

# THE AGE OF DISCIPLINE: THE RELEVANCE OF AGE TO THE REASONABLENESS OF CORPORAL PUNISHMENT

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*“Corporal punishment is the use of physical force with the intention of causing a child to experience pain, but not injury, for the purpose of correction or control of the child’s behavior.”*<sup>1</sup>

## I

### INTRODUCTION

For several decades, the debate about “appropriate” punishment of children has raged on, and today two polarized camps still seem to dominate the discussion. On one side of the debate are those who believe that physical punishment should remain available as a disciplinary tool. On the other side are those who oppose its use altogether. This disagreement is playing out in the academic sphere, as well as in popular culture, and involves complex differences over the rights of parents and children, culture and religion, and the scientific case for and against corporal punishment based on the child’s responses and development.

Lawmakers have also struggled with whether parents’ use of corporal punishment is dangerous, effective, or justified. One state even saw efforts to ban corporal punishment in the home altogether. In 2007, a Massachusetts state legislator introduced a bill to ban spanking in the home at the behest of a local nurse.<sup>2</sup> The bill was easily defeated, but it evoked intense publicity at the possibility, nonetheless.<sup>3</sup>

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1. MURRAY A. STRAUS, BEATING THE DEVIL OUT OF THEM: CORPORAL PUNISHMENT IN AMERICAN FAMILIES 4 (1994).

2. *Should It Be Illegal for Parents to Spank Their Children? Massachusetts Could Become First State to Outlaw Corporal Punishment*, ABCNEWS.COM (Nov. 28, 2007), <http://abcnews.go.com/WN/story?id=3921895>.

3. The bill was sent to die in committee. See H. 3922, 185th Gen. Ct., Reg. Sess. (Mass. 2008), available at <http://www.mass.gov/legis/185history/h03922.htm>; *Should It Be Illegal to Spank Your Child? Massachusetts Lawmakers Propose a Ban on Corporal Punishment*, ABCNEWS.COM (Mar. 11, 2008), <http://abcnews.go.com/video/playerIndex?id=3933700>.

Notwithstanding these debates and initiatives, all fifty states continue to allow parents to use corporal punishment as a disciplinary tool, limiting its use to what is “reasonable.”<sup>4</sup> Conversely, all states describe unreasonable or excessive corporal punishment as child abuse,<sup>5</sup> but their legislatures have hesitated to specify the acts and injuries that transgress the bounds of reasonableness. The effect of this more “open” standard and approach has been to leave to the courts and other relevant legal actors the difficult task of assessing what is “reasonable” in individual cases, to sort the acceptable from the prohibited. Faced with these objectives, courts have discussed various factors to consider in that assessment. Among the factors are the parent’s act, the amount of force used, the extent of injury caused, and the child’s behavior and mental condition. Increasingly, courts and legislatures have also begun to consider the child’s age in evaluating the reasonableness both of the parent’s disciplinary motive and of the nature and degree of the force used. In governments’ efforts to determine what is “reasonable” (and thus allowable) corporal punishment, the age of the child has become a focal point—a new and important factor in calling balls and strikes.

Actors in all branches of government are beginning to take steps to make age matter in corporal-punishment law, but the methods for doing so are wide-ranging. This paper first addresses the reasonableness standard and its relationship to the underlying purposes of corporal punishment generally. It then describes the various approaches to the consideration of age: some explicitly introduce age as a factor in assessing “reasonableness” in individual cases, while others use age benchmarks for prohibiting corporal punishment before or after certain ages. This paper then evaluates these varying approaches in the longstanding effort to give meaning to the term “reasonableness” in the context of corporal punishment.

## II

### THE REASONABLENESS STANDARD

State legislatures historically have offered little guidance regarding what is reasonable corporal punishment. Originally, statutes defined acceptable corporal punishment through specifying what was *not* child abuse: forty-eight states and the District of Columbia took this approach.<sup>6</sup> Today, most states still use “reasonableness” as the statutory standard for corporal punishment. Some

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4. See, e.g., ALA. CODE § 13A-3-24 (2009); ARIZ. REV. STAT. ANN. § 13-403 (2009); CONN. GEN. STAT. § 53a-18 (2008); MICH. COMP. LAWS. ANN. § 750.136b (West 2009); N.D. CENT. CODE § 12.1-05-05 (2009).

5. See Doriane L. Coleman, Kenneth A. Dodge & Sarah K. Campbell, *Where and How to Draw the Line Between Reasonable Corporal Punishment and Abuse*, 73 LAW & CONTEMP. PROBS. 107, 114-17 (Spring 2010).

6. Elizabeth T. Gershoff, *Corporal Punishment by Parents and Associated Child Behaviors and Experiences: A Meta-Analytic and Theoretical Review*, 128 PSYCHOL. BULL. 539, 540 (2002); 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 (1997).

also say that the punishment must be “appropriate”<sup>7</sup> or “moderate,”<sup>8</sup> but, in practice, these terms are just as difficult to evaluate as “reasonable.” Such vague standards have left the task of sorting out individual cases of parental behavior to the courts,<sup>9</sup> and the lack of guidance has led them to make inconsistent, and often shocking, rulings.<sup>10</sup>

Fortunately, the idea of “reasonableness” has begun to take more-definitive shape in both legislatures and courtrooms in recent years. Progress is being made to better define what behavior is acceptable for parents and, conversely, what conduct can be justifiably prohibited and punished by the state. More states are delineating what, in their view, can never be reasonable. Some states have clarified the standard by developing a list of illustrative prohibited acts. Statutes in Delaware, the District of Columbia, and Minnesota, for example, state that punitive force is *not* justified if it involves such behavior as throwing or kicking the child, or striking the child with a closed fist.<sup>11</sup> In Washington, it is “*presumed* unreasonable” to “[do] any other act that is likely to cause and which does cause bodily harm greater than transient pain or minor temporary marks.”<sup>12</sup> Such statutory specifications place more-concrete boundaries on courts while empowering them to condemn conduct they may have previously felt bound to respect as the privileged acts of parents.

Other states have listed objective factors that courts must consider in individual cases, such as the degree and severity of the child’s injury,<sup>13</sup> the manner of discipline or use of an instrument,<sup>14</sup> and the frequency of discipline.<sup>15</sup> These statutes enable courts to consider the propriety of punishment and to address improper action whenever the specific action of the parent alone may

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7. These states include Alabama, Alaska, Arizona, and Colorado. *See* ALA. CODE § 13A-3-24 (2009); ALASKA STAT. § 11.81.430 (2009); ARIZ. REV. STAT. ANN. § 13-403 (2009); COLO. REV. STAT. § 18-1-703 (2009).

8. DEL. CODE ANN. tit. 11, § 468 (2009); D.C. CODE § 16-2301 (2009); MINN. STAT. § 626.556 (2009); S.D. CODIFIED LAWS § 22-18-5 (2009); WASH. REV. CODE ANN. § 9A.16.100 (LexisNexis 2009).

9. Many other system actors must heed these standards as well, such as parents, school personnel, and child-protective services. But because the courts are the ultimate arbiters in most cases, this discussion will be limited to those who must make legal, as opposed to practical, determinations.

10. *See* Sheila McLaughlin, *Judge Rules Bare-Bottom Spanking of Girl, 14, by Man Okay*, CINCINNATI ENQUIRER, Jan. 17, 2003, available at <http://nospank.net/n-j87.htm>; Stuart Pfeifer & Jennifer Mena, *Burning Son's Hand Gets Dad \$100 Fine*, L.A. TIMES, April 27, 2002, available at <http://latimes.perfectmarket.com/2002/apr/27/local/me-burn27>.

11. DEL. CODE ANN. tit. 11, § 468 (2009); D.C. CODE § 16-2301 (2009); MINN. STAT. § 626.556 (2009).

12. WASH. REV. CODE ANN. § 9A.16.100 (LexisNexis 2009) (emphasis added).

13. *See, e.g.*, T.G. v. Dep’t of Children & Families, 927 So. 2d 104, 106 (Fla. Dist. Ct. App. 2006) (citing FLA. STAT. § 39.01(30)(a)4 (2005) (noting that, to constitute abuse, the discipline must be “inappropriate or excessively harsh” and “likely to result in physical, mental, or emotional injury”).

14. *See, e.g.*, *In re Rogers*, No. 12-89-5, 1989 WL 98423, at \*2 (Ohio Ct. App. Aug. 24, 1989) (discussing how paddling with a board falls within the prohibitions of the state’s statutes).

15. *See, e.g.*, *In re O.C.*, 934 So. 2d 623, 628 (Fla. Dist. Ct. App. 2006) (looking for “evidence of a pattern of excessive punishment”).

not have been sufficient reason to intervene. They also encourage courts to look to a wider variety of circumstances in a given case.

These steps are beneficial, but they are not enough. Reasonableness cannot simply be viewed in a vacuum; evaluation cannot be based merely on the circumstances of the force used. Instead, conduct must be reasonable in light of the reasons our society allows parents to use corporal punishment in the first place.

### III

#### THE PURPOSES AND GOALS OF CORPORAL PUNISHMENT

Parents have two intertwined childrearing goals: developing their children's "moral character and optimal competence. Character is what it takes to will the good, and competence is what it takes to do good well."<sup>16</sup> Discipline is a primary way that parents accomplish these goals. Discipline begins early on, but the need for it continues and changes from the time a child is a toddler to when the child becomes an adult. Children must be free to grow and learn for themselves, but discipline is needed to teach them age-appropriate behavior and self-control. The purpose of discipline is about competence and character: "to encourage moral, physical, and intellectual development and a sense of responsibility in children."<sup>17</sup> The goal of discipline, whatever the method, is to set reasonable limits that protect children from harm and teach them what is safe, right, and acceptable. Parents' use of discipline is thus considered important and necessary for the well-being of the *child*.

Some state statutes reflect these purposes by expressly limiting corporal punishment to only those acts that further these important goals. Alaska begins its definition of accepted conduct with "[w]hen and to the extent reasonably necessary and appropriate to promote the welfare of the child."<sup>18</sup> Similar provisions are included in the laws of Arizona, Arkansas, and Colorado.<sup>19</sup> South Dakota law states that force is lawful only "in the exercise of a lawful authority to restrain or correct the child . . . and if restraint or correction has been rendered necessary by the misconduct of the child."<sup>20</sup> Delaware's law goes even further: the force must be "used for the purpose of safeguarding or promoting the welfare of the child, including the prevention or punishment of misconduct[,] and the force used [must be] intended to benefit the child."<sup>21</sup> Note that none of the statutes mentioned here conditions justification on whether the

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16. Diana Baumrind, *The Discipline Controversy Revisited*, 45:4 FAM. REL. 405, 406 (1996).

17. *Newsroom*, AMERICAN HUMANE ASSOCIATION, <http://www.americanhumane.org/about-us/newsroom/fact-sheets/child-discipline.html> (last visited Sept. 3, 2010) (citing Committee for Children (2004)).

18. ALASKA STAT. § 11.81.430 (2009).

19. ARIZ. REV. STAT. ANN. § 13-403 (2009), ARK. CODE ANN. § 5-2-605 (2009), COLO. REV. STAT. § 18-1-703 (2009).

20. S.D. CODIFIED LAWS § 22-18-5 (2009).

21. DEL. CODE ANN. tit. 11, § 468 (2009) (emphasis added).

parent “believed” his or her actions to be necessary for such goals.<sup>22</sup> Instead, the actions, when viewed objectively, must actually be related to those ends.<sup>23</sup>

Other states reflect this limitation in their case law. For example, in Maryland, force is privileged only if it is intended to punish and discipline “for the betterment of the child or promotion of the child’s welfare.”<sup>24</sup> An Illinois case specified that an ordinary spanking could be the basis of a child-abuse charge if it was “for other than disciplinary reasons.”<sup>25</sup> Finally, South Dakota employs a two-pronged analysis for whether parental action falls within the corporal-punishment exception, the first of which is whether the action was a “corrective measure” that was “rendered necessary” by the child’s actions.<sup>26</sup>

As the reasons behind corporal punishment of children are brought into focus, an important limiting concept becomes apparent: the child must be able to learn from it—it must do some *good*. Either in pursuit of such a limiting concept, or in the name of it, governments are beginning to discuss an additional limitation on reasonable corporal punishment: the child’s age.

#### IV

#### WHEN AGE MATTERS

As all three branches of government struggle with how to account for the child’s age in the corporal-punishment context, two distinct approaches have emerged: The first requires that age be a factor in assessing reasonableness, but preserves the process of case-by-case analysis. The second approach is one of prohibition, proscribing physical punishment based on age distinctions alone. These prohibitions are most often seen for the punishment of children under the age of three or four or, more rarely, over a certain age at adolescence. Though recent, action reflecting these approaches has been taken in legislative, judicial, and even executive contexts.

##### A. Age as a Factor

Several states have begun to consider age as a factor in deciding whether to classify corporal punishment as reasonable or abusive through legislative, executive, or judicial action.

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22. *But see, e.g.*, CONN. GEN. STAT. § 53a-18 (2008) (demonstrating a common practice of making judgments contingent upon the parent’s subjective belief); *State v. Matavale*, 166 P.3d 322 (Haw. 2007) (noting that the former state statute, HAW. REV. STAT. §703-309 (1985), reflected a policy choice not to review the reasonableness of parents’ judgment in these matters “so long as a parent uses moderate force for permissible purposes”).

23. *See Coleman et al., supra* note 5, at 117-18. In contrast to these statutes, other states require merely that parents believe that the situation warrants corporal punishment: a limitation of good faith. These statutes, however, neither adequately further the purposes of discipline nor protect children from parents’ erroneous perceptions, so they are not discussed here as examples of improved standards. *Id.*

24. *Anderson v. State*, 487 A.2d 294, 298 & n.10 (Md. Ct. Spec. App. 1985) (holding that a purpose of punishment is a “necessary precondition” to privileged action).

25. *In re Aaronson*, 382 N.E.2d 853, 855 (Ill. App. Ct. 1978).

26. *People ex rel. C.F.*, 708 N.W.2d 313, 317 (S.D. 2005).

Many state laws refer explicitly to the age of the child as a factor in evaluating whether the punishment constitutes acceptable corporal punishment. For example, Hawaii law specifies that parental force is acceptable if it “is employed with due regard for the age and size of the minor and is reasonably related to the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of the minor’s misconduct.”<sup>27</sup> Similarly, Washington law specifies that “the age, size, and condition of the child . . . shall be considered when determining whether the bodily harm is reasonable or moderate.”<sup>28</sup> Maryland has similar laws.<sup>29</sup> Minnesota takes a different approach, providing specifically that “[a]ctions which are not reasonable . . . include, but are not limited to, any of the following *that are done in anger or without regard to the safety of the child*: . . . shaking a child under age three . . . [or] striking a child under age one on the face or head.”<sup>30</sup>

Executive officials are also beginning to invoke age for consideration. California’s attorney general, for example, suggested that age is relevant to assessing corporal-punishment cases. The relevant statute, Penal Code Section 273, does not define reasonableness. When asked whether parents could permissibly spank a child with an object, the attorney general issued an opinion that went beyond the question asked. It first cited case law to explain that acceptable parental discipline required an analysis of two parts: the need for the punishment and whether the degree of the punishment was “reasonable or excessive.”<sup>31</sup> Yet the attorney general then referenced a separate section of the California Code—Welfare and Institutions—which *did specify* that the “physical harm” that would warrant removal of children from a home does not include “reasonable and *age-appropriate* spanking to the buttocks.”<sup>32</sup> By specifically referring to this “age-appropriate” standard in the opinion, the attorney general made age a factor in assessing the punishment’s reasonableness for purposes of the criminal code, even though the criminal statute never took that step.<sup>33</sup>

Courts also consider age a relevant factor in distinguishing reasonable corporal punishment from child abuse.<sup>34</sup> A Connecticut case, *Smith v. Hamilton*, is representative of such cases.<sup>35</sup> In *Smith*, the court set forth factors to consider in making a reasonableness finding, which included “the necessity for discipline,

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27. HAW. REV. STAT. § 703-309 (2009).

28. WASH. REV. CODE ANN. § 9A.16.100 (LexisNexis 2009).

29. MD. CODE ANN., FAM. LAW § 4-501 (West 2009).

30. MINN. STAT. § 626.556 (2009) (emphasis added). Though the statute lists acts that are “not reasonable” based on the child’s age, the law only prohibits these actions taken in anger or without regard to safety; therefore, the statute’s effect is to make age a factor, not to create an age-based prohibition.

31. 80 Op. Cal. Att’y Gen. 203 (1997).

32. *Id.* (citing CAL. WELF. & INST. CODE § 300 (West 2009)) (emphasis added).

33. 80 Op. Cal. Att’y Gen. 203 (1997).

34. *See, e.g.*, *Cox v. State*, 1 So. 3d 1220, 1222 (Fla. Dist. Ct. App. 2009).

35. *Smith v. Hamilton*, No. 07-4015735, 2008 WL 5481173 (Conn. Super. Ct. Dec. 1, 2008).

looking to the welfare of the child; the motive of the parent[;] the type of punishment; the amount of force used; and the child's age, size and ability to understand the punishment."<sup>36</sup> Similarly, the Virginia Supreme Court held that "a parent has the right to administer such reasonable and timely punishment as may be necessary to correct faults in his growing children."<sup>37</sup> In assessing this standard, the court mentioned several factors, including the child's age, size, and conduct.<sup>38</sup>

When age is explicitly used as a factor, it can be determinative. For example, in *United States v. Arnold*,<sup>39</sup> a case before the United States Air Force Court of Military Review, the defendant was convicted of assault on his infant son. The court upheld the conviction, reasoning that "the [child's] age, the physical and mental condition, its size, and its understanding should be considered. Sometimes a great deal of force may be used. In other cases, less force is appropriate."<sup>40</sup> Applying this standard, the court held that shaking the infant for a minute was "clearly excessive, given the age, size, and physical and mental condition of the victim,"<sup>41</sup> so the defense of discipline was inapplicable.<sup>42</sup>

Whether formalized in a statute, propounded by an executive officer, or incorporated by the courts, the common denominator of these uses of the age factor is that the child's age is an important component in assessing the appropriateness of a parent's actions, but the determination is still made through a case-by-case analysis.

## B. Age as a Prohibition

The second category of age limitations includes measures that prohibit all corporal punishment of children within certain age ranges. Such prohibitions have been considered by both legislators and courts.<sup>43</sup>

### 1. Statutory Prohibitions

Various legislatures have introduced bills that would use age as a prohibition. Such statutes would forbid all corporal punishment on children below or above certain ages. The most recent attempt at such a prohibition occurred in the California legislature in 2007. California Assemblywoman Sally Lieber drafted an anti-spanking bill that would have made it a criminal

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36. *Id.* at \*4.

37. *Carpenter v. Commonwealth*, 44 S.E.2d 419, 423 (Va. 1947).

38. *Id.* at 423-24.

39. 40 M.J. 744, 744 (A.F.C.M.R. 1994).

40. *Id.* at 746.

41. *Id.*

42. *Id.*

43. The choice to use age as a prohibition is much less prominent in U.S. law than abroad, but there are signs that the United States is beginning to respond to international efforts in this area, or is at least becoming conscious of them. Therefore, laws using age as a prohibition elsewhere are important to discuss.

misdeemeanor to spank a child three years of age or under.<sup>44</sup> The bill's introductory section explained its motivation:

The Legislature hereby finds and declares that child abuse is a major social problem and that children in the age group of birth to three years suffer the highest rate of victimization. Child fatalities are the most tragic consequence of maltreatment, and the vast majority of children killed are younger than four years old. Fatal abuse is too often the result of hitting or shaking by caregivers under the guise of discipline. Infants and toddlers are the most vulnerable because of their tender age and inability to defend themselves or ask for help. It is therefore wholly reasonable that the integrity and sanctity of their bodies should be afforded the greatest protection possible under the law.<sup>45</sup>

The bill did not propose a reasonableness standard, but would have made it a violation to use any amount of force on children three and under. It did not differentiate between kinds of contact, kinds of behavior being punished, or kinds of injury that occurred. Instead, corporal punishment of a child age three or younger would be per se child abuse. The bill went on to specify that violations would be made punishable by requiring the parent to take child-rearing classes, by fines, or by the parent's being sentenced to up to a year in jail.<sup>46</sup> When it eventually became clear that her bill would not pass a vote,<sup>47</sup> Lieber abandoned it and introduced a more "modest proposal," which did not include the age-based prohibition.<sup>48</sup> Yet even the amended proposal was met with staunch opposition and was defeated.<sup>49</sup> Had the original bill been passed, it would have been the first state law to ban corporal punishment in the home, albeit for a certain subgroup of children.<sup>50</sup>

Efforts to pass age-based prohibitions have occurred internationally as well. In 2002, the Scottish Executive announced broad plans regarding the criminal laws on child discipline. The catalyst for this move was a decision out of the European Court of Human Rights. In that case, a nine-year-old boy was beaten with a three-foot cane by his stepfather, but the stepfather was cleared when an English court found the chastisement was reasonable. On appeal, the Court of Human Rights reversed, ruling that the man was guilty of assault, and that English law had failed to protect the boy from "inhuman or degrading treatment."<sup>51</sup>

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44. Jennifer Steinhauer, *A Proposal to Ban Spanking Sparks Debate*, N.Y. TIMES, Jan. 21, 2007, available at <http://www.nytimes.com/2007/01/21/us/21spank.html>.

45. A.B. 755, 2007–2008 Assem., Reg. Sess. (Cal. 2007).

46. *Id.*

47. Jesse McKinley, *Lawmaker Ends Effort to Make Spanking a Crime*, N.Y. TIMES, Feb. 23, 2007, at A15.

48. Tracy Press, *Lawmaker Drops Unpopular Effort to Ban Spanking in California*, ASSOCIATED PRESS, Feb. 23, 2007, available at <http://www.nospank.net/n-q70r.htm>.

49. *Id.*

50. McKinley, *supra* note 47.

51. *A. v. United Kingdom*, 2 Eur. Ct. H.R. 959 (1998), available at [http://www.cirp.org/library/legal/A\\_v\\_UK1998](http://www.cirp.org/library/legal/A_v_UK1998).



The case caused England and Wales also to reconsider the standards within their corporal punishment statutes,<sup>52</sup> but Scotland took it further. The Scottish bill included some changes directly applicable to the case, such as a ban on the use of implements in corporal punishment and a total ban on blows to the head.<sup>53</sup> Yet the bill also added an age prohibition: under its original terms, any physical punishment of children under the age of three would be a criminal offense. Some parts of the bill were met with wide agreement and public approval, but the age-based prohibition sparked much controversy.<sup>54</sup> A parliamentary committee conducted research and public polling and issued a report of its conclusions.<sup>55</sup> The report consisted of qualitative interviews as well as a quantitative survey designed to provide data on the prevalence of certain views and behaviors. Most of the parents interviewed in the study felt that spanking was still widespread, if not universal, among Scottish parents. “In other words, it tends to be seen as a ‘normal’ part of parenting, rather than as an exceptional practice.”<sup>56</sup> Furthermore, seventy-seven percent of parents of children between the ages of three and five reported using physical chastisement within the last year.<sup>57</sup> Approximately one-fifth of parents who had children under five reported using it in the previous week. A majority of those who used physical discipline saw it as either “fairly” or “very” effective in stopping the child’s behavior at that time and in preventing similar behavior later.<sup>58</sup>

The results of the study sent the committee a clear message against the proposed age-based prohibition. Views were mixed on whether children under certain ages should be “smacked,” but even more importantly, the results revealed that a belief that “children of a certain age *should not* be smacked is not the same as saying that it should be *illegal* to do so.”<sup>59</sup> Only one-third of those surveyed said they would support a ban on physical punishment of children under three, and the committee found “of those who currently smack [children under three], there was little evidence that parents would greatly modify their behaviour in response to a ban.”<sup>60</sup> The report revealed widespread support for other parts of the bill, but declined to recommend the age prohibition. “The committee strongly supports any measures that will reduce harm to, or abuse of, children,” one committee member stated, “but we do not

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52. Tom Peterkin & Nicole Martin, *Prison for Smacking a Toddler*, TELEGRAPH, Sept. 7, 2001, available at <http://www.telegraph.co.uk/news/uknews/1339781/Prison-for-smacking-a-toddler.html>.

53. Criminal Justice Bill, 2002, Bill [50] (Scot.), available at <http://www.scottish.parliament.uk/business/bills/billsPassed/b50s1.pdf>.

54. Peterkin & Martin, *supra* note 52.

55. See SIMON ANDERSON ET AL., DISCIPLINING CHILDREN: RESEARCH WITH PARENTS IN SCOTLAND (2002), available at <http://www.scotland.gov.uk/cru/kd01/blue/dcrp.pdf>.

56. *Id.* at 28.

57. *Id.* at 21.

58. *Id.* at 43.

59. *Id.*

60. *Id.* at 56.

wish to see an increase in the prosecution of parents for moderate physical punishment.”<sup>61</sup> Ultimately, a majority of the committee members felt that such a law would not reduce harm to children to the degree necessary to justify its enforcement.<sup>62</sup>

After the committee refused to support the bill, its sponsor recommended to the cabinet that the age element be dropped, but stated that “we will of course continue to pursue a range of measures to further protect young children from physical abuse.”<sup>63</sup> After the under-three ban was dropped, most of the bill’s other provisions ultimately passed.

Though the broad age-defined prohibitions attempted in Scotland and California have not yet made their way into American law, some jurisdictions have begun to use similar definitions. For example, the District of Columbia explicitly lists “nonaccidental injury to a child under the age of 18 months” as child abuse.<sup>64</sup> The meaning of this language is unclear—and whether this means “injury” in the sense of physical contact and pain, or “injury” in terms of lasting harm, matters dramatically.

## 2. Judicial Prohibitions

At least one age-based prohibition has been created by judicial, instead of legislative, action. In 2004, the Supreme Court of Canada addressed a constitutional challenge to the nation’s corporal-punishment law. The statute, section 43 of the Criminal Code, simply stated that “[e]very schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child . . . if the force does not exceed what is reasonable under the circumstances.”<sup>65</sup> The statute was a carve-out provision similar to some American laws that provide a corporal-punishment defense to what would otherwise be considered child abuse.

The decision ultimately upheld the child-abuse statute, finding that the “reasonable” standard was not unconstitutionally vague. To support this holding, however, the court undertook an extensive discussion of what is “reasonable,” and in doing so, announced an entirely new rule. The chief justice, writing for the majority, ruled out the use of corporal punishment for children under the age of two and for teenagers. The decision also prohibited the use of instruments and declared that corporal punishment by teachers was unacceptable—regardless of what the statute said. “[Acceptable corporal punishment] requires that the child be capable of actually learning from the physical force,” the court explained. “Accordingly, the defence does not

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61. Paul Kelbie, *Scots Move to Outlaw Smacking is Abandoned*, INDEPENDENT, Sept. 14, 2002, available at <http://www.independent.co.uk/news/uk/crime/scots-move-to-outlaw-smacking-is-abandoned-642713.html>.

62. *Id.*

63. *Smacking Ban Thrown Out*, BBC NEWS, Sept. 13, 2002, available at [news.bbc.co.uk/2/hi/uk\\_news/Scotland/2254644.stm](http://news.bbc.co.uk/2/hi/uk_news/Scotland/2254644.stm).

64. D.C. CODE § 16-2301 (2009).

65. Canada Criminal Code, R.S.C. 1985, ch. C-46.

operate where the child is under the age of two[,] . . . as on the evidence those children are incapable of understanding the reason why they are hit.”<sup>66</sup> The court further concluded that “[a] consensus of the evidence before the court indicated that corporal punishment of teenagers is harmful and thus unreasonable, because it can induce aggressive or antisocial behaviour.”<sup>67</sup> The result was that the “reasonable” standard remained, but with added prohibitions of physical punishment on children under age two or on teenagers. In its reasoning and holding, the country’s highest court had successfully taken a statute requiring case-by-case analysis and carved out blanket prohibitions at both ends of the age spectrum.

## V

### SHOULD AGE MATTER?

As jurisdictions work to distinguish reasonable corporal punishment from child abuse, the age of the child has become an increasingly important criterion. But the question remains: Should it be? It is important to assess whether the use of age at all is justified, and if so, how. There appears to be little disagreement about the use of age as a factor in the analysis. There is quite a bit of disagreement, however, about whether it is appropriate to ban corporal punishment of children in certain age ranges. Most of the attention in this area has focused on bans or proposed bans of corporal punishment of children under the age of three. Some attention has also been paid to the notion of banning corporal punishment of adolescents. Because of the Canadian Supreme Court’s opinion on this point, it is likely that this issue will become of increasing interest in the future.

#### A. Limits on Punishment of Children Three and Under

Proponents of limiting or banning corporal punishment of children three and under articulate three rationales. These include (1) progress toward a wider corporal-punishment ban, (2) concerns about the efficacy and propriety of physical punishment, and (3) the risk that corporal punishment will escalate into abuse.

##### 1. Age-Related Limitations as Progress Toward a Complete Ban

One motivation—sometimes candidly admitted—for limiting or banning corporal punishment based on age is one of “means to an end.” Many people believe that corporal punishment of any kind is unjustified and therefore should not be allowed under any circumstances.<sup>68</sup> Those who oppose all corporal punishment often see these age limitations as one giant step toward an ultimate

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66. Canadian Found. for Children, Youth & the Law v. Canada, [2004] 1 S.C.R. 76 (Can.).

67. *Id.*

68. See generally STRAUS, *supra* note 1 (arguing that all corporal punishment is a major psychological and social problem).

goal of outlawing corporal punishment altogether.<sup>69</sup> Therefore, the arguments in favor of a total ban must be assessed in order to determine whether this end goal justifies the incremental step of an age-related prohibition.

Leading proponents have published many academic articles, detailing their findings and serious concerns. In 2002, for example, Elizabeth Thompson Gershoff published a meta-analysis of several corporal-punishment studies.<sup>70</sup> She concluded that corporal punishment is mentally harmful to children and leads to aggression and delinquency later in life.<sup>71</sup> Pointing to findings of psychological harm,<sup>72</sup> ineffectiveness,<sup>73</sup> and increased antisocial behavior,<sup>74</sup> she and other advocates argue that corporal punishment should be banned entirely.<sup>75</sup>

Much of the research cited in each of these studies to support the broad conclusion that corporal punishment places a child at risk for maladjustment, however, came from research on children who had endured physical *abuse*,<sup>76</sup> which all researchers agree does have negative effects. As a result, the studies do not provide a basis from which to understand the effects of moderate corporal punishment. Additionally, proponents of bans rely on studies that “suffer[ ] from other such serious methodological limitations as oversampling, reliance on clinic populations, shared method variance, and failure to use contrast groups or to control for the child’s tendency to misbehave.”<sup>77</sup>

In a reply article to Gershoff, several leading researchers, including Diana Baumrind and Robert Larzelere, wrote that because the original studies in

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69. See, e.g., Gary Palmer, *Child Spanking is Discipline, Not a Form of Abuse*, TUSCALOOSA NEWS, Feb. 4, 2007, available at <http://www.corpun.com/usd00702.htm> (“We would all like a perfect world . . . where we just stopped hitting children. In the imperfect world, you sometimes have to do things incrementally.”); Latest Developments, *Scotland Debates Legislation to Ban Smacking for All Children Under Three* (March 2002), <http://www.endcorporalpunishment.org/pages/news/scotland.html> (“[T]his is a large step towards the end of all corporal punishment of children throughout the UK.”). For the debate based on researchers’ meta-analyses of available data concerning corporal punishment, see generally Elizabeth T. Gershoff, *More Harm than Good: A Summary of Scientific Research on the Intended and Unintended Effects of Corporal Punishment on Children*, 73 LAW & CONTEMP. PROBS. 31 (Spring 2010) [hereinafter Gershoff, *More Harm than Good*]; Larzelere & Baumrind, *Are Spanking Injunctions Scientifically Supported?*, 73 LAW & CONTEMP. PROBS. 57 (Spring 2010); Murray A. Straus, *Prevalence, Societal Causes, and Trends in Corporal Punishment by Parents in World Perspective*, 73 LAW & CONTEMP. PROBS. 1 (Spring 2010).

70. Gershoff, *supra* note 6.

71. *Id.* at 544. A meta-analysis is an empirical research synthesis, in this case “linking corporal punishment to specific child outcomes by statistically combining existing data to discern the average strength of the findings.” Gershoff, *More Harm than Good*, *supra* note 69, at 33.

72. See STRAUS, *supra* note 1.

73. IRWIN A. HYMAN, THE CASE AGAINST SPANKING: HOW TO DISCIPLINE YOUR CHILD WITHOUT HITTING 70 (1997) (pointing to “high rates of misbehavior, disruption, and violence”).

74. Gershoff, *supra* note 6, at 544.

75. See generally STRAUS, *supra* note 1; HYMAN, *supra* note 73.

76. Diana Baumrind, *Necessary Distinctions*, 8 PSYCHOL. INQUIRY 176, 177 (1997) (citing Robert E. Larzelere, *A Review of the Outcomes of Parental Use of Nonabusive or Customary Physical Punishment*, 98 PEDIATRICS 824 (1996) [hereinafter Larzelere, *Review*]); see also Larzelere & Baumrind, *supra* note 69.

77. Baumrind, *supra* note 76.

Gershoff's analysis included instances of extreme or excessive physical punishment, her finding is not an evaluation of normative corporal punishment and cannot properly be weighed as such. "The evidence presented in [the] meta-analysis does not justify a blanket injunction against mild to moderate disciplinary spanking."<sup>78</sup>

Experts on both sides, including Gershoff, caution that the negative findings do not imply that most children who experience corporal punishment turn out to be aggressive or delinquent.<sup>79</sup> The most salient predictors of the effects of corporal punishment are a host of situational factors, such as the parent-child relationship,<sup>80</sup> frequency and severity of punishment,<sup>81</sup> means of punishment,<sup>82</sup> social support,<sup>83</sup> characteristics of the misbehavior,<sup>84</sup> and goals of the parent,<sup>85</sup> to name just a few. Therefore, studying the true effects of corporal punishment as a general means requires drawing those important distinctions, including a boundary line between punishment and abuse. This is difficult to do, especially when relying on parents' self-reports of their disciplinary methods. It is impossible to do when researchers refuse to refine these distinctions because of their desire to reach a predetermined conclusion. As two organizers of an American Academy of Pediatrics conference on spanking admitted, "We must confess that we had a preconceived notion that corporal punishment, including spanking, was innately and always 'bad.'"<sup>86</sup>

Instead, recent evidence suggests the contrary. Some studies indicate that corporal punishment, when used properly, serves its purposes better than alternative means of discipline. Researchers suggest that parents using corporal punishment achieve positive results when they are communicative and affectionate, but firm.<sup>87</sup> In 1996, Larzelere published the results of a sweeping review of spanking research. Rejecting studies with procedural flaws, and excluding instances in which overly severe or abusive punishment was present, the study failed to find any convincing evidence that typical spanking damaged children. Faced with this and other similar studies, even proponents of spanking bans have acknowledged that "given a relatively 'healthy' family life in a

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78. Diana Baumrind, Robert E. Larzelere & Philip A. Cowan, *Ordinary Physical Punishment: Is It Harmful? Comment on Gershoff (2002)*, 128 PSYCHOL. BULL. 580, 586 (2002).

79. Gershoff, *supra* note 6, at 551.

80. *Id.*

81. *Id.* at 552; Baumrind et al., *supra* note 78, at 584.

82. Baumrind et al., *supra* note 78, at 581.

83. Gershoff, *supra* note 6, at 561.

84. *Id.* at 556; Thomas F. Catron & John C. Masters, *Mothers' and Children's Conceptualizations of Corporal Punishment*, 64 CHILD DEV. 1815, 1815 (1993).

85. Gershoff, *supra* note 6, at 550.

86. Lynn Rosellini & Anna Mulrine, *When to Spank*, U.S. NEWS & WORLD REP., Apr. 5, 1998, available at [http://www.usnews.com/usnews/culture/articles/980413/archive\\_003698\\_5.htm](http://www.usnews.com/usnews/culture/articles/980413/archive_003698_5.htm).

87. Joan E. Grusec & Jacqueline J. Goodnow, *Impact of Parental Discipline Methods on the Child's Internalization of Values: A Reconceptualization of Current Points of View*, 30 DEVELOPMENTAL PSYCHOL. 4, 5-6 (1994).

supportive environment, spanking in and of itself is not detrimental to a child or predictive of later problems.”<sup>88</sup>

In fact, Larzelere’s study revealed that spanking, when used appropriately, had *more* beneficial results for young children than any other discipline technique—including timeout, reasoning, or withdrawal of privileges.<sup>89</sup> Even Gershoff does not deny the efficacy of some corporal punishment for certain purposes: “There is general consensus that corporal punishment is effective in getting children to comply immediately . . . .”<sup>90</sup> But more importantly, parents themselves report that spankings are helpful in their discipline as well.<sup>91</sup> The case for a ban is made more difficult if corporal punishment is truly helpful when used properly; therefore, the debate continues.<sup>92</sup>

Any accurate measure of the efficacy or the harms of corporal punishment will depend on consideration of several variables. Therefore, isolation and further study regarding which punishment characteristics lead to beneficial outcomes can help parents use discipline effectively. Such studies have already determined that certain discipline techniques, including spanking, are effective in furthering children’s internalization of values and moral behavior. Completely removing parents’ ability to choose corporal punishment is too extreme when the harms are inconclusive, and the benefits still arguably exist.<sup>93</sup> The salience of situational factors supports the consideration of age as a factor in any specific case. But since a complete ban is not warranted, the pursuit of one should not serve as justification for an age-based ban.

## 2. The Efficacy and Propriety of Corporal Punishment for Children Three and Under

The second, and perhaps most widely held, rationale for limiting or banning corporal punishment of young children is that such punishment is not justified from an efficacy or propriety standpoint. Essentially, the concerns here are two-

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88. Rosellini & Mulrine, *supra* note 86.

89. Larzelere, *Review*, *supra* note 76, at 825.

90. Gershoff, *supra* note 6, at 549.

91. Anthony M. Graziano & Karen A. Namaste, *Parental Use of Physical Force in Child Discipline*, 5 J. INTERPERSONAL VIOLENCE 449, 456 (1990) (reporting that a majority of the respondents thought their use of spankings was usually “helpful” to “very helpful”).

92. Concededly, the “ideal” environment is not always present for children, and not all parents use corporal punishment in the way experts agree it “should” be used. In reality, the real debate is between those who think corporal punishment is acceptable and beneficial under certain conditions, and therefore should be allowed in those circumstances, and those who believe a ban is warranted for all because of the variation in use. Ultimately, however, the data does not warrant a ban on corporal punishment, and in fact, indicates that it can do some good. *See generally* Diana Baumrind, *A Blanket Injunction Against Disciplinary Use of Spanking is Not Warranted by the Data*, 98:4:2 PEDIATRICS 828 (1996).

93. *See generally* David Benatar, *Corporal Punishment*, 24:2 SOC. THEORY & PRACTICE 237 (1998) (discussing the anti-spanking arguments from a philosopher’s perspective). Benatar analyzes the suggestions that corporal punishment is degrading, psychologically damaging, etc. He demonstrates that these arguments fail for lack of evidence or are logically unsound.

fold. First, does it work? And second, is it appropriate from a developmental-harm perspective?

Proponents of bans like the ones in California and Scotland argue that corporal punishment fails from an efficacy standpoint: it does not produce learning or internalization of behavior in children under the age of four.<sup>94</sup> The concern is that young children are unable to associate the punishment with their actions and therefore cannot alter their behavior because of the attempted discipline. This is a reason given by those who mounted the legislative attempt in Scotland,<sup>95</sup> as well as the conclusion reached by the Supreme Court of Canada in *Canadian Foundation*.<sup>96</sup>

Proponents of a ban argue that corporal punishment fails from a propriety perspective as well, saying it creates physical and psychological harms. This argument is supported by broader studies of corporal punishment discussed elsewhere in this issue,<sup>97</sup> though there is very little evidence that corporal punishment may be *more* psychologically harmful to children three and under than to those who are older. Neither the American Academy of Pediatrics nor child-development specialists believe that spanking should be the sole or preferred means of child discipline, or that it should be administered when a parent is very angry. Along with these limitations, such specialists sometimes hold that it should not be used with adolescents or with children under two years old.<sup>98</sup>

The efficacy of any discipline during those first years matters. Far from being too early to be a concern, “the interests of many scholars have shifted to toddlerhood and early childhood, now increasingly recognized as the critical context for the origins of morality.”<sup>99</sup> Therefore, the spanking controversy is an important real-life dilemma for parents as well, and proposals to ban the practice for very young children do not resolve this dilemma. In fact, most parents use the practice more often during the first years of a child’s life. One study found that mothers of two-year-olds had to interrupt their children every

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94. See generally Martin Hoffman, *Affective and Cognitive Processes in Moral Internalization*, in SOCIAL COGNITION AND SOCIAL DEVELOPMENT: A SOCIOCULTURAL PERSPECTIVE 236 (Tory E. Higgins, Diane N. Ruble & Willard W. Hartup eds., 1983).

95. Peterkin & Martin, *supra* note 52 (quoting Justice Minister Wallace saying, “Up to this age, it is very doubtful that a child would understand why he or she was being punished . . .”).

96. *Canadian Found. for Children, Youth, & the Law v. Canada*, [2004] 1 S.C.R. 76 (Can.). Interestingly, it is not at all clear what “the evidence” was that the court referred to, which created such a “consensus” as to warrant this conclusion. The decision cited to the plaintiffs’ brief, but that document only referred to this type of evidence in passing. Far from presenting a consensus, the evidence before the court included the testimony of the defense experts who were the very scholars known for their work defending the efficacy of corporal punishment.

97. Gershoff, *supra* note 6; Larzelere & Baumrind, *supra* note 69; see also Gershoff, *supra* note 6 at 549–50; Kirby Deater-Deckard et al., *Physical Discipline Among African American and European American Mothers: Links to Children’s Externalizing Behaviors*, 32 DEVELOPMENTAL PSYCHOL. 1065, 1065–72 (1996).

98. Rosellini & Mulrine, *supra* note 86.

99. Grazyna Kochanska, *Multiple Pathways to Conscience for Children with Different Temperaments: From Toddlerhood to Age 5*, 33 DEVELOPMENTAL PSYCHOL. 228, 228 (1997).

six to eight minutes to alter their behavior.<sup>100</sup> The frequency of incidents of negative behavior peaks during the “terrible twos,” and physical aggression and oppositional behavior peak around the age of thirty months.<sup>101</sup> Other discipline problems grow and continue through the end of the preschool years. Parents of these young children often find that in dangerous or repeat instances an appropriate spanking is the best discipline available.<sup>102</sup>

One major concern with a ban on physical punishment of young children is that it does not merely punish or criminalize the actions of a few parents, or of those in an extreme minority; instead, it prohibits actions approved of, and even taken, by the vast majority of parents. In 1995, for example, ninety-four percent of American parents of three- and four-year-old children reported using physical punishment at least occasionally.<sup>103</sup> Despite the peaks of negative behavior during the toddler years and the widespread use of corporal punishment by parents during this time, “the data are limited and surprisingly little attention has been paid to the way in which age might have an effect.”<sup>104</sup>

The data that do exist support these parents’ reports that corporal punishment for young children *is* effective. Research indicates that reference to the physical consequences of misbehavior (that is, spanking) produces greater suppression of behavior in four-year-olds than reference to more-abstract notions.<sup>105</sup> Yet the same research shows that the discussions of abstract notions—respect and propriety, for example—*do* produce those favorable results once children reach the age of seven.<sup>106</sup> Similarly, reasoning is more likely to be associated with advanced moral development only in children seven years of age and older.<sup>107</sup> Younger children are not as likely to understand their parents’ reasoning or more-complex forms of punishment. Yet parents cannot wait until their children are much older to begin training them about what is unacceptable, what is wrong, and even what is dangerous. A simple and fleeting physical punishment *can* be understood by children who are two, three, or four years of age.

Not only can such a punishment help to teach children in this age group appropriate behavior when discussion may not be effective, but studies

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100. Cheryl Minton, Jerome Kagan & Janet A. Levine, *Maternal Control and Obedience in the Two-Year-Old*, 42 CHILD DEV. 1873–94 (1971).

101. Robert Larzelere, Thomas G. Amberson & Julie A. Martin, *Age Differences in Perceived Discipline Problems from 9 to 48 Months*, 41 FAM. REL. 192, 196 (1992).

102. Minton et al., *supra* note 100.

103. Murray A. Straus & Julie H. Stewart, *Corporal Punishment by American Parents: National Data on Prevalence, Chronicity, Severity, and Duration, in Relation to Child and Family Characteristics*, 2 CLINICAL CHILD & FAM. PSYCHOL. REV. 55, 55 (1999).

104. Grusec & Goodnow, *supra* note 87, at 11.

105. See Ross D. Parke, *Rules, Roles, and Resistance to Deviation: Recent Advances in Punishment, Discipline, and Self-Control*, in MINNESOTA SYMPOSIA ON CHILD PSYCHOLOGY 111, 115–18 (A. Pick ed., vol. 8, 1974).

106. *Id.*

107. Gene Brody & David Shaffer, *Contributions of Parents and Peers to Children’s Moral Socialization*, 2 DEVELOPMENTAL REV. 31, 54–55 (1982).



demonstrate that young children evaluate physical punishment by mothers more favorably than older children do.<sup>108</sup> There is evidence that, far from presenting more psychological harm, corporal punishment is associated with *less* negative effects in younger children than in older ones.<sup>109</sup> In fact, even the studies that find associations between corporal punishment and child aggression have found that the association *decreases* as the age of the child decreases.<sup>110</sup>

Overall, far too little study has been devoted to the specific effect of age in the corporal-punishment context, but existing evidence and parents' anecdotal experience suggest that it is effective for children three and under—perhaps even most effective during this time. Therefore, much greater attention should be devoted to the subject before a widespread practice is removed from parents' hands, especially when those parents report that it is working.

Using age as a factor, instead of a line of demarcation, eliminates the overbreadth problem, and allows the use of corporal punishment by many parents to receive individualized consideration. *If* a child cannot associate her actions with a punishment—whatever the method—then the method does not work as a mode of discipline; it will not teach the child the intended lesson. There will be cases in which a child cannot understand the connection. For instance, a particular toddler may not understand that he is being punished because he called Mommy an ugly word he overheard. But age is merely a crude, often inaccurate, proxy for understanding. In many circumstances, even a one-year-old child understands why his hand is being swatted away from the breakables he has reached for repeatedly. Yet a developmentally slow four-year-old may not understand when he is allowed to yell and when he is not. Age should be a factor allowing courts to consider these individualized circumstances—whether a child is capable of learning from the discipline, or whether it will instead do him harm. However, spanking<sup>111</sup> is effective, proper, and sometimes even necessary with children under the age of four. Therefore, a law prohibiting all corporal punishment in that range would be inappropriate.

### 3. Saving Parents from Themselves

The last rationale for placing limits on corporal punishment of young children is that many “consider physical abuse to be a potential outcome of

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108. Michael Siegel & Jan Cowen, *Appraisals of Intervention: The Mother's Versus the Culprit's Behavior as Determinants of Children's Evaluations of Discipline Techniques*, 55 CHILD DEV. 1760, 1765 (1984).

109. Marjorie L. Gunnoe & Carrie L. Mariner, *Toward a Developmental-Contextual Model of the Effects of Parental Spanking on Children's Aggression*, 151 ARCHIVES OF PEDIATRIC AND ADOLESCENT MED. 768 (1997); Fred Rothbaum & John R. Weisz, *Parental Caregiving and Child Externalizing Behavior in Nonclinical Samples: A Meta-Analysis*, 116 PSYCHOL. BULL. 55, 62 (1994).

110. Gershoff, *supra* note 6, at 549.

111. Spanking should be understood to include only punishments that fit within Murray Straus's definition of corporal punishment: “use of physical force with the intention of causing a child to experience pain, but not injury, for the purpose of correction or control of the child's behavior.” STRAUS, *supra* note 1.

corporal punishment.”<sup>112</sup> Opponents of corporal punishment view spanking as sharing space on the same “continuum” as abuse and believe that parents who spank “transform” into parents who abuse.<sup>113</sup> This concern, which is clear particularly in the recent legislative attempts to limit corporal punishment, is one of saving parents from themselves.<sup>114</sup> The California bill did not discuss any harms of corporal punishment in its preamble, but instead detailed the harms of child abuse.<sup>115</sup> The banning of the first was assumed to prevent the latter. Proponents of this rationale suggest that even if spanking, in and of itself, is not harmful, it leads to child abuse and should therefore be disallowed. They think that even well-intentioned parents will often use too much force; parents cannot be trusted to punish only appropriately, then stop. Therefore, since very young children are most at risk of serious harm from this mistake, it is best to simply take the option off the table entirely.<sup>116</sup>

The problem with this rationale is that it is not supported by the evidence.<sup>117</sup> “Beliefs that there are necessary connections between spanking and . . . parents’ escalation to child abuse . . . are strongly held conjectures, no more supported by solid empirical evidence than the contrary belief that to spare the rod is to spoil the child.”<sup>118</sup>

Experts explain that the distinction between corporal punishment and abuse is more than simply a natural progression of severity. Instead, the two are qualitatively different acts, and parents more likely to resort to abuse often share a “distinctive set of attributes” not present in most parents who use corporal punishment.<sup>119</sup> A common-sense observation reinforces the point. The vast majority of parents support or use corporal punishment with their children,<sup>120</sup> and yet the majority of parents never become physically abusive.<sup>121</sup> This would not be the case if spanking and other moderate corporal punishment were simply gateways to inappropriate and dangerous punishment. The

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112. Gershoff, *supra* note 6.

113. *See id.* at 553 (“[C]orporal punishment and physical abuse are two points along a continuum,” and researchers must seek to determine when “corporal punishment is transformed into abuse.”).

114. There is no indication that Lieber’s attempt in California was based on social-science research or on a belief that corporal punishment of young children was ineffective or psychologically harmful. The only indication of the bill’s rationale lies in the introductory section, which seems to suggest that the ban was to prevent child fatalities from child abuse within those age groups. For that language, see *supra* text accompanying note 45.

115. A.B. 755, 2007–2008 Assem., Reg. Sess. (Cal. 2007).

116. STRAUS, *supra* note 1, at 116.

117. *See id.* at 263 (“We also could not directly test the part of the model that deals with escalation from the use of corporal punishment such as spanking . . .”).

118. Baumrind, *supra* note 92, at 829.

119. Baumrind et al., *supra* note 78, at 585; *see also* DIANA BAUMRIND, CHILD MALTREATMENT AND OPTIMAL CAREGIVING IN SOCIAL CONTEXTS 76 (1995).

120. Straus & Stewart, *supra* note 103 (finding that ninety-four percent of parents of children three to four years of age use corporal punishment).

121. Baumrind, *supra* note 76 (noting that abusive punishment “falls outside the normative range” of practice in the United States but that spanking “is normatively used by most parents with young children”).

Scotland study demonstrates the truth of this point.<sup>122</sup> Though a large majority of parents reported using corporal punishment, the researchers found that two important key points emerged when parents were asked about the last time they used it: “First, a smack on the bottom or on the hand, arm or leg is by far the most common form of physical chastisement, accounting for 96% of all incidents. Secondly, in almost 9 out of 10 cases, the child was smacked or hit [just] once.”<sup>123</sup>

Furthermore, *even if* a few parents are more likely to engage in disciplinary behavior that escalates from corporal punishment to abuse, it does not justify banning an otherwise acceptable practice. Dieting has been argued to lead to eating disorders. Drinking beer socially has been argued to cause alcoholism or drunk driving. And the availability of condoms has been argued to produce higher rates of teen sexual activity. Even *if* these connections were found to be causal—should that change the legality of dieting, drinking, or using condoms? Our society values autonomy, and it simply cannot be said that harmless—and when used correctly, beneficial—activities should be outlawed so that a few citizens can be protected from their own lack of self-control.

Ultimately, “saving parents from themselves” through spanking bans is neither necessary nor acceptable. The law should not impose prohibitions on all parents’ disciplinary actions in order to target the more-specific harmful actions of a few, especially actions that are already outlawed and need only be better defined and enforced. Instead, the law should remain open to parents’ beneficial use of corporal punishment, and parents should be educated to assure that when they choose corporal punishment, they do so only when it is safe and effective for their children.

Just as addictive personalities should not drink alcohol or use drugs, some parents—those with a low tolerance for frustration, a history of violence, an inordinate need to control others, and those who are impulsive, narcissistic, and immature—should not spank. The fact that some parents punish excessively and unwisely is not an argument, however, for counseling all parents not to punish at all.<sup>124</sup>

## B. Limits of Punishment of Adolescents

Bans on punishment of adolescents have not been as widely discussed as those proposed for young children. However, the Canadian Supreme Court decision in *Canadian Foundation*,<sup>125</sup> which banned physical discipline of teenagers, triggers a discussion that will likely be broadened in the future.

Presumably, state statutes and standards that now make age a factor do so for this higher age range as well as for young children. But the prospect of broader action, like a ban, is complex, for corporal punishment of adolescents raises considerations and concerns distinct from those of the three-and-under

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122. See ANDERSON ET AL., *supra* note 55.

123. *Id.* at 28.

124. Baumrind et al., *supra* note 78.

125. Canadian Found. for Children, Youth, & the Law v. Canada, 1 S.C.R. 76 (Can.)

provisions. On the one hand, such action raises questions of efficacy different from those concerning toddlers. Adolescents are clearly capable of making the connection between their actions and a corresponding physical punishment, which obviates the analogous key criticism against the efficacy with young children. The question remains, though, whether older children will learn from such punishment or simply resent their parents' use of the method at a time when they are developing their own autonomy.

Corporal punishment of adolescents also raises questions of propriety. Unlike very young children, for whom experts disagree about resulting psychological harms, there seems to be consensus that psychological harms are greater for children once they reach a certain age. Some studies have found that outcomes for spanking of teenagers are "predominantly detrimental"<sup>126</sup> or that such punishment is "likely to be futile and counterproductive."<sup>127</sup> What experts do not agree on, however, is the age at which the punishment becomes inappropriate.<sup>128</sup>

Corporal punishment of adolescents is still widespread—almost half of all children in early adolescence experience it.<sup>129</sup> But it does not raise the same concerns about the vulnerability of the younger child—that a parent will take the act too far, and the child will be too young to resist and too fragile to withstand the force. Quite the contrary: adolescents are often just as strong, or stronger, than their parents. They are also often more capable of leaving, and even more likely to fight back.

Of course, many parents still find corporal punishment to be effective for their adolescent children, though studies suggest that parents use it less frequently with children as they get older. For example, Larzelere found that for older children, physical punishment had more-beneficial outcomes than any other disciplinary method except for grounding.<sup>130</sup> And even more than in young toddlers, the psychological development and needs of adolescents can range widely among individual children. The problems posed by line-drawing in young children are exacerbated in adolescents, for the stage of mental development of a child, and corresponding discipline needs, cannot accurately be assumed from a child's age.

Though the adolescent years present a comparatively better candidate for an age-based corporal-punishment ban, this period of child growth is even less

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126. Larzelere, *supra* note 89, at 827.

127. Baumrind, *supra* note 92, at 829.

128. See, e.g., Baumrind, *supra* note 76, at 179 (arguing corporal punishment should not be used after puberty); James Dobson, *Preteen Discipline: How Discipline Changes as Your Child Moves into the Preteen Years*, FOCUS ON THE FAMILY, available at [http://www.focusonthefamily.com/parenting/schoolage\\_children/disciplining\\_schoolage\\_kids/preteen\\_discipline.aspx](http://www.focusonthefamily.com/parenting/schoolage_children/disciplining_schoolage_kids/preteen_discipline.aspx) (reprinted from JAMES DOBSON, *THE NEW STRONG-WILLED CHILD* (1978)) (stating that corporal punishment loses its effectiveness and should be discontinued for most children around age ten).

129. Heather A. Turner & David Finkelhor, *Corporal Punishment as a Stressor Among Youth*, 58 J. MARRIAGE & FAM. 155, 155 (1996).

130. Larzelere, *supra* note 89, at 827.

studied than that of early childhood. If experts and legislators seek to learn more about the effects of corporal punishment and ensure that it is used when it will be effective and not harmful, the later adolescent period should be studied more fully, and legislative efforts should be targeted in this arena more intensely. Currently, the dangers of severe physical harm are less for adolescents than they are for toddlers, and the individual needs of adolescents vary greatly. Therefore, using age as a factor is far more appropriate than a stark line in the sand, at least as the state of knowledge currently stands. Efforts to better understand the effects of corporal punishment on this age group, as well as the state of current usage of the method, would be efforts well spent.

## VI

### WHAT IS JUSTIFIED?

Opponents of corporal punishment are critical of the extensive use of such punishment and of the severity with which it is sometimes inflicted. Yet experts, legislators, and parents all agree that punishment in *those* instances is wrong: it should be disallowed when it is too frequent or too harsh, for then, the question is one of child abuse, not child discipline.

But opponents of corporal punishment go too far in saying that physical punishment should never be inflicted. Instead, courts have held to a “reasonableness” standard for so long, and legislatures have hesitated to get involved in the process of line-drawing on parents’ behavior, for a reason. The Arizona Court of Appeals may have said it best:

One cannot expound an inflexible rule which would define what, under all conditions, would be reasonable or excessive force in the disciplining of a child. As children vary in degrees of sensitivity, responsibility and other qualities of character, as well as tolerance to pain, age, sex and physical condition, so must the degree of parental severity vary, especially when balanced against the gravity of the particular offense for which punishment is to be meted out.<sup>131</sup>

There are appropriate ways for parents to spank their children. It is true that some shocking cases have been decided because of the sometimes rampant flexibility found in what is “reasonable.” It is therefore good that legislatures and courts are beginning to provide more guidance on this fuzzy standard. States are beginning to implement this guidance through examples and factors to be taken into account. This is certainly progress.

The same is true when the age of a child is considered. The introduction of age as an explicit consideration is a necessary and useful development in the law, which also benefits and protects both children and parents. Appropriate punishment will vary as a child grows older; certain actions that are not acceptable for a two-year-old are appropriate when the same child is nine. It is equally true that a physical punishment effective at age eight may no longer be so at age fifteen. But it is also true that a particular two-year-old will react very differently than another two-year-old to a certain punishment and that a child’s

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131. *Arizona v. Hunt*, 406 P.2d 208, 222 (Ariz. Ct. App. 1965).

size, maturity, understanding, and culpability will not always perfectly correspond to birthday milestones.

It appears that spanking is most useful from the age of eighteen months until a child reaches puberty.<sup>132</sup> But the inquiry cannot end there. Prohibiting all physical punishment of a two-year-old (simply because he is two) is no more acceptable than endorsing all physical punishment of an eight-year-old (simply because he is eight). Instead, any assessment of discipline should be on a case-by-case basis, taking into account many factors. Every child's circumstances are unique, and we cannot expect children to be properly trained if parents are not free to account for these circumstances. The decision about spanking should always consider age, but it should not be determined by it.

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132. Baumrind, *supra* note 92, at 829.