discipline defense in a wide variety of cases, including homicide. *See* Andy Neuman & Leslie Kaufman, *Murder Case Tests Limits on Parents' Right to Hit*, N.Y. TIMES, Jan. 20, 2008, at A33, *available at* http://www.nytimes.com/2008/01/20/nyregion/20corporal.html?fta=y. The article discusses Cesar Rodriguez, a man who was accused of murdering his seven-year-old stepdaughter, Nixzmary Brown. *Id*. His lawyer argued that the corporal punishment law of New York was not descriptive enough to indicate which of Rodriguez's forms of punishment were unlawful. *Id*. Martin Guggenheim, a law professor at New York University, noted that the best way to define what is unlawful is to say that when corporal punishment is excessive, it is impermissible. *Id*. For an example of a statute that disallows certain parental conduct, see MINN. STAT. § 626.556(2) (West 2009) (stating that certain behaviors, such as hitting with a closed fist, are impermissible forms of discipline).

[163] *See* Gershoff & Bitensky, *supra* note 21, at 245. *See also* Johnson, *supra* note 13, at 424 (discussing that children subjected to corporal punishment are more likely to be aggressive towards others). For an interesting discussion about the impact of corporal punishment, see also Ezer, *supra* note 21, at 19–22, who argues that the distinction between the private and the public realm of the family is fictional and misleading. Ezer finds that the superficial distinction does not take into account how the private life of a family affects the public. *Id*. at 22.

[164] Johnson, *supra* note 13, at 423–24. Johnson advocates that the parental-discipline defense should be limited to circumstances only where the child does not receive physical injury. *Id*. at 418. She proposes a statute that defines what constitutes physical injury and

punishment reaches the level of child abuse or neglect, the public bears the cost of care and sometimes medical treatment.[165] Therefore, the current defense should be amended to provide better protection for children.[166] In order to propose a proper amendment, it is necessary to analyze the current approaches to the parental-discipline defense.[167]

III. ANALYSIS

The Indiana Supreme Court chose a good starting point in reining in the parental-discipline defense by adopting the Restatement standards. However, issues still exist with parental-discipline law that must change in order to give children more protection from abuse. Most issues stem from the lack of a definition of child abuse in criminal law.[168] First, criminal law is silent on the importance of a statutory definition of child abuse.[169] Thus, decisions are predicated upon an assumption that all judges share a pre-conceived definition of child abuse.[170] Second, the discretionary factors provided in *Willis* fail to account for a multitude of other important characteristics judges should consider to determine whether the parent's conduct was justified, such as proportionality and

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then explicitly disallows the use of the defense when a parent physically injures a child. *Id.* at 471. The proposed statute states: "Force that does not result in physical injury may be used by a parent for the purpose of discipline, control, or restraint of a child, but only to the extent that such force does not place the child at a substantial risk of either death, serious physical or emotional injury, or gross degradation." *Id.*

165 *See* CHING-TUNG WANG & JOHN HOLTON, PREVENT CHILD ABUSE AM., TOTAL ESTIMATED COST OF CHILD ABUSE AND NEGLECT IN THE UNITED STATES 2 (2007), *available at* http://www.preventchildabuse.org/about_us/media_releases/pcaa_pew_economic_impact_study_final.pdf (discussing the economic impact of child abuse and neglect in the United States). A recent study by Prevent Child Abuse America, funded by the Pew Charitable Trust, estimates that in 2007, child abuse and neglect cost families and society $103.8 billion. *Id.* In 1992, Michigan pursued a study of the costs to the state and found that child abuse and neglect cost the state $823 million per year, while prevention programs cost merely $43 million. FindCounseling.com, Child Abuse: An Overview: Costs to Society, http://www.findcounseling.com/journal/child-abuse/abuse-neglect.html (last visited Oct. 11, 2008) (citing a study conducted by Dr. Robert Caldwell at Michigan State University).

166 *See infra* Part IV (proposing a new law that would restrict the use of the parental-discipline defense).

167 *See infra* Part III (analyzing the various approaches to parents' and children's rights).

168 *See infra* Parts III.A–B (discussing the positive and negative aspects of Indiana's parental-discipline defense).

169 *See infra* Part III.A (analyzing the Model Penal Code and Restatement approaches and advocating the Restatement approach).

170 *See infra* Part III.A.

necessity.[171] Third, even when the *Willis* balancing test is successfully met, the use of such a defense expresses toleration for child abuse, which surely is not a desirable goal.[172] Therefore, this Note examines the omissions and ambiguities in the law and considers the subsequent effect it has on families in order to determine whether the legislature can strike a proper balance between parental and children's rights.[173]

Part III.A compares and contrasts the Model Penal Code and Restatement (Second) of Torts approaches to the parental-discipline defense and finds that the Restatement better protects children.[174] Part III.B analyzes how a definition of child abuse may help guide fact-finders to make decisions that do not excuse child abuse.[175] Part III.C discusses how the *Willis* decision appears to run contrary to public policy, and based on this result, how the Restatement position needs to be amended to incorporate better standards that will encourage child protection.[176]

A. The Restatement (Second) of Torts Section 150 is a Good Starting Point for Indiana Law on the Parental-Discipline Defense.

The *Willis* court made a good decision in applying the Restatement standards to parental-discipline defense cases insofar as the results under this test often lead to greater protection of children than under the Model Penal Code's approach.[177] A comparison of the Model Penal Code and Restatement (Second) of Torts illustrates why the Restatement approach better protects children than the Model Penal Code.

1. Model Penal Code

The Model Penal Code creates a two prong test to determine when parental use of force on a child is protected.[178] Its primary concerns are that the physical force is used for "safeguarding or promoting the

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171 *See infra* Part III.B (discussing the problems with Indiana's lack of a child abuse definition, training for judges, and differing outcomes due to the splits that can occur in the civil and criminal cases).

172 *See infra* Part III.C (discussing the negative consequences of the parental-discipline defense as it stands in Indiana).

173 *Infra* Parts III.A–C (analyzing Indiana's approach to the parental-discipline defense).

174 *Infra* Part III.A (analyzing the Model Penal Code and Restatement approaches to the parental-discipline defense).

175 *Infra* Part III.B (discussing how a definition of child abuse may reduce the inconsistency between civil and criminal courts).

176 *Infra* Part III.C (discussing the unintended consequences of allowing the parental-discipline defense to excuse abuse).

177 *See generally* MYERS, *supra* note 3, at 171–72 (discussing how the Model Penal Code may adopt the notions of older common law, thus reducing objectivity).

178 MODEL PENAL CODE § 3.08(1) (1985).

welfare of the minor" and 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."[179] Thus, when the state prosecutes a parent for physical abuse, the defendant has the burden of proving that the physical force was used for disciplinary purposes and that it was not designed to, or known to, create a substantial risk of serious bodily harm.[180]

To overcome this burden, the prosecution must prove beyond a reasonable doubt that either the force was not used to promote the child's welfare or the force was known to create a substantial risk of serious bodily harm.[181] However, proving these elements beyond a reasonable doubt is challenging because of the subjective nature of the parental intent to use force.[182] Furthermore, the evidence that the prosecution must rely upon sometimes is circumstantial evidence that may raise doubts of factual credibility.[183] This high burden of persuasion is difficult to meet in light of the potential evidence that can be used, such as minor testimony.[184]

Furthermore, most states have interpreted the parental-discipline defense law so that there is no need for necessity or proportionality.[185] While the requirement that the conduct must promote the child's welfare brings it close to necessity, the drafters of the Model Penal Code stated that the omission of necessity was intentional.[186] The drafters recognized

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179 *Id*. *Compare id*. (stating that the defense does not cover acts committed that are known to create or likely to cause substantial bodily injury); *with* IND. CODE § 31-34-1-2 (2008) (requiring that the child's physical or mental health beseriously endangered).

180 MYERS, *supra* note 3, at 210. Without a reasonableness element courts have found that parents are able to leave bruises when they have a proper parental purpose and the injury was unintended. Brobst, *supra* note 3, at 208. However, even intended physical force that results in injury, which would typically be characterized as abuse, may be protected within the criminal justice system. *Id*.

181 MYERS, *supra* note 3, at 210.

182 *Id*.; *see, e.g.*, Willis v. State, 888 N.E.2d 177, 179 n.1 (Ind. 2008) (explaining that the child testified his mother was angry when she hit him while the mother stated that she was not mad).

183 *See infra* note 190 and accompanying text (discussing evidentiary issues in juvenile cases).

184 *See Willis,* 888 N.E.2d at 184 (Sullivan, J., dissenting) (voicing dissent because the evidentiary standard is very high to meet, thus making it more difficult to prosecute abuse cases).

185 ROBINSON, *supra* note 3, § 144(d). Robinson notes that states either expressly provide that necessity is not required to gain the protection of the defense or the law does not mention necessity. *Id*.

186 *See id* § 144(d) n.27 (citing MODEL PENAL CODE § 3.08 cmt. 71 (Tentative Draft No. 8, 1958)). Namely, in criminal cases, the interest to be protected is often the parent's fundamental right instead of the child's best interest. *See* Pollard, *supra* note 2, at 575. It is the child's interest in CHINS cases. *See* IND. CODE §§ 31-34-1-1, 31-14-13-2 (2008).

that the basis for the defense was the belief among parents who "thought that [physical force] is an appropriate preventive or corrective measure."[187] Even a mistaken belief made in good faith would be protected.[188] This supports the notion that the first prong is a purely subjective test, so overcoming this beyond a reasonable doubt is exceedingly difficult.[189]

As for proportionality, the Model Penal Code does not expressly provide that the force must be proportional to the protected interest.[190] Instead, the Model Penal Code outlines forms of physical abuse that are not tolerated, such as serious bodily injury, death, and disfigurement.[191] Arguably, death or serious bodily injury would never be proportional to a child's best interest.[192] However, there are other forms of physical

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187 *See* ROBINSON, *supra* note 3, § 144(d) n.27 (citing MODEL PENAL CODE § 3.08, cmt. 71 (Tentative Draft No. 8, 1958)).

188 *Id.* at 3. *But see* James Hohensee, *When the Bough Breaks: Parental Discipline Defense in Child Abuse Cases*, ARMY LAW., Sept. 1989, at 24, 27 ("When that belief is reckless or negligent, the defense will fail against any offense that makes negligence or recklessness the standard for culpability.").

189 *See* ROBINSON, *supra* note 3, § 144(a). The Indiana Rules of Evidence provide that everyone is competent to be a witness. IND. EVID. R. 601. However, prior to trial the court may seek special inquiry into whether a child is a competent witness. Burrell v. State, 701 N.E.2d 582, 585 (Ind. Ct. App. 1998). Even if the child at hand is competent, it does not mean the child will be willing to tell his or her side of the story because of fear of punishment. STEPHEN J. CECI & MAGGIE BRUCK, JEOPARDY IN THE COURTROOM: A SCIENTIFIC ANALYSIS OF CHILDREN'S TESTIMONY 263 (1995). However, children with developmental differences in communication and understanding, or those who are too immature or sensitive to stand trial, or those children who are mentally incapable of recalling a series of traumatic events could arguably be competent to serve as a witness in trial yet not be able to produce evidence to convince someone beyond a reasonable doubt. *See* SUSAN R. HALL & BRUCE D. SALES, COURTROOM MODIFICATIONS FOR CHILD WITNESSES: LAW AND SCIENCE IN FORENSIC EVALUATIONS 4, 7–8 (2008) (discussing that the some child witnesses lose their ability to testify accurately when confronted with the perpetrator in the courtroom and that development issues and confrontational stress can negatively impact a child's memory). Without the oral testimony of a child, the case will rely upon circumstantial evidence of the abuse to disprove the parent's motives and the extent of pain and suffering a child suffered at the hands of his or her parent, which may not be enough to convict in a criminal case. *Compare* MYERS, *supra* note 3, at 217–18, (discussing how circumstantial evidence is all you need to obtain a physical abuse verdict), *with* Charles Alan Wright, *Eyewitness Testimony – Reasonable Doubt and Presumption of Innocence § 500*, 2A FED. PRAC. & PROC. CRIM. 3D § 500 (2008). (noting that beyond a reasonable doubt is the standard of proof for criminal convictions and is defined as "a doubt that would cause a prudent person to hesitate before acting in matters of importance to themselves".

190 *See* MODEL PENAL CODE § 3.08(1) (1985) (showing an absence of an explicit requirement of proportionality).

191 *See id.* (providing a list of injuries deemed unjustifiable).

192 *See* ROBINSON, *supra* note 3, § 144(e) (discussing that deadly force and other force that creates extreme pain and suffering are not consistent with a child's best interests and cannot be proportionate either, and therefore a justification defense is barred when the harm is too severe in relation to the interest to be protected); *see, e.g.*, State v. Crouser, 911

discipline, such as forms of consistent discipline, that cause slight to moderate pain and mental suffering and that can have as much, if not more, of a detrimental effect on a child's well-being.[193] Yet, such punishment is protected under the Model Penal Code.[194] The parental-discipline defense is unlike any other justification defense inasmuch as it does not require that the parent's conduct be necessary and the force used be proportional to the protected interest.[195]

2. Restatement (Second) of Torts Section 150

Where the Model Penal Code fails, Restatement (Second) of Torts Section 150 succeeds at better protecting children. The Restatement provides for "reasonably necessary" conduct, and it also provides, as one of three options, that the punishment may not be disproportionate to the offense.[196] In order to determine the reasonableness of the use of force, a court will look at several factors.[197]

The Restatement provides that the punishment must be "reasonably necessary."[198] The Restatement accounts for the desirability of instilling

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P.2d 725, 732 (Haw. 1996) (holding that the use of force must be reasonably related to punishing misconduct and be "both reasonably proportional to the misconduct being punished and reasonably believed necessary to protect" the child's welfare).

193 *See* Pollard, *supra* note 2, at 618–19.

194 *Id.*

195 *See* Johnson, *supra* note 13, at 434 (discussing other affirmative defenses available in a battery case).

196 RESTATEMENT (SECOND) OF TORTS § 150 (1965).

197 *Id.* (delineating the factors a court may consider). S*ee* Hohensee, *supra* note 188, at 26. Hohensee states the Restatement approach recognizes a limit on parental authority to discipline a child but does not provide specific limits. *Id*. He notes that the legislature does not lay down any fixed parameters to define reasonable discipline as it will depend on attendant circumstances and societal standards. *Id*.

198 RESTATEMENT (SECOND) OF TORTS § 150 cmt. c. The Restatement states:

> The punishment which a parent, or other person charged with the control, training, or education of a child, has the privilege to inflict upon the child must be reasonably proportionate to the character of the offense, and to a certain degree depends upon the character or apparent character of the offender. Thus a more severe punishment may be imposed for a serious offense, or an intentional one, than for a minor offense, or one resulting from a mere error of judgment or careless inattention. The fact that the child has shown a tendency toward certain types of misconduct may justify a punishment which would be clearly excessive if imposed upon a first offender. If one child in a family or group has shown himself to be a ringleader in misconduct, the necessity of correcting his mischievous tendencies in order that other children may not be influenced may justify a punishment more severe than would be permissible if there were no other children likely to be misled by his example. The age and sex of the child may also be important. A punishment which would not be

in children obedience to parental authority while also considering a parent's need to compel a child to obey.[199] However, the necessity requirement is still different than that of other justification defenses, which require that the harm be imminent.[200] Thus, a parent can physically punish a child even when the harm is not absolute.

The Restatement approach promotes proportionality.[201] The trier of fact *may* consider whether the force was disproportionate in relation to the offensive conduct.[202] Thus, if a less severe method is available, a parent is not privileged to use a more drastic amount of force.[203] This may prevent parents from using physical force when other discipline options are available.[204] However, it is problematic that the proportionality standard is optional as a trier of fact may also consider whether the force was unnecessarily degrading or likely to cause serious or permanent harm or injury.[205] Thus, a court may allow

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> too severe for a boy of twelve may be obviously excessive if imposed upon a child of four or five. Likewise it may be excessive to punish a girl for a particular offense in a manner which would be permissible as a punishment for the same offense committed by a boy of the same age.

Id. *See* Brobst, *supra* note 3, at 209 (providing a Texas statute which states that necessity and proportionality are required in order to meet the defense criteria).

[199] *See* RESTATEMENT (SECOND) OF TORTS § 150 cmt. c (delineating the factors a court may consider).

[200] *See* Barham, *supra* note 81, at 40 (discussing the necessity and proportionality requirements of the parental-discipline defense in a military court). The Model Penal Code does not require necessity or even reasonable force. *Id*. at 42. Yet strict necessity requires that the defendant's conduct occur to prevent imminent harm and the force used is no greater than what is necessary to prevent said harm. *Id*. at 41. Only then can the actor's conduct be justified. *Id*.

[201] RESTATEMENT (SECOND) OF TORTS § 150 cmt. b. Comment b refers the reader to RESTATEMENT (SECOND) OF TORTS § 147 cmt. c, which states, "[t]he parent has the privilege of applying reasonable force or confinement to the child in order to control the child and prevent such conduct, as well as to maintain order in his household, and to train and educate the child."

[202] *Id.* § 150.

[203] *See Id.* § 150 cmt. c (delineating the factors a court may consider).

[204] *See* Johnson, *supra* note 13, at 472 (suggesting that necessity standards would encourage other forms of discipline instead of corporal punishment).

[205] *See id*. (illustrating that the rule does not require the fact-finder to look at whether the force was disproportionate). While the textual interpretation lends the interpretation that proportionality is optional, and while some courts (as will be discussed) have ignored proportionality in discussion, the commentary to the Restatement indicates that reasonable proportionality is required. RESTATEMENT (SECOND) OF TORTS § 150 cmt. d. The commentary goes on to suggest that the reasonableness factors are predominantly used to determine proportionality, not necessity, but Indiana has used the standards to determine the reasonableness of the conduct without referring to proportionality or necessity. *Id*. § 150 cmt. c.; *see* Willis v. State, 888 N.E.2d 177, 180–82 (Ind. 2008) (providing the reasoning for finding the mother's conduct justified).

disproportionate force in situations so long as it does not cause serious or permanent harm or injury.[206]

Arguably, this occurred in *Willis* where the Indiana Supreme Court adopted the Restatement position.[207] The child had a history of defiance, yet the force used to punish him for stealing his mother's clothes was a premeditated lashing with an electrical cord three days after the incident.[208] The court concluded that this unusual form of punishment was permissible because the parent used progressive forms of discipline to address the problem to no avail, disciplined the child without anger, and did not inflict injuries constituting bodily harm.[209] It appears the court was more concerned with giving a single parent latitude in disciplining an unruly child than it was in ensuring that the parent's response was the lesser of two evils and in response to an imminent threat.[210]

While the Restatement approach gets closer to a standard that appropriately balances child and parental rights, problems still exist. First, as previously mentioned, the Restatement does not require

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[206] *See* Johnson, *supra* note 13, at 417 (stating that a court will allow force as long as it is reasonable and moderate). This can be problematic because bizarre punishments are usually indicators of risk for abuse. IND. DEP'T OF CHILD SERVS., CHILD WELFARE MANUAL 4.18, at 1 (2007), *available at* http://www.in.gov/dcs/files/4.18_Safety_Assessment.pdf (noting use of bizarre punishment is a caretaker risk factor the Indiana Department of Child Services takes into account when assessing a child's risk for abuse). *See* David Markland, California Faultline, Spanking Could be Banned in California, http://californiafaultline.wordpress.com/2008/04/15/spanking-could-be-banned-in-california (Apr. 15, 2008) (noting that California's Legislature considered a bill that would prohibit the use of foreign objects in parental discipline of children). *See also* Jamie Satterfield, *Woman Guilty of Child Abuse*, KNOXVILLE NEWS SENTINEL, Sep. 25, 2008, http://www.knoxnews.com/news/2008/sep/25/woman-guilty-child-abuse. Satterfield cites a case that is factually similar to *Willis*, except that the mother was found guilty on criminal charges of child abuse for beating her seven-year-old son with an extension cord. *Id*. The seven-year-old son had a history of misbehavior at school. *Id*. The mother tried removal of privileges to no avail and started spanking him with foreign objects. *Id*. During the incident that led to her criminal conviction, the mother said she only struck the child five times, yet the officials found the child had thirty lash marks. *Id*. *Compare id*., *with Willis*, 888 N.E.2d at 179 (noting that the mother had used progressive discipline against her unruly child only to find herself using corporal punishment as a last resort). In *Willis*, there was a dispute between mother and child, and the child was left with bruises on his back, buttocks, and legs. *Id*. at 183.

[207] *See generally Willis*, 888 N.E.2d at 183.

[208] *Id*.

[209] *Id.* at 183–84. This also presents the evidentiary issue introduced in *supra* note 190, as the child said his mother was acting out of anger while the mother said she was not angry. *Id*. at 179.

[210] *Id.* at 183–84 (discussing the concern over J.J's history of poor behavior and Willis' struggle with it). The court noted that Sophia Willis had struggled to parent J.J. and that it was sympathetic to her woeful situation. *Id.* at 183.

necessity and proportionality as traditionally prescribed in a justification defense.[211] Second, the Restatement factors can either help or hinder because they take the subjectivity out of the parental defense but allows for a greater amount of discretion in the fact-finder.[212] Defining punishment by the term reasonableness leads to disparate outcomes because often the results depend on the fact-finder's concept of the proper upbringing of a child and how to achieve it instead of a standardized definition of abuse.[213]

B. Indiana's Parental-Discipline Defense Law Fails to Protect Children because it Does Not Provide an Explicit Definition of Child Abuse to Guide Judicial Decisions.

Indiana's parental-discipline defense does not refer to a definition of child abuse.[214] In fact, the definition in Indiana law is found under the Child in Need of Services ("CHINS") statute and is applicable only in juvenile proceedings.[215] Furthermore, the language is more reflective of the Model Penal Code's definition of abuse.[216] Even though the purpose of the Restatement factors is to guide the courts in ascertaining whether a parent's force was reasonable, it does not provide a clear line among legally acceptable physical forces.[217] What does this silence mean? On one hand, the law can be interpreted as intentional silence because the multiple factors should prevent the courts from allowing abuse while also protecting a parent's constitutional right to raise a child as he or she

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[211] *See* RESTATEMENT (SECOND) OF TORTS § 150 (1965) (prohibiting disproportionate force but not requiring that the parent's harm be less than the child's potential harm).

[212] *See* Davidson, *supra* note 32.

[213] *Id*. (noting that the term "'reasonable'" leaves the door open to varied interpretations because a court decision will be based on varied concepts of acceptable punishment).

[214] *See supra* note 147 (defining child abuse in juvenile cases).

[215] IND. CODE § 31-34-1-2 (2008).

[216] *See supra* note 179 and accompanying text (discussing the similarity in language shared by the Model Penal Code and the CHINS Statute). In *Willis v. Indiana*, the court recognized that the Model Penal Code approach was one that many states adopted, but that Indiana would not because

> the Code does not explicitly demand that the use of force be reasonable. Second, under the Code, so long as a parent acts for the purpose of safeguarding or promoting the child's welfare (including the specific purpose of preventing or punishing misconduct), the parent is privileged in using force, unless the force creates a substantial risk of death or excessive injuries. Neither of these two propositions finds support in Indiana's common law.

888 N.E.2d 177, 181–82 (Ind. 2008).

[217] *See supra* note 19 and accompanying text.

sees fit.[218] On the other hand, the law can be considered purposefully void of a definition of child abuse, thus leaving the interpretation of what is child abuse to the judge's conception of appropriate parenting or community standards.[219] The lack of a definition of child abuse in criminal law has led to the contradictory result of one judge declaring a parent's acts abuse and subject to state intervention, while another judge exonerates a parent based on a successful parental-discipline defense.

But even if the current definition of child abuse was used in criminal adjudications, it would fail to give much guidance or clarification to the question of what constitutes child abuse. Indiana's definition of child abuse is the "minimum" definition supported by the Child Abuse Prevention and Treatment Act.[220] Indiana's definition provides that a child is a Child in Need of Services when he or she is subjected to serious endangerment by the act or omission of a parent *and* when the child is unlikely to receive care, treatment, or rehabilitation without intervention of the court.[221] While Indiana's definition of child abuse includes acts that threaten the child with, or create a substantial risk to the child of, serious harm and is more protective than requiring the simple presence of an injury, it nevertheless does not provide examples of what is considered abuse.[222] In states where the statutes provide no guidance as to where the line between lawful corporal punishment and child abuse exists, one of two scenarios occurs: the terms applied in these situations change according to contemporary societal standards and the conditions

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218 *See* Pollard, *supra* note 2 and accompanying text (arguing that the protected interest in child abuse cases is the parent's rights and not the children's).

219 *See* Davidson, *supra* note 32, at 20–22 (explaining that because some state legislatures' failure to specifically define corporal punishment, state courts have been required to determine on a case-by-case basis whether certain forms of punishment constitute abuse).

220 *See* 42 U.S.C. § 5106(g) (2006) (stating that this is the minimum definition for child abuse recommended by the Act). *See also* IND. CODE § 31-34-1-2 (2008); *supra* note 147; (providing Indiana's definition of a child in need of services).

221 IND. CODE § 31-34-1-2.

222 *See* J. Robert Shull, Note, *Emotional and Psychological Child Abuse: Notes on Discourse, History and Change*, 51 STAN. L. REV. 1665 (1999) (discussing the problems inherent in systems that do not define abuse). Shull stated that states offer definitions of physical abuse and neglect, yet legal definitions fail to capture a definition of emotional abuse. *Id*. at 1668. However, he does not recommend creating a definition of emotional abuse. *Id*. at 1701. A definition would simply not cover all possibilities in the future. *Id*. Illinois and Minnesota also have statutes that lack definitions of abuse. *Id*. at 1674 n.37. Indiana's statute would not work adequately without some amendment because it requires that parents must not be willing or able to participate in treatment without court intervention. *See* IND. CODE § 31-34-1-2. The statute is also geared towards directing when the State can take custody of a child, not towards defining child abuse. *See supra* note 147 (providing the statutory text of the elements of abuse or neglect needed to adjudicate a child as a CHINS).

of the community in which the family lives or the terms are defined by the fact-finder.[223]

Other states provide more explicit definitions of child abuse that could be helpful in guiding lawyers and judges.[224] Idaho, for example, provides certain criteria to determine whether physical abuse has occurred.[225] Iowa and Alabama have made an even broader prohibition by stating that any non-accidental physical injury constitutes physical abuse.[226] Thus, it is possible for Indiana's legislature to devise a specific definition of physical abuse that would reduce the variance among fact-finders.[227] The variance would be further reduced by training which, at this time, is neither mandatory nor made regularly available to judges.[228]

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[223] *See* Davidson, *supra* note 32, at 22 (discussing that the common law terms applied "to limit parental corporal punishment are 'ever changing according to the ideas prevailing in our minds during the period and conditions in which we live'") (citing Carpenter v. Commonwealth, 44 S.E.2d 419, 424 (Va. 1947)).

[224] *See infra* notes 225–26 and accompanying text (providing child abuse definitions from other states).

[225] IDAHO CODE ANN. § 16-1602 (2009). Idaho's statute states:

> (1) "Abused" means any case in which a child has been the victim of:
> (a) Conduct or omission resulting in skin bruising, bleeding, malnutrition, burns, fracture of any bone, subdural hematoma, soft tissue swelling, failure to thrive or death, and such condition or death is not justifiably explained, or where the history given concerning such condition or death is at variance with the degree or type of such condition or death, or the circumstances indicate that such condition or death may not be the product of an accidental occurrence.

Id. *See* COLO. REV. STAT. ANN. § 19-1-103 (West 2005 & Supp. 2008) (stating that physical abuse consists of "[a]ny case in which a child exhibits evidence of skin bruising, bleeding, malnutrition, failure to thrive, burns, fracture of any bone, subdural hematoma, soft tissue swelling, or death"); MINN. STAT. § 626.556(2)(g) (West 2009) (offering several types of conduct that are prohibited, such as throwing, kicking, hitting a child with a closed fist, and hitting a child under age one on the face). *See* HAW. REV. STAT. § 350-1 (1993) stating that physical abuse occurs:

> (1) When the child exhibits evidence of:
> (A) Substantial or multiple skin bruising or any other internal bleeding; (B) Any injury to skin causing substantial bleeding; (C) Malnutrition; (D) Failure to thrive; (E) Burn or burns; (F) Poisoning; (G) Fracture of any bone; (H) Subdural hematoma; (I) Soft tissue swelling; (J) Extreme pain; (K) Extreme mental distress; (L) Gross degradation; (M) Death.

[226] IOWA CODE ANN. § 232.68 (West 2006 & Supp. 2009) states, "'[c]hild abuse' or 'abuse' means: (a) [a]ny nonaccidental physical injury, or injury that is at variance with the history given of it, suffered by a child as the result of the acts or omissions of a person responsible for the care of the child." ALA. CODE § 26-14-1(1) (LexisNexis 1992 & Supp. 2008) states that abuse means, "[h]arm or threatened harm to a child's health or welfare . . . through nonaccidental physical or mental injury."

[227] *See, e.g, supra* notes 225–26 (providing the ways in which other states define child abuse in a descriptive manner).

[228] E-mail from Jeffrey Bercovitz, Director, Juvenile and Family Law, Indiana Judicial Center (Dec. 12, 2008, 19:14 CST) (on file with author). Another issue this brings up is the

C. Indiana's Criminal Law Created Legal Precedent That May Have Unintended Consequences

Indiana has invested several million dollars in child protection services, showing a strong interest in protecting youth from abuse and neglect.[229] Furthermore, the judicial system has also sought to limit corporal punishment by parents against children involved with court-

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divergent interests present in civil and criminal cases. *See* Pollard, *supra* note 2, at 645–46 (noting that parent-centered concerns dominate the criminal court system). *See also* Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?* 29 CARDOZO L. REV. 1487 (2008) (alluding to the notion that the criminal system serves to punish while the civil system serves to rehabilitate). Goldfarb's article focuses on the marginalization of intimate relationships when forming a protective order; she argues that these abusive relationships cannot be ignored in the process. *Id*. at 1490. Within this discussion, she compares the goals of the criminal process—protecting the public—from those of the civil process, where the autonomy of the individual trumps the interests of the general public. *Id*. at 1542. *See also* Davidson, *supra* note 32, at 23. Davidson describes the focus of the civil and criminal systems as very different and states that the juvenile court system often seeks to rehabilitate while the criminal system seeks to punish. *Id*. Davidson suggests that in order for the courts to help families in child protection cases, judges, lawyers and clinicians need to participate in continuing education to help them better understand the cultural traditions of corporal punishment and how children's misbehavior has been treated within the variety of cultures. *Id*.; Peter Salem & Billie Lee Dunford-Jackson, *Beyond Politics and Positions: A Call for Collaboration Between Family Court and Domestic Violence Professionals*, 59 JUV. & FAM. CT. J. 437 (2008) (discussing the unique concerns of the family court and advocating for collaboration between the family courts and domestic violence advocates in order to address the underlying problems leading to the family's involvement in the legal system); Betsy Tsai, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 FORDHAM L. REV. 1285 (2000) (advocating for collaborative justice courts, which often combine the domestic violence case with the criminal case in order to have a wrap-around approach to solving the underlying problems in the case). Tsai finds that domestic violence law has taken a hard stance against abuse, yet is missing the mark. Tsai, *supra*, at 1291–94. The problem is that the system needs to focus on therapeutic justice. *Id*. The basic principle underlying therapeutic jurisprudence is that "'law is a social force that has inevitable (if unintended) consequences for the mental health and psychological functioning of those it affects.'" *Id*. at 1295. *See also* BRENDA K. UEKERT,ANN KEITH & TED RUBIN, THE NAT'L CTR. FOR STATE COURTS, INTEGRATING CRIMINAL AND CIVIL MATTERS IN FAMILY COURTS: PERFORMANCE AREAS AND RECOMMENDATIONS 31–32 (2002), *available at* http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/famct&CISOPTR=71. The National Center for State Courts study sought to provide recommendations to increase family court performance in civil and criminal matters. *Id*. The Center recommended that courts consolidate criminal and civil cases in order to promote greater consistency and efficiency. *Id*. at 27.

[229] *See, e.g.*, Matthew Van Dusen, *Child Services Budget Grows by $4.1 Million*, NW. IND. TIMES, Aug. 19, 2005, http://nwitimes.com/news/local/article_fddb35dd-7c33-59c6-84fb-57cb28a04a81.html (stating that Porter County has, at $7.9 million, one of the smallest budgets for child services in the state).

ordered supervision.[230] Thus, there appears to be a trend moving toward more protection for children in Indiana.[231] However, the parental-discipline defense negates those attempts when courts vindicate parents' abusive acts.

Dyson v. State illustrates the state's desire to encourage parents to utilize other forms of discipline in lieu of physical discipline.[232] In the absence of supervision, a parent who receives court-ordered, supervised visitation may not use physical force upon a child outside of supervised visitation.[233] The reasonableness of any punishment outside of the context of a supervised visit will not be considered by the court as appropriate physical punishment because such conduct is strictly prohibited.[234] Notably, physical discipline is expressly prohibited throughout supervised visitation agreements adhered to by service providers hired by the State.[235] In fact, Allen County courts have gone so far as to order parents to refrain from physical discipline.[236] This illustrates the state's interest in preventing the use of physical force on children at times when people are subjected to court-ordered, supervised

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230 *See* Dyson v. State, 692 N.E.2d 1374, 1376 (Ind. Ct. App. 1998) (noting state interest in protecting children); *see also* FAMILIES UNITED, SUPERVISED VISITATION GUIDELINES 1 (1986) (on file with author). Families United, a state-contracted service provider, has set forth guidelines for supervised visitation supervisors explicitly stating that corporal punishment is disallowed during supervised visits. *Id*.

231 *See* Associated Press, *Indianapolis Schools to Ban Spanking*, THE COURIER-JOURNAL (Louisville), May 27, 2004, http://orig.courier-journal.com/localnews/2004/05/27in/B3-spank0527-4169.html (discussing that the Indianapolis Public School system banned teachers from using corporal punishment even though it is protected by law); Mitch Daniels for Governor, Helping Children, http://www.mymanmitch.com/news_article.asp?pressid=1017 (as reported in the EVANSVILLE COURIER, Aug. 2007) (discussing Daniel's support for aggressive hiring and training of caseworkers to address Indiana's deaths of children by abuse or neglect).

232 692 N.E.2d at 1376.

233 *Id.*

234 *Id.* at 1377.

235 *See, e.g.*, FAMILIES UNITED, *supra* note 230 (providing that corporal punishment is not allowed in supervised visitations provided by state agency-contracted service providers).

236 *In re* Termination of the Parent-Child Relationship of C.R. & D.R., No. 02A03-0705-JV-218, 2007 WL 3025657 (Ind. Ct. App. Oct. 18, 2007) [hereinafter *In re* C.R. & D.R.]. The trial court ordered a parent to receive supervised visitation with her children for a variety of reasons after she did not comply with services provided through the Department of Child Services. *Id*. While the decision does not describe the rationale behind such an overbroad court order, it may be in part due to the co-occurrence of neglect and physical abuse and her failure to comply with services. *See id*. at *1 (discussing that the family was involved with child protection services because of neglect but that there were also concerns that physical abuse may have been occurring); *see also* MYERS, *supra* note 3, at 205. Myers argues that "[p]hysical abuse and neglect often occur together." *Id*. He notes that neglect often is "embedded in a context of physical abuse, domestic violence, substance abuse, and material deprivation." *Id*.

visitation, even if the family's involvement with the state is not because of the use of excessive force on a minor.[237] Therefore, the state recognizes problems with granting everyone the privilege of using corporal punishment and has sought to reduce its use when the state has become involved with the family, recognizing that the practice is not safe.[238]

Other states are starting to consider the balance between protecting children's rights and parents' rights in their constitutions.[239] While evidence is scarce, Colorado's citizens have prioritized children's rights over parent's rights through the defeat of the Amendment 17 proposition, which would have amended the constitution to include parental rights.[240] Thus, Colorado illustrates a trend away from recognizing a parent's right to control his or her child's upbringing in

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[237] *See generally In re C.R. & D.R.*, 2007 WL 3025657. This case illustrates the broad powers of courts to protect children in civil proceedings. *See id*. Furthermore, it illustrates that children receive more protection in civil proceedings than they do in criminal proceedings. *See also* Brobst, *supra* note 3, at 185 (stating that in New Zealand children also receive more protection in civil proceedings than they do in criminal proceedings).

[238] *See In re C.R. & D.R.*, 2007 WL 3025657 (illustrating that the courts may order a family under the supervision of Department of Child Services to refrain from using physical discipline). Furthermore, there is a division within the state about the use of corporal punishment in schools, which has led the Indianapolis Public Schools to ban the use of corporal punishment. *See* Associated Press, *supra* note 231 (discussing Indianapolis Public School system's ban on corporal punishment). Governor Mitch Daniels supports extending legal protection to teachers who discipline students. *See* Press Release, Jane Jankowski, Governor Announces School Discipline Plan to Protect Teachers, (Aug. 11, 2008) http://www.in.gov/portal/news_events/24928.htm (last visited Nov. 9, 2008). The Governor called for more protection for teachers from frivolous lawsuits stemming from the use of discipline in the classroom. *Id*. While twenty-seven states prohibit corporal punishment in schools, Indiana still condones corporal punishment. EducationWorld.com, Corporal Punishment: Teaching Violence through Violence, http://www.educationworld.com/a_issues/starr/starr051.shtml (last visited Jan. 12, 2009); Laurie Couture, Corporal Punishment: Facts about United States and International Laws, http://www.childadvocate.org/1a_laws.htm (last visited Jan. 12, 2009); StopHitting.com, *supra* note 117. *See also* Urbonya, *supra* note 152, at 427. Urbonya examines public schools' use of force in the context of the Fourth Amendment. *Id*. She found that the Supreme Court has not recognized protection for children from corporal punishment in the school setting under the Fourth Amendment. *Id*. In her analysis, she provides a breakdown of the state laws on corporal punishment in the classroom. *Id*. at 427–34.

[239] *See, e.g.*, Donovan, *supra* note 53, at 187 (stating that the Colorado Amendment 17 initiative failed to codify parental rights). When the parental right to direct the upbringing, education, values, and discipline of a child was put up for referendum vote, it failed by fifty-seven percent. *Id*. One attributed reason was concern over how this would impact the state's ability to remove children from abusive homes. *Id*. It also brought to the attention of voters the impact the amendment would have on children trying to obtain reproductive health care and sex education and on the burden of removing children from abusive homes. *Id*.

[240] *Id*.

light of concern over its impact on a child's welfare—a trend that Indiana should embrace.[241]

In conclusion, Indiana's current approach lacks the standards needed to properly weigh parents' and children's rights. The standard is too deferential to parents by imposing a difficult burden of persuasion on the prosecution in order to defeat the parental-discipline defense.[242] The Restatement fails in part because of the lack of necessity and proportionality standards and in part because of the lack of a uniform definition of child abuse intertwined with the standard.[243] A better way to approach the problem in order to protect children would be to create statutory language that defines the line between proper acts of parental authority and acts that are considered abusive.[244]

IV. CONTRIBUTION

The parental-discipline defense does not strike an appropriate balance between child abuse and parental authority. Instead, it creates an opportunity for parents to justify their misbehavior, leaving children to be victims of a crime that courts would not allow to occur to a stranger. The discretionary factors need to be defined and expanded to include necessity and proportionality in order to reduce the likelihood that abusive behavior will be excused.[245] While the Restatement approach adopted in *Willis* comes closer to protecting children, it lacks definitional aspects that, if codified into the standards, would better protect children.[246]

In light of psychological research supporting the negative impact corporal punishment has on children, corporal punishment's possible risk of abuse, and the potential for incongruent results in child abuse adjudications, it is time for Indiana to reform its parental-discipline defense.[247] Indiana should redefine child abuse in its statutory language

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241 *Id.* The article focuses on the campaign's pressure on voters to oppose the amendment, noting that it brought to the attention of voters the impact the amendment would have on children trying to obtain reproductive health care and sex education and on the burden of removing children from abusive homes. *Id.*

242 *See supra* Part III.A (analyzing the Restatement approach to the parental-discipline defense).

243 *See supra* Parts III.A–B (analyzing the parental-discipline defense's many approaches and the problems Indiana faces with its defense).

244 UEKERT, KEITH & RUBIN, *supra* note 228, at 31–32.

245 *Supra* Part III.A.2 (analyzing how the Restatement does not require necessity and proportionality); *see infra* Part IV.B (proposing the addition of proportionality and necessity standards).

246 *See supra* Part III.B (analyzing Indiana's current definition of child abuse).

247 *See supra* Parts III.A–B (analyzing the impact of parental discipline on children and the courts).

in order to give concrete examples of impermissible abuse. This definition should then be coupled with the Restatement (Second) of Torts Section 150 factors.[248] These factors should be reformed so that a fact-finder must look at the totality of the circumstances, including the child and his or her behavior and the behavior of the caregiver.

This Note contributes a new statutory definition to guide the parental-discipline defense.[249] Part IV.A provides a new definition of child abuse that better provides examples of unlawful abuse.[250] Part IV.B provides a requirement that a parent's actions be necessary and proportional.[251] Part IV.C proposes a model statute.[252] Part IV.D discusses the effect this statute may have on society and its children.[253]

A. Redefining Child Abuse

The first initiative the legislature should undertake is redefining child abuse. As previously mentioned, the definition of child abuse is a minimal definition.[254] An expansion of the definition to cover types of prohibited conduct or injuries would lead to better protection of children. The proposed definition of child abuse, influenced by states such as Idaho, Iowa, and Alabama, is:

> *Child abuse is any non-accidental act or omission by a parent or guardian that causes or threatens to cause substantial bodily harm, which includes any case in which a child has been the victim of skin bruising, bleeding, malnutrition, burns, fracture of any bone, subdural hematoma, soft tissue swelling, failure to thrive, or death, and such condition or death is not justifiably explained* (portions omitted).[255]

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[248] *See supra* note 115 (providing the text of the RESTATEMENT (SECOND) OF TORTS § 150).

[249] *See infra* Parts IV.A–D (advocating a parental-discipline statute).

[250] *See infra* Part IV.A (providing a new definition of child abuse).

[251] *See infra* Part IV.B (adding necessity and proportionality to the text of the Restatement (Second) of Torts § 150).

[252] *See infra* Part IV.C (proposing a model statute that incorporates a definition of child abuse, necessity and proportionality standards, and parental risk factors).

[253] *See infra* Part IV.D (discussing the impact of the proposed statute on society and children).

[254] 42 U.S.C. § 5106(g) (2006) (stating this definition is the *minimum* definition for child abuse recommended by the Act).

[255] The proposed amendments are italicized and are a compilation of statutory code from Alabama's, Idaho's, Iowa's, and Colorado's definitions of child abuse. *See supra* notes 225–26 and accompanying text (providing Alabama's, Idaho's, Iowa's, and Colorado's definitions of child abuse).

Commentary

This proposed definition bases its characterization of abuse on injuries.[256] A parent who causes these types of injuries to a child is unjustified in his or her behavior unless it is found to be necessary under the circumstances.[257] The definition provides a uniform and consistent approach to defining abuse as it does not try to pinpoint all different types of conduct that can be considered abusive, but instead defines the abuse by the potential outcomes.[258] This definition will provide guidelines for criminal law judges, who may lack experience in juvenile cases, to determine whether the parent's act was abuse.

Of course, one can see the possibility of a situation in which a parent acts to prevent physical harm to his child, yet causes him or her physical injury. Should the parent be accused of child abuse? Society must consider the totality of the circumstances surrounding the parent's action in order to determine whether the conduct is justified.[259]

B. Standards That Require Necessity and Proportionality

Parents should not be able to physically discipline their children freely, primarily because doing so has a negative impact on a child's physical and mental well-being.[260] Also, such physical discipline should not be allowed because of the costs to society when physical force goes too far.[261] A parent's conduct should only be justified when physical force is necessary to control a child who is a danger to himself or

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256 *See supra* Part IV.A (providing a proposed definition of child abuse); *see also* Shull, *supra* note 222, at 1700–01 (proposing that a definition based on conduct would not cover the gamut of possible bizarre punishments in which a parent may engage).

257 *See* Shull, *supra* note 222, at 1700–01. Shull states that by defining things through conduct society restricts the law's fluidity in time, and that instead of predicting all of the different ways a parent could abuse a child, society should leave room for interpretation in (emotional) abuse definitions. *Id*. at 1701. *See infra* Part IV.B (advocating a necessity requirement).

258 *See* Shull, *supra* note 222, at 1700–01 (discussing how definitions that prohibit certain types of conduct are inflexible and may not cover bizarre punishments).

259 *See infra* Parts IV.B–C (suggesting that the legislature should create a statute that requires courts to look at the totality of the circumstances in order to determine whether a parent's conduct was reasonable based upon its necessity, proportionality, and the child and parent's history and characteristics).

260 *See supra* Part III.B (discussing the negative impact of corporal punishment on children).

261 *See supra* Part III.C (discussing the financial and social costs to society resulting from child abuse).

others.[262] One way to ensure that the defense is successful in such cases is to require necessity and proportionality, which are characteristic of other justification defenses.[263]

The parental-discipline defense standards should explicitly require that the conduct be necessary and proportional. Necessity should be shown by proof that alternative, non-physical parenting strategies were used prior to the physical assault and that those remedies were exhausted to no avail or that the immanency of danger created a situation where the opportunity to seek other recourse was not reasonable.[264] Proportionality should require the parent to use an amount of force that is less harmful than the danger the child's conduct creates.[265]

C. A Proposed Statute

A new statute should include (i) a prohibition against child abuse; (ii) a requirement that a parent's use of physical force is necessary to prevent further harm to the child or others; and (iii) a requirement that a parent's action is roughly proportional to the child's misbehavior.[266] Thus, the new statute and its commentary should read as follows:

> *In determining whether physical force is a lawful exercise of parental authority for the promotion of a child's welfare, the court shall consider all relevant factors, including:*
> *(a) whether the act is child abuse, as codified in Indiana Code section 31-34-1-1;*[267]
> *(b)* whether the actor is a parent;
> *(c)* the age, sex, and physical and mental condition of the child *and parent*;
> *(d) the history of violence of the parent or child;*
> *(e)* the nature and *motive of the child's and parent's* offense;
> (f) the influence of the child's example upon other children of the same family or group;

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262 *See* CHILD WELFARE MANUAL 4.18, *supra* note 206 (stating that one risk factor requiring the state to take custody of a child may be where the child might harm himself or others and needs protection).

263 *See* ROBINSON, *supra* note 3, § 131(d).

264 *See supra* Parts III.A.1–2 (analyzing the lack of necessity and proportionality standards that are characteristic of a justification defense in the Model Penal Code and Restatement (Second) of Torts approaches).

265 *See supra* Parts III.A.1–2.

266 *See supra* Parts IV.A–B (providing the reasons for including these factors).

267 *See supra* Part IV.A (advocating amending the definition of child abuse).

> *(g)* whether the force or confinement is necessary and appropriate to compel obedience to a proper command;
> *(h) whether the force used is proportionate to the offense;*
> *(i) whether the force or confinement used is* unnecessarily degrading or *the force or confinement* is likely to cause serious or permanent harm.[268]

Commentary

Several factors of this test have changed in order to protect children. First, the test requires that one consider whether the conduct is a prohibited form of abuse.[269] Second, the factors require the fact-finder not only to consider the child's history and characteristics, but also his or her parents' history.[270] Third, the factors incorporate language that puts the requirements of necessity and proportionality, as traditionally found in justification defenses, into the statute.[271]

In order to further explain the revisions to the Restatement (Second) of Torts Section 150, the following commentary should also be included with the statute:

> *Comment A. An act which meets the definition of child abuse should be presumably unjustified. It is up to the parent to rebut the presumption that the act was unjustified by asserting that the child's conduct was leading to imminent danger or was likely to lead to imminent danger and that no lesser force could be used to curtail the child's course of conduct.*[272]
> *Comment B. In light of research about a parent's history of violence and its impact on his or her parenting, the parent's characteristics must also be considered.* [273] *A court may*

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[268] The italics indicate content added by the author to the factors provided by RESTATEMENT (SECOND) OF TORTS § 150 (1965).

[269] *See supra* Part IV.A (proposing the addition of a definition of child abuse).

[270] *See supra* Part IV.C (adding to the RESTATEMENT (SECOND) OF TORTS § 150 parental factors).

[271] *See supra* Part IV.B (proposing reasons and ways in which the legislature may introduce necessity and proportionality standards into the law).

[272] *See supra* Part II.D (analyzing the negative impact of child abuse on children). Also, this provision helps shift the burden of proof from the prosecutor to the parent, which eliminates a concern raised in the *Willis* dissenting opinion. *See* Willis v. State, 888 N.E.2d 177, 184 (Ind. 2008) (Sullivan, J., dissenting).

[273] *See* CHILD WELFARE MANUAL 4.18, *supra* note 206 (providing the safety assessment tool the Department of Child Services utilizes in assessments). The assessment tools consider the parent's predominant viewpoint of the child, history of violence, and prior involvement in a child abuse case. *Id.*

> *consider a parent's history of being an aggressor or the parent's predominant viewpoint about the child.*[274] *Furthermore, a parent's physical and mental health may impact his or her parenting.*[275] *Thus, a court may consider these factors as aggravating circumstances or mitigating circumstances, depending on the parent's conduct in the past. Comment C. The child's conduct must run a substantial likelihood of harm to self or others in order for a parent to gain protection for the use of physical discipline that leads to non-accidental physical injury.*[276]

D. New Standards Benefit Society and its Children

The proposed statute is beneficial to society and its children. First, the proposed statute is helpful to society. With a clear guideline prohibiting designated categories of physical injury, courts will be able to operate under a succinct definition of abuse. Judges who have little experience with domestic violence will be more alert to the injuries considered the result of abuse.[277] Furthermore, judges will have readily available parental risk factors that indicate child abuse, thus increasing the likelihood that judges will arrive at decisions predicated on information child abuse experts look at when assessing a situation.[278] A criminal law court, guided by this statute, will more likely arrive at the same or similar conclusion as would a civil law court that adjudicates a child as a CHINS.[279] This statute will increase judicial consistency and efficiency within family cases by reducing judicial discretion over what constitutes abuse.

Second, and most importantly, the proposed statute is beneficial to children. As previously mentioned, the statute may deter parents from engaging in abusive practices.[280] By preventing parents from engaging in abusive acts, the statute helps maintain the parent-child bond.[281] Furthermore, the statute will reduce the confusion and anxiety a child feels towards the legal system for allowing his or her parent to abuse him or her while the child is punished by being placed in foster care or

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274 *Id.*

275 *Id.*

276 *See supra* Part III.A (supporting the addition of a necessity requirement).

277 *See supra* Part IV.A (defining child abuse injuries).

278 *See supra* Part IV.C (incorporating parental risk factors into the Restatement's language).

279 *See* CHILD WELFARE MANUAL 4.18, *supra* note 206 (providing parental risk factors that the proposed statute adopts).

280 *See supra* Part IV.D (discussing the impact this reform would have on parents).

281 Straus, *supra* note 10, at 146.

another parent's care.[282] Finally, more parents who abuse their children will be prosecuted for their wrongful acts, thus decreasing the amount of violence against children.

V. CONCLUSION

The parental-discipline defense creates an excuse for violence. There is a need for the Indiana legislature to re-evaluate this area of law because the current laws put children at risk and the Restatement standards do not provide the same criteria that the State's risk and safety assessments look at when determining whether a parent's acts or affinity for future acts are abusive. The legislature needs to close the gap between these two systems in order to create a coherent system of laws that delicately balance the right to a raise a child and the child's right to live free from abuse.

A stronger approach to child protection would include creating a statutory definition of child abuse and incorporating it into a totality of the circumstances test. Then children—like William—will understand that while their conduct was not right, neither was their parents'. This is one step toward ending the cycle of domestic violence so characteristic of American culture. Furthermore, parents will understand that abuse is not tolerated regardless of the reasoning behind it. In the end, Indiana will be one step closer to protecting its children from abuse.

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[282] *See supra* Part II.B (discussing the negative impact of corporal punishment on a child's well-being).

* J.D., Valparaiso University School of Law (2009); B.A., Political Science, Magna Cum Laude, DePauw University (2004). I dedicate this Note to my husband, Jason, my daughter, Caitlin, and my mom, Cheryl, for the love, support, and sacrifices they have made so I could pursue my dream. Thanks to Professor JoEllen Lind and Christin Eberst for their guidance and editing of this Note.