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### Spanking and Other Corporal Punishment of Children by Parents: Undervaluing Children, Overvaluing Pain

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# ARTICLE

## SPANKING AND OTHER CORPORAL PUNISHMENT OF CHILDREN BY PARENTS: OVERVALUING PAIN, UNDERVALUING CHILDREN

*David Orentlicher\**

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## I. INTRODUCTION

For generations, parents have viewed spanking and slapping as important, though perhaps regrettable, methods of discipline for ensuring the appropriate social development of their children. As the proverbial dictum warns, to spare the rod is to spoil the child.<sup>1</sup> To be sure, some parents abjure corporal punishment entirely, and other parents employ it as an infrequent and last resort, but corporal punishment of children has wide and deep roots in American society.<sup>2</sup>

This broad social imprimatur of corporal punishment is reflected in the law. Court decisions regularly show a good deal of tolerance for corporal punishment of children.<sup>3</sup> Indeed, in the absence of significant bruising or worse, corporal punishment by parents does not run afoul of prohibitions against child abuse.<sup>4</sup> Yet, when we compare the legal acceptability of corporal punishment with the view of medical and other experts in child rearing and family violence, we see a substantial gap.<sup>5</sup> Child-rearing experts are far less tolerant of corporal punishment than is the law.<sup>6</sup> In the view of professionals in the field, corporal punishment has serious disadvantages, and its advantages can be

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1. See generally Timothy A. Carey, *Spare the Rod and Spoil the Child. Is This a Sensible Justification for the Use of Punishment in Child Rearing?*, 18 CHILD ABUSE & NEGLECT 1005, 1005-06 (1994) (examining the validity of the well-known proverb).

2. See Murray A. Straus et al., *Spanking by Parents and Subsequent Antisocial Behavior of Children*, 151 ARCHIVES OF PEDIATRICS & ADOLESCENT MED. 761, 761 (1997) (indicating that nearly 100% of parents used corporal punishment on toddlers in the 1950s and more than 90% do so today).

3. See, e.g., *In re Coleen "P,"* 538 N.Y.S.2d 361, 362-63 (N.Y. App. Div. 1989) (finding no child neglect in a case in which a parent shook her child, causing the child's head to strike the pavement twice, because there was no "impairment of the child's physical, mental or emotional condition"); *In re Rodney C.*, 398 N.Y.S.2d 511, 516 (N.Y. Fam. Ct. 1977) (declining to find abuse in a case in which a seven-year-old boy with emotional difficulties was found with 26 visible marks on his back three days after receiving a beating because the punishment was not "life threatening or likely to cause permanent disfigurement").

4. Refer to note 37 *infra* and accompanying text (discussing instances in which convictions were upheld).

5. Refer to notes 6, 26-36 *infra* and accompanying text (comparing the law's view of corporal punishment with commentators' views).

6. See, e.g., T. BERRY BRAZELTON, *TOUCHPOINTS* 260 (1992) (noting that "physical punishment has very real disadvantages"); Murray A. Straus, *Corporal Punishment By Parents*, in *DEBATING CHILDREN'S LIVES* 195, 197-203 (Mary Ann Mason & Eileen Gambrill eds., 1994) (arguing that the use of corporal punishment is child abuse and that spanking a child should be illegal). See generally BENJAMIN SPOCK, *DR. SPOCK ON PARENTING* 151-52 (1988) (disapproving of physical punishment); MURRAY A. STRAUS & DENISE A. DONNELLY, *BEATING THE DEVIL OUT OF THEM* (1994).

achieved through less harmful, alternative means of discipline.<sup>7</sup> Accordingly, experts see little, if any, role for corporal punishment in child rearing.<sup>8</sup>

This gap between the law and professional expertise needs to be explained. Why does the law permit much more corporal punishment than can be justified in terms of the purposes of discipline? The gap might reflect a distrust of professional expertise, but, in other areas of the law, particularly medical malpractice, the legal standard expressly incorporates a deference to professional expertise.<sup>9</sup> The gap might also reflect some important legal principle, but, as discussed at greater length in this Article, consideration of legal principle indicates that this explanation is not adequate either.<sup>10</sup> In this Article, I will argue that the legal-professional disjunction reflects a combination of our society's views about pain and about children—we overvalue pain, and we undervalue children.

The tolerance of corporal punishment, then, is highly problematic. It fails to serve the legitimate social goal of enhancing child rearing, but instead reinforces misguided views about children and pain. Corporal punishment also undermines social efforts to curtail violence, especially family violence. To the extent that society tells children that hitting others has a legitimate role, children are more likely to adopt physical force as a means of resolving disputes with others. A better approach for children and society would be for this country to follow the lead of those countries, like Sweden, whose laws show little tolerance for corporal punishment.

## II. THE DEFINITION OF CORPORAL PUNISHMENT

What do I mean by corporal punishment? I follow the definition articulated by Murray Straus, a sociologist who has studied and written extensively on the topic.<sup>11</sup> He defines corporal punishment as

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7. Refer to Part VI *infra* (suggesting alternative means of discipline).

8. Refer to note 6 *supra* (giving examples of this intolerance for corporal punishment).

9. See, e.g., W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 189 (5th ed. 1984).

10. Refer to Part VII *infra* (considering legal principle as an explanation for the gap).

11. See, e.g., STRAUS & DONNELLY, *supra* note 6, at 4-5; MURRAY A. STRAUS & RICHARD J. GELLES, PHYSICAL VIOLENCE IN AMERICAN FAMILIES (1990); Murray A. Straus et al., *supra* note 2, at 761; Murray A. Straus, *Discipline and Deviance: Physical Punishment of Children and Violence and Other Crime in Adulthood*, 38 SOC. PROBS. 133 (1991) [hereinafter Straus, *Discipline and Deviance*]; Murray A. Straus & Glenda Kaufman Kantor, *Corporal Punishment of Adolescents by Parents: A Risk Factor in the Epidemiology of Depression, Suicide, Alcohol Abuse, Child*

"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>12</sup> Frequent forms of corporal punishment are "spanking, slapping, grabbing or shoving a child roughly . . . , and hitting with certain objects such as a hair brush, belt, or paddle."<sup>13</sup>

Under this definition, restraining a child to prevent the child from running into the street or from touching a hot stove would not constitute corporal punishment. Such restraint is used only to prevent impending undesirable behavior, not to also cause pain and not as a punitive response to undesirable behavior.

States typically do not define corporal punishment, but define instead the line between reasonable and excessive corporal punishment.<sup>14</sup> However, several states do define corporal punishment in their public education statutes.<sup>15</sup> In Florida, for example, corporal punishment "is the moderate use of physical force or physical contact by a teacher or principal as may be necessary to maintain discipline or to enforce school rule."<sup>16</sup> In Michigan, corporal punishment "means the deliberate infliction of physical pain by hitting, paddling, spanking, slapping, or any other physical force used as a means of discipline."<sup>17</sup>

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*Abuse and Wife Beating*, 29 ADOLESCENCE 543 (1994).

12. STRAUS & DONNELLY, *supra* note 6, at 4.

13. *Id.* at 5.

14. Refer to Part IV *infra* (analyzing the law on corporal punishment).

15. See, e.g., CAL. EDUC. CODE § 49001 (West 1993) (defining corporal punishment as the "willful infliction of, or willfully causing the infliction of, physical pain on a pupil" and prohibiting the use of such punishment on pupils); FLA. STAT. ANN. § 228.041(27) (West Supp. 1998); MICH. STAT. ANN. § 15.41312 (Law. Co-op. 1996); MINN. STAT. ANN. § 127.45 (West 1994) (defining corporal punishment as "(1) hitting or spanking a person with or without an object; or (2) unreasonable physical force that causes bodily harm or substantial emotional harm"); MONT. CODE ANN. §20-4-302 (1997) (defining corporal punishment as "knowingly and purposely inflicting physical pain on a pupil as a disciplinary measure").

16. FLA. STAT. ANN. § 228.041(27). The statute also provides that corporal punishment "does not include the use of such reasonable force by a teacher or principal as may be necessary to protect himself or other students from disruptive students." *Id.*

17. MICH. LAWS ANN. § 15.41312. Corporal punishment is also defined in some child and family services statutes. See, e.g., IOWA CODE ANN. § 234.40 (West 1994) (defining corporal punishment for purposes of foster care as "the intentional physical punishment of a foster child," but stating that "[a] foster parent's physical contact with the body of a foster child shall not be considered corporal punishment if the contact is reasonable and necessary under the circumstances and is not designed or intended to cause pain or if the foster parent uses reasonable force").

## III. PREVALENCE OF CORPORAL PUNISHMENT BY PARENTS

Corporal punishment of children by parents is common. In national surveys of families that looked at the prevalence of family violence, researchers found in both 1975 and 1985 that more than sixty percent of parents reported using corporal punishment in the preceding twelve months and that more than ninety percent of parents reported using corporal punishment at some point in raising their children.<sup>18</sup> Corporal punishment was most common with children between the ages of three and six.<sup>19</sup> More than eighty percent of parents reported using corporal punishment on children of those ages.<sup>20</sup> The likelihood that parents would spank or slap their children did not drop below fifty percent unless the children were younger than age two or older than age twelve.<sup>21</sup>

Data on parental approval and use of corporal punishment since 1968 suggest that support for corporal punishment has decreased.<sup>22</sup> When asked in 1968 whether there is sometimes a role for corporal punishment in child rearing, ninety-three percent of parents expressed their approval.<sup>23</sup> By 1986, parental approval of corporal punishment had declined to eighty-three percent, and, by 1994, parental approval had dropped to sixty-nine percent.<sup>24</sup> In a series of national surveys conducted between 1988 and 1992, there was a decline over the five year period from sixty-four to fifty-three in the percentage of parents reporting that they spanked or hit their child in the past year.<sup>25</sup>

## IV. THE LAW ON CORPORAL PUNISHMENT BY PARENTS

Legislatures and courts employ a high threshold before deeming corporal punishment unacceptable.<sup>26</sup> Children are therefore subject to substantial levels of physical punishment that risk serious harm, but promise little benefit. The degree to which the law permits corporal punishment is not apparent from the formal

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18. See STRAUS & DONNELLY, *supra* note 6, at 23, 26-27.

19. See *id.* at 23.

20. See *id.*

21. See *id.*

22. See Murray A. Straus & Anita K. Mathur, *Social Change and Trends in Approval of Corporal Punishment by Parents from 1968 to 1994* (visited Mar. 8, 1998) <<http://www.unh.edu/frl/cp27f.htm>>.

23. See *id.*

24. See *id.*

25. See Deborah Daro & Richard J. Gelles, *Public Attitudes and Behaviors with Respect to Child Abuse Prevention*, 7 J. INTERPERSONAL VIOLENCE 517, 521 (1992).

26. Refer to note 29 *infra* and accompanying text (discussing lawmakers' and courts' treatment of the issue).

legal standards.<sup>27</sup> Rather, it is in the application of those standards that the permissiveness of the law becomes clear.<sup>28</sup>

The predominant approach by legislatures and courts across the fifty states is to allow "reasonable and timely corporal punishment" by parents.<sup>29</sup> The punishment must be delivered for purposes of behavioral modification rather than to express the anger of the parent.<sup>30</sup> More specifically, corporal punishment must be employed for the "proper training or education of the child or for the preservation of discipline."<sup>31</sup> In addition, what counts as reasonable varies "in relation to the sensitivity and character of the child, the child's age, sex, physical condition, as well as in relation to the particular offense for which punishment is to be meted out."<sup>32</sup> Thus, for example, the graver the misbehavior, the more severe may be the punishment.<sup>33</sup> In addition, since corporal punishment is permitted only for appropriate behavioral modification, it is tolerated less for children who are too young to "have the capacity to understand or appreciate the correction" and on whom "the value of the training, education or discipline is [therefore] lost."<sup>34</sup> Other relevant factors in determining the reasonableness of corporal punishment include the child's mental condition, the child's motive for committing the misbehavior, and the influence of the misbehavior on the child's siblings.<sup>35</sup> Accordingly, harsher punishments are permitted if the children's offenses are intentional rather than the result of misjudgment or inattention and if children are "ringleaders" or otherwise likely to encourage siblings to follow their example of misconduct.<sup>36</sup>

On its face, this standard seems perfectly appropriate. After all, how could a requirement that corporal punishment be "reasonable and timely" not be a reasonable approach? In addition, it

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27. Refer to notes 29-36 *infra* and accompanying text (analyzing the standards).

28. Refer to notes 37-41 *infra* and accompanying text (discussing the application of the standards).

29. 59 AM. JUR. 2D *Parent and Child* § 22 (1987).

30. See, e.g., *State v. Arnold*, 543 N.W.2d 600, 603 (Iowa 1996) (defining punishment meted out for such purposes as "corrective" punishment that is acceptable under the law).

31. RESTATEMENT (SECOND) OF TORTS § 151 (1965).

32. *State v. Thorpe*, 429 A.2d 785, 788 (R.I. 1981); see also *Arnold*, 543 N.W.2d at 603; *Carpenter v. Commonwealth*, 44 S.E.2d 419, 424-25 (Va. 1947).

33. See RESTATEMENT (SECOND) OF TORTS § 150 cmt. c (1965).

34. *In re Rodney C.*, 398 N.Y.S.2d 511, 515 (N.Y. Fam. Ct. 1977).

35. See RESTATEMENT (SECOND) OF TORTS § 150 (1965).

36. See *id.* § 150 cmt. c. For further discussion of current legal standards, see Mary Kate Kearney, *Substantive Due Process and Parental Corporal Punishment: Democracy and the Excluded Child*, 32 SAN DIEGO L. REV. 1, 33-34 (1995) (discussing the scope of reasonable corporal punishment).

seems appropriate to permit weightier punishments for older children and for more serious misconduct.

The problem is in how the courts and legislatures have fleshed out the standard of reasonableness. Parents usually do not get into trouble unless they engage in serious abuse, such as when they beat a child repeatedly with paddles, belts, or other implements and cause at least marked bruising, if not more serious injury like broken bones or burns.<sup>37</sup> In Iowa, corporal punishment becomes unreasonable only if the parent "[k]nowingly acts in a manner that creates a substantial risk to a child or minor's physical, mental or emotional health or safety."<sup>38</sup> In Pennsylvania, corporal punishment is permitted as long as "the force used is not designed or known to create a substantial risk of death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation."<sup>39</sup> In North Dakota, corporal punishment does not amount to abuse unless it causes "serious physical harm or traumatic abuse."<sup>40</sup> In Rhode Island, corporal punishment by parents becomes unreasonable if the parent "ceases to act in good faith and with parental affection and acts immoderately, cruelly, or mercilessly with a malicious desire to inflict pain."<sup>41</sup> Under all of these approaches, children do not receive the protection of the state until corporal punishment becomes quite severe.

To be sure, given the implications for criminal or child custody proceedings, one might expect the law to employ a high

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37. See, e.g., *Carson v. United States*, 556 A.2d 1076, 1081 (D.C. 1989) (upholding a conviction for cruelty to children because of multiple bruises, lacerations, and abrasions in several places on the children's bodies); *People v. Rogers*, 432 N.E.2d 975 (Ill. App. 1982) (upholding a conviction for child endangerment in a case in which a parent broke several bones and caused a cigarette burn on the eyelid of her infant child); *Arnold*, 543 N.W.2d at 601-03 (upholding a conviction for child endangerment on the basis of multiple bruises that led the child abuse investigator to conclude "rarely do you see bruising to the magnitude that [the child] had on her buttocks"); *In re Coleen "P,"* 538 N.Y.S.2d 361, 362-63 (N.Y. App. Div. 1989) (finding no child neglect in a case in which parent shook her child, causing the child's head to strike the pavement twice, because there was no "impairment of the child's physical, mental or emotional condition"); *Rodney C.*, 398 N.Y.S.2d at 516 (finding neglect in a case in which a seven-year-old boy with emotional difficulties had 26 marks visible on his back three days after a beating was administered, but not finding abuse because the punishment was not "life threatening or likely to cause permanent disfigurement").

38. IOWA CODE ANN. § 726.6(1)(a) (West Supp. 1997); see also *Arnold*, 543 N.W.2d at 602 (delineating the statutory standard of child endangerment).

39. *Boland v. Leska*, 454 A.2d 75, 78 (Pa. Super. Ct. 1982).

40. N.D. CENT. CODE § 50-25.1-02(2) (Supp. 1995); see also *Raboin v. North Dakota Dept. of Human Servs.*, 552 N.W.2d 329, 334 (N.D. 1996) (finding no evidence of child abuse due to the absence of serious physical harm or traumatic abuse in disciplinary parental spankings).

41. *State v. Thorpe*, 429 A.2d 785, 788 (R.I. 1981).



threshold before finding abuse. We do not want to convict people or to deprive them of their fundamental rights of parenting for all conduct that is unacceptable, just as we do not revoke a driver's license simply because a person violates the speed limit. However, it is also problematic when the law sends a strong message to parents that they have a good deal of freedom to employ corporal punishment. Parents are essentially told that they may employ physical violence against their children that is harsh and that unquestionably would not be tolerated if employed against others.<sup>42</sup> Indeed, as one court observed, "[t]he control and proper discipline of a child by the parent may justify acts which would otherwise constitute assault and battery."<sup>43</sup>

The law's tolerance for corporal punishment is even greater under the United States Constitution than under state common or statutory law. The Constitution does not limit parental use of corporal punishment because the Constitution applies only to state action.<sup>44</sup> Rather, the Constitution is invoked in cases involving corporal punishment in the public schools because such punishment involves a governmental actor.<sup>45</sup> However, the Supreme Court has held that corporal punishment of students does not violate the Eighth Amendment's prohibition against cruel and unusual punishment and that the Eighth Amendment was adopted to protect individuals convicted of crimes, not children paddled by teachers.<sup>46</sup> Because schools, unlike prisons, are open institutions at which students are in the presence of classmates and teachers "who may witness and protest any instances of mistreatment" and because students are free at the end of the day to return home, the Court has concluded that public school students do not need the protection of the Eighth Amendment.<sup>47</sup>

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42. See Straus, *Discipline and Deviance*, *supra* note 11, at 134 (noting that parents have a legal right to hit their children, an act that would be criminal if carried out by someone with a noncustodial relationship to a child).

43. *Arnold*, 534 N.W.2d at 603 (quoting 59 AM. JUR. 2D *Parent and Child* § 22 (1987)).

44. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 12.1, at 470 (5th ed. 1995) (explaining that the constitutional protections for individual rights and liberties apply only to the activities of state or federal governments).

45. See *id.* (stressing that actions of any governmental entity, including any subdivision of a state, constitute state actions for constitutional purposes).

46. See *Ingraham v. Wright*, 430 U.S. 651, 664, 671 (1977) (adhering to the Eighth Amendment's longstanding application only to convicted criminals and holding that the Eighth Amendment is inapplicable to corporal punishment in public schools).

47. See *id.* at 670-71. The Court held that the right to procedural due process under the Fourteenth Amendment applies to corporal punishment in public schools, but that due process does not require that the student receive a hearing before the administration of corporal punishment. See *id.* at 672, 682.

While some of the federal courts of appeals have held that the Fourteenth Amendment's guarantee of substantive due process protects school children from excessive corporal punishment, there is often little protection for students.<sup>48</sup> The Fifth Circuit Court of Appeals has held that corporal punishment of students does not violate substantive due process.<sup>49</sup> Other appellate courts have applied the same standard as developed for police brutality cases.<sup>50</sup> In the Fourth and Tenth Circuits, the issue is

"whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience."<sup>51</sup>

The Third and Eighth Circuits are somewhat more protective of students, holding that we should look at the need for corporal punishment, the relationship between the need and the amount of force used, the extent of injury caused, and the extent to which the punishment was administered "in a good faith effort to maintain discipline or maliciously and sadistically for the very purpose of causing harm."<sup>52</sup>

## V. CONCERNS ABOUT CORPORAL PUNISHMENT

The law's tolerance of corporal punishment is problematic not only because of the high threshold before such punishment becomes unacceptable, but also because the law's tolerance cannot be justified in terms of the benefits and harms from corporal punishment. There may be some benefits from spanking,<sup>53</sup> but those benefits can be realized by alternative methods of discipline.<sup>54</sup> In addition, there is evidence suggesting a link between

48. See David Orentlicher, *Corporal Punishment in the Schools*, 267 JAMA 3205, 3205 (1992) (observing that lower federal courts have examined the substantive due process right to liberty in corporal punishment cases while emphasizing that few limitations have been imposed under such right).

49. See *Coleman v. Franklin Parish Sch. Bd.*, 702 F.2d 74, 76 (5th Cir. 1983) (per curiam).

50. See Orentlicher, *supra* note 48, at 3205.

51. *Garcia v. Miera*, 817 F.2d 650, 655 (10th Cir. 1987) (quoting *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980)).

52. *Wise v. Pea Ridge Sch. Dist.*, 855 F.2d 560, 564 (8th Cir. 1988); see also *Metzger v. Osbeck*, 841 F.2d 518, 520 (3d Cir. 1988).

53. The benefits, however, may be short-lived. Many parents can think of cases in which corporal punishment stopped an undesirable behavior at the time, but there is some question about its effectiveness in changing behavior over time. See PETER NEWELL, *CHILDREN ARE PEOPLE TOO* 16-21 (1989).

54. Refer to Part VI *infra* (discussing the effective alternatives to corporal

corporal punishment and serious problems for the child later in life, harms that can be avoided by the use of alternative methods of discipline.<sup>55</sup>

There are several potential harms from corporal punishment.<sup>56</sup> The most obvious risk is that of physical injury to the child.<sup>57</sup> Injuries may be inadvertent, as when the child trips or falls while trying to escape punishment or when the parent strikes an infant without taking into account the infant's vulnerability to injury.<sup>58</sup> If corporal punishment is ineffective at first, the parent may resort to more severe punishment, thereby increasing the risk of injury.<sup>59</sup> Indeed, children often become inured to mild or moderate spankings after sufficient repetition such that parents must resort to increasingly harder spankings to achieve the desired response.<sup>60</sup> As the discussion of case law involving corporal punishment indicates, many children suffer serious injury from parental discipline, and academic research suggests that corporal punishment may escalate into frank child abuse.<sup>61</sup>

There also appears to be a significant risk of psychological injury to the child. Corporal punishment is associated with a loss

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punishment).

55. See *The Role of the Pediatrician in Violence Prevention: Findings, Recommendations, and Action Steps*, 94 PEDIATRICS 577, 580 (1994) (contending that corporal punishment increases the probability of and acceptance of violent behavior as an adult).

56. This is not to suggest that corporal punishment is the only kind of discipline harmful to children. Children are also harmed by yelling or other verbal assault. See Yvonne M. Vissing et al., *Verbal Aggression by Parents and Psychosocial Problems of Children*, 15 CHILD ABUSE & NEGLECT 223, 225, 235 (1991) (demonstrating that verbal aggression adversely affects a child's psychosocial development and finding that verbal aggression increases the probability of physical aggression, delinquency, and interpersonal problems); see also Donileen R. Loseke, *Reply to Murray A. Straus: Readings on "Discipline and Deviance"*, 38 SOC. PROBS. 162, 165 (1991) (observing that people can also be dominated by others through non-corporal means of control). Still, verbal assault appears to be used in concert with physical assault rather than as a substitute for it. See David Hemenway et al., *Child-Rearing Violence*, 18 CHILD ABUSE & NEGLECT 1011, 1016 (1994) (observing that physical and verbal punishment tend to coexist).

57. See STRAUS & DONNELLY, *supra* note 6, at 81.

58. See NEWELL, *supra* note 53, at 31.

59. See Carey, *supra* note 1, at 1007 (asserting that when corporal punishment fails, punishment increases over time and child abuse often results).

60. See Robert D. Needman, *Growth and Development*, in NELSON TEXTBOOK OF PEDIATRICS 30, 56 (Waldo E. Nelson et al. eds., 15th ed. 1996).

61. See Barbara A. Wauchope & Murray A. Straus, *Physical Punishment and Physical Abuse of American Children: Incidence Rates by Age, Gender, and Occupational Class*, in PHYSICAL VIOLENCE IN AMERICAN FAMILIES 133, 147 (Murray A. Straus & Richard J. Gelles eds., 1990) (revealing that physical abuse usually begins as ordinary corporal punishment).

of self-esteem and increased anxiety.<sup>62</sup> There is a correlation between being hit by one's parents and becoming depressed later in life—the more a child is hit, the more likely it is that the child will develop depression.<sup>63</sup> Moreover, this correlation persists after controlling for other important variables like sex of the child, socioeconomic status, alcohol abuse by the child later in life, and violence between the child's parents.<sup>64</sup>

Corporal punishment also appears to promote violent behavior by children contemporaneously and/or later in life.<sup>65</sup> Many, but not all, studies have found that children subjected to corporal punishment are at higher risk for becoming users of violence themselves, whether against their siblings or playmates while young,<sup>66</sup> or against spouses and children when older.<sup>67</sup> These

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62. See Straus et al., *supra* note 2, at 761 (noting that studies have found a link between corporal punishment and behavioral problems such as depression, low self-esteem, and aggressive/delinquent behavior).

63. See STRAUS & DONNELLY, *supra* note 6, at 71-77 (showing that adults who were hit by their parents as adolescents are more likely to be depressed than those whose parents did not use physical punishment); Robert H. DuRant et al., *Exposure to Violence and Victimization and Depression, Hopelessness, and Purpose in Life Among Adolescents Living in and Around Public Housing*, 16 J. DEVELOPMENTAL & BEHAVIORAL PEDIATRICS 233, 236 (1995) (demonstrating intrafamilial violence as a strong correlate of psychological distress, including adult depression and hopelessness); Sandra J. Holmes & Lee N. Robins, *The Role of Parental Disciplinary Practices in the Development of Depression and Alcoholism*, 51 PSYCHIATRY 24, 31 (1988) (finding a strong relationship between reports of harsh or unfair punishment during childhood and alcohol abuse and depression as an adult); Straus & Kantor, *supra* note 11, at 550-51 (finding corporal punishment in adolescence results in an increased probability of depression as an adult).

64. See STRAUS & DONNELLY, *supra* note 6, at 77-78; Straus & Kantor, *supra* note 11, at 550.

65. See Leopold Bellak & Maxine Antell, *An Intercultural Study of Aggressive Behavior on Children's Playgrounds*, 44 AM. J. ORTHOPSYCHIATRY 503, 508 (1974) (finding a correlation between parental aggressiveness toward their children and aggressiveness by the children toward others); Straus & Kantor, *supra* note 11, at 555-56 (stressing that the use of corporal punishment on a child increases the probability that the subject will abuse a spouse or child as an adult).

66. See Bellak & Antell, *supra* note 65, at 508 (showing an association between parental aggressiveness toward their children and child aggressiveness toward other playmates); Robert H. DuRant et al., *Factors Associated with the Use of Violence Among Urban Black Adolescents*, 84 AM. J. PUB. HEALTH 612, 614-15 (1994) (noting a correlation between violent activity of urban black adolescents and their having experienced corporal punishment at home); Zvi Strassberg et al., *Spanking in the Home and Children's Subsequent Aggression Toward Kindergarten Peers*, 6 DEV. & PSYCHOPATHOLOGY 445, 445 (1994) (finding that children who were spanked at home were more aggressive toward their classmates and that the most aggressive children were those who received violent discipline); Straus, *Discipline and Deviance*, *supra* note 11, at 142 (finding that children who are physically punished are three times as likely as other children to assault their siblings);. *But see* Marjorie Lindner Gunnoe & Carrie Lea Mariner, *Toward a Developmental-Contextual Model of the Effects of Parental Spanking on Children's Aggression*, 151 ARCHIVES OF PEDIATRICS & ADOLESCENT MED. 768, 773-74 (1997) (indicating that spanking fosters aggression only for 8-to 11-year-old Caucasian boys being raised by a single

harmful consequences may reflect the fact that corporal punishment sends an inappropriate message from the people on whom children model their behavior.<sup>68</sup> Corporal punishment tells children that the way to deal with anger or to resolve disputes is through the imposition of physical force, *i.e.*, "might makes right."<sup>69</sup> It also tells children that love and hitting go together. To the child, the parent employing corporal punishment is saying that the people who love you the most, your parents, are the most likely people, and possibly the only people, to hit you.<sup>70</sup>

Children who are corporally punished may be prone not only to physical aggression but also to other kinds of misbehavior, including cheating, lying, bullying, disobedience, and breaking things deliberately.<sup>71</sup> They may also be more likely to show callous disregard for the feelings of others and to engage in truancy, drug abuse, and

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mother).

67. See Hemenway et al., *supra* note 56, at 1013 (observing that parents who were spanked at least weekly as a child are much more likely to spank their children than are parents who were spanked less often than once a week); Straus & Kantor, *supra* note 11, at 555-56 (finding that the likelihood of abuse against children or spouses by a person increases with the frequency of corporal punishment experienced by the person as a child); Murray A. Straus & Carrie L. Yodanis, *Corporal Punishment by Parents: Implications for Primary Prevention of Assaults on Spouses and Children*, 2 U. CHI. L. SCH. ROUNDTABLE 35, 44, 58 (1995) (finding a link between corporal punishment and later violence against spouses and children); see also Robert T. Muller et al., *The Intergenerational Transmission of Corporal Punishment: A Comparison of Social Learning and Temperament Models*, 19 CHILD ABUSE & NEGLECT 1323, 1324, 1332 (1995) (finding that use of corporal punishment is better explained by individuals learning their parenting techniques from their own parents rather than by the temperament of the individuals).

However, as critics have noted, the evidence demonstrating a link between corporal punishment of children and violence as an adult is open to question. See Demie Kurz, *Corporal Punishment and Adult Use of Violence: A Critique of "Discipline and Deviance,"* 38 SOC. PROBS. 155, 156 (1991) (denoting that efforts by social scientists to explain why physical punishment as a child results in adult violence are disappointing).

68. See Muller et al., *supra* note 67, at 1332 (discussing the probability that use of physical punishment is socially learned from the parents). There is disagreement among experts as to whether physical punishment by parents promotes aggression by children because the children imitate the behavior of their parents or because children who are abused or neglected, whether through physical punishment or other means, become antisocial. See Joan McCord, *Questioning the Value of Punishment*, 38 SOC. PROBS. 167, 167-68 (1991) (arguing for the antisocial theory to explain why punishment leads to violent behavior).

69. See Kim J. Overby, *Pediatric Health Supervision*, in RUDOLPH'S PEDIATRICS 1, 27 (Abraham M. Rudolph et al. eds., 20th ed., Appleton & Lange 1996).

70. See Straus & Yodanis, *supra* note 67, at 37-38.

71. See Straus et al., *supra* note 2, at 762, 766 (explaining that use of corporal punishment increases the risk of antisocial behavior).

criminal conduct.<sup>72</sup> In addition, rather than promoting respect toward parents, corporal punishment tends to promote fear<sup>73</sup> and anger.<sup>74</sup>

There is some evidence for the view that corporal punishment per se is not harmful, but that parents who employ corporal punishment are more likely to be deficient in parenting skills.<sup>75</sup> For example, one study found that, if parents accompanied their spanking with discussion to resolve conflict with the child, the association between spanking and aggressiveness by the child toward the parents disappeared.<sup>76</sup> Another study suggested that the harmful effects of corporal punishment can be mitigated if parents make consistent demands on their children.<sup>77</sup> There is also evidence, however, suggesting that physical punishment is effective only if it is used under conditions that are difficult to satisfy and that are likely to be unacceptable to most parents. Some studies indicate that, for physical punishment of humans to be effective, it should be employed frequently and harshly.<sup>78</sup>

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72. See Patricia Cohen & Judith S. Brook, *The Reciprocal Influence of Punishment and Child Behavior Disorder*, in COERCION AND PUNISHMENT IN LONG-TERM PERSPECTIVES 154, 156-58 (Joan McCord ed., 1995) (documenting a link between corporal punishment and childhood conduct disorder, as defined in the American Psychiatric Association's third edition-revised of the *Diagnostic and Statistical Manual of Mental Disorders* ("DSM-III-R")). According to DSM-III-R, childhood conduct disorder includes truancy, drug abuse, and criminal conduct. See AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-III-R*, §§ 312.20, 312.00, 312.90, at 53-56 (3d ed., rev. 1987).

73. See Lawrence A. Vitulano & Jacob Kraemer Tebes, *Child and Adolescent Behavior Therapy*, in CHILD AND ADOLESCENT PSYCHIATRY 815, 819 (Melvin Lewis ed., 2d ed. 1996) (indicating that physical punishment may elicit fear conditioned to the situation or the punisher).

74. See Susan Crockenberg, *Predictors and Correlates of Anger Toward and Punitive Control of Toddlers by Adolescent Mothers*, 58 CHILD DEV. 964, 971-73 (1987) (relating that child anger is associated with maternal anger).

75. See Mary Lou Kelley et al., *Acceptability of Positive and Punitive Discipline Methods: Comparisons Among Abusive, Potentially Abusive, and Nonabusive Parents*, 14 CHILD ABUSE & NEGLECT 219, 219 (1990).

76. See Robert E. Larzelere, *Moderate Spanking: Model or Deterrent of Children's Aggression in the Family?*, 1 J. FAM. VIOLENCE 27, 32 (1986). However, the use of discussion did not reduce the association between spanking and aggressiveness of the child toward siblings. See *id.* at 33; see also Robert E. Larzelere et al., *Relations of Spanking and Other Parenting Characteristics to Self-Esteem and Perceived Fairness of Parental Discipline*, 64 PSYCHOL. REP. 1140, 1141 (1989) (finding that the negative effects of spanking disappeared when parents used positive communication).

77. See Robert Agnew, *Physical Punishment and Delinquency*, 15 YOUTH & SOC'Y 225, 231-34 (1983).

78. These studies suggest that corporal punishment should be employed after each occurrence of the undesirable behavior and with fairly high intensity. See NEWELL, *supra* note 53, at 17-19; Carey, *supra* note 1, at 1006 (discussing important factors affecting corporal punishment's effectiveness); Kenelm F. McCormick, *Attitudes of Primary Care Physicians Toward Corporal Punishment*, 267 JAMA 3161, 3161 (1992) (citing J.M. Johnston, *Punishment of Human Behavior*, 27 AM. PSYCHOL. 1033, 1033-54 (1972)). Some data, however, suggest that increasing the

It is important to recognize that the empirical evidence on corporal punishment is not definitive.<sup>79</sup> There is disagreement as to whether the problems with physical punishment are problems with frequent and/or harsh punishment or whether problems also exist with infrequent and mild levels of punishment.<sup>80</sup> In addition, the studies generally have not controlled for the direction of the cause and effect relationship.<sup>81</sup> It may be that children with behavioral problems are more likely to be punished rather than that children who are punished are more likely to end up with behavioral problems. Some recent research suggests that it is the punishment that causes the behavioral problems, while other recent research casts doubt on the link between corporal punishment and behavioral problems.<sup>82</sup>

Despite uncertainties in the data, the existence of the evidence suggesting harm gives us good reason to be concerned about corporal punishment. Moreover, there are two other important considerations. First, even if we believe it to be effective, corporal punishment violates basic values of human dignity and respect. As a society, we no longer condone, or even tolerate, the hitting of other persons.<sup>83</sup> Only children are still viewed as proper objects of corporal punishment. Second, there are alternatives to corporal punishment that make it unnecessary.

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intensity of corporal punishment will decrease its effectiveness. See Carey, *supra* note 1, at 1007 (citing Marie T. Balaban et al., *Orienting and Defense Responses to Punishment: Effects on Learning*, 30 BIOLOGICAL PSYCHOL. 203, 215 (1990) (noting a disagreement among researchers on this issue)).

79. See Gunnoe & Mariner, *supra* note 66, at 774 (recognizing that additional research is needed to reconcile the competing interpretations offered on the effectiveness of corporal punishment).

80. See Robert E. Larzelere, *Corporal Punishment by Parents*, in DEBATING CHILDREN'S LIVES, *supra* note 6, at 204, 204 (attempting to distinguish between abusive and beneficial corporal punishment).

81. See Straus et al., *supra* note 2, at 763-64 (disclosing that no studies were found that controlled for the child's initial aggression level). Because ethical and practical problems prevent direct experimental studies from being performed, data about causal direction must most likely come from longitudinal research. See *id.*

82. Compare *id.* at 765-66 (finding that, after controlling for behavioral problems initially, a child's behavior grew worse the more the child was spanked), with Gunnoe & Mariner, *supra* note 66, at 774 (finding little evidence that spanking children at young ages leads to aggression and other anti-social behavior by those children).

83. Even in the context of professional sports, society does not condone violence outside the playing arena. See Erik Brady & Gary Mihoces, *Crossing the Line: Player-Coach Battle Stirs Debate*, U.S.A. TODAY, Dec. 5, 1997, at C1 (discussing the public's intolerance of off-field violent incidents involving players and coaches). "A sports league does not have to accept or condone behavior that would not be tolerated in any other segment of society," announced NBA Commissioner David Stern regarding the suspension of a player for physically assaulting his coach. See *id.* at C1.

## VI. ALTERNATIVES TO CORPORAL PUNISHMENT

Perhaps the strongest argument against corporal punishment is the availability of nonviolent alternatives for disciplining children.<sup>84</sup> Several of these alternatives are measures to prevent the need for punishment. If a child misbehaves by biting, fighting with siblings, going into the street or other dangerous locations, sulking, or using foul language, the child often is acting that way to elicit attention from parents.<sup>85</sup> Accordingly, much misbehavior can be avoided if parents ensure that they are adequately attending to the child.<sup>86</sup> For example, young children often seek assurance by looking to or coming over to their parents for contact.<sup>87</sup> The child's need can be satisfied by brief responses to these bids for contact.<sup>88</sup> It is also useful to set aside special time for undivided attention in which the parent shows interest in what the child is doing but is nonjudgmental and nondirective.<sup>89</sup> This special time is experienced by the child as unconditional love.<sup>90</sup> It is important for parents to acknowledge good behavior with verbal praise, smiles, and occasional small rewards (e.g., reading a story, stickers, or extra privileges), especially for children who are prone to disruptive behaviors, and to ignore minor or harmless transgressions by the child (e.g., tantrums, whining, or sulking).<sup>91</sup> Acknowledging the good behavior reinforces it, and ignoring the minor, bad behavior avoids feelings for the child that the parent is supervising and criticizing.<sup>92</sup> Ignoring bad behavior also avoids the creation of secondary gain for the child from the behavior.<sup>93</sup>

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84. See Irwin A. Hyman, *Corporal Punishment, Psychological Maltreatment, Violence, and Punitiveness in America: Research, Advocacy, and Public Policy*, 4 APPLIED & PREVENTIVE PSYCHOL. 113, 119 (1995).

85. See Barbara J. Howard, *Discipline in Early Childhood*, 38 PEDIATRIC CLINICS N. AM. 1351, 1353 (1991) (noting that children learn that such behavior elicits attention from parents).

86. See *id.* (opining that for the ignored child "[e]ven negative attention from parents is better than none at all").

87. See *id.* at 1353-54.

88. See *id.* at 1354 (noting that providing attention to the child for as little as one to two seconds is usually sufficient to satisfy the child's need for attention).

89. See *id.*

90. See *id.*

91. See *id.* at 1355-56; Overby, *supra* note 69, at 26-27; Martin T. Stein, *Difficult Behavior: Temper Tantrums to Conduct Disorders*, in RUDOLPH'S PEDIATRICS, *supra* note 69, at 128, 132.

92. See Howard, *supra* note 85, at 1355-56 (observing that positive reinforcement has the effect of increasing the frequency of good behavior).

93. See *id.* at 1356 (adding that ignoring behavior also helps eliminate it).



Misbehavior can also be prevented by appropriate verbal responses.<sup>94</sup> When encouraging or discouraging certain behaviors, for example, it is important to label the behavior, rather than the child, as good or bad.<sup>95</sup> Similarly, verbal feedback should be specific and terse (e.g., "I like this clean room; you put away all the blocks and cars").<sup>96</sup> If feedback is too elaborate, the point can get lost or be seen as not credible (as with elaborate praise), and the parent comes across as overbearing.<sup>97</sup> Communications to the child must be consistent with the parent's emotions and feelings.<sup>98</sup> If parents say one thing but convey something different with their tone or facial expressions, then the child receives a mixed message that is confusing and reinforcing of the child's lack of self-control.<sup>99</sup> Comparison to other children can be demoralizing and should be avoided.<sup>100</sup> If done routinely and kindly, correcting behavior is important not only in shaping future behavior but also in preparing the child for correction in school and elsewhere in life.<sup>101</sup>

Misbehavior can also be prevented by conveying to the child a sense of being capable.<sup>102</sup> This can be achieved by employing routines for the child's schedule (e.g., regular times and rituals for meals, chores, and sleeping), by modeling appropriate behavior (e.g., thanking or apologizing to the child when indicated), by giving clear instructions, by having progressive and realistic expectations for the child (i.e., having the child move on to more demanding tasks but also recognizing the need for repetition to master new tasks), and by offering the child choices that are simple and therefore manageable.<sup>103</sup>

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94. See *id.* at 1357 (opining that verbal communication is "central to a child's developing sense of being lovable").

95. See *id.*; Alexander K.C. Leung et al., *Counseling Parents About Childhood Discipline*, 45 AM. FAM. PHYSICIAN 1185, 1187 (1992) (stressing the importance of directing punishment toward the behavior rather than the child); Overby, *supra* note 69, at 27 (recommending that verbal disapproval be coupled with positive instruction).

96. See Howard, *supra* note 85, at 1357 (remarking that young children also need feedback about their behavior approximately every five minutes).

97. See *id.* (noting that specificity fosters learning by the child).

98. See *id.* at 1358.

99. See *id.* (attributing the confusion to "the primacy of nonverbal communication"); see also BRAZELTON, *supra* note 6, at 260.

100. See Howard, *supra* note 85, at 1358.

101. See Overby, *supra* note 69, at 26-27.

102. See Howard, *supra* note 85, at 1359.

103. See *id.* at 1359-60 (discussing how using routines, models, instructions, progressive expectations and allowing children the opportunity to make choices, helps convey to the child a sense of being capable); see also BRAZELTON, *supra* note 6, at 259-60 (noting that modeling behavior for the child helps him or her develop ways to deal with situations through the use of examples); Overby, *supra* note 69, at 27 (noting that allowing a child to make choices from acceptable options allows the

Finally, it is important for parents to anticipate situations in which misbehavior can arise and take action to avoid such scenarios.<sup>104</sup> For example, parents might schedule shopping trips when their children are rested, bringing along the child's toys to avoid boredom.<sup>105</sup> Children typically have little control over their activities, so they often respond with disruptive behavior to changes in their routine.<sup>106</sup> It is therefore helpful for parents to give their children some notice (*e.g.*, "five more minutes of play time before a bath, nap, or bedtime") in advance of changes to assist the transitions.<sup>107</sup> It is also helpful when parents give their children clear and unequivocal directions (*e.g.*, "it's time to go to bed" rather than, "would you like to go to bed?"),<sup>108</sup> and parents should engage in active listening, whereby they verbally reflect and express their child's emotions, to show that the child is being understood (*e.g.*, "you seem to be really angry").<sup>109</sup> Sometimes disruptive behavior results from frustrating features of the child's physical environment, and parents can avoid the problem by rearranging or otherwise restructuring the home.<sup>110</sup>

Even with the best parenting, children will misbehave, and there are ways for parents to respond without employing corporal punishment. In some cases, parents can let the child suffer the natural consequences of their action.<sup>111</sup> If children are late for dinner, they can be given their meal in its current cold state; if they spill a cup or jar, they can be expected to help clean up the spill; and if they mishandle a toy, the toy can be taken away.<sup>112</sup> Other important responses to misbehavior include verbal or non-verbal expressions of disapproval,<sup>113</sup> diversion of the child to another activity or another room,<sup>114</sup> loss of a treat or privilege,<sup>115</sup> and

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child an outlet to express in a positive manner the child's need for control and independence).

104. See Overby, *supra* note 69, at 27 (noting that by appropriately structuring an environment, the parent will help minimize the temptation of misadventure).

105. See Stein, *supra* note 91, at 131.

106. See Howard, *supra* note 85, at 1358.

107. See *id.* at 1358; Overby, *supra* note 69, at 27; Stein, *supra* note 91, at 131.

108. See Stein, *supra* note 91, at 131.

109. See Howard, *supra* note 85, at 1356-57; Stein, *supra* note 91, at 131-32 (suggesting also a moment of silence after verbal reflections to allow the child to absorb the experience).

110. See Stein, *supra* note 91, at 131.

111. See Howard, *supra* note 85, at 1361.

112. See Overby, *supra* note 69, at 27.

113. See BRAZELTON, *supra* note 6, at 257.

114. See Stein, *supra* note 91, at 132.

115. See *id.* (stating that loss of privileges usually gives a strong message to the child that disruptive behavior will not be tolerated); see also Overby, *supra* note 69, at 27 (noting that "[d]elaying privileges until other less pleasurable tasks are com-

"time out" (i.e., requiring the child to sit quietly for a specified and brief period of time).<sup>116</sup> Because sensitive children may be devastated by discipline that would be appropriate for other children, the specific discipline used should be adjusted to the child.<sup>117</sup> With all of these alternative methods of discipline, parents can achieve the same goal that they would hope to achieve with corporal punishment—the fostering of appropriate social development of their children.<sup>118</sup>

Given the disadvantages of corporal punishment and the availability of alternative methods of discipline, many experts in pediatrics either strongly discourage the use of corporal punishment or call for its elimination entirely.<sup>119</sup> According to a leading textbook in pediatrics,

[t]he argument against physical punishment focuses on two issues. First, there are other effective methods for managing disruptive behaviors that teach children self-regulation, provide alternatives to uncontrolled anger, and assist in the attainment of self-esteem. Second, physical punishment models an adult method of conflict resolution that children should not be taught to use. It is a form of behavior modification that cannot be internalized in the child's quest for learning to regulate feelings and conflicts. In fact, it may be experienced as a form of resolving unpleasant situations that is counterproductive to their emerging sense of self-worth. Child-oriented advocacy that focuses on anticipatory guidance, behavior modification, improved

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pleted" is an effective method of discipline).

116. See Edward R. Christophersen, *Anticipatory Guidance on Discipline*, 33 PEDIATRIC CLINICS N. AM. 789, 794-96 (1986); Howard, *supra* note 85, at 1363-65; Overby, *supra* note 69, at 27; Stein, *supra* note 91, at 132.

117. See BRAZELTON, *supra* note 6, at 259.

118. See Overby, *supra* note 69, at 26-27 (noting that parents can best shape their child's behavior and conscience by showing interest and caring, complimenting good behavior, providing consistent, appropriate limits, and setting good examples).

119. See BRAZELTON, *supra* note 6, at 260 (explaining that physical punishment has real disadvantages in that it lets the child see you lose control and act physically aggressive); Howard, *supra* note 85, at 1365 (contending that physical punishment, at best, has short term effectiveness and should only be a small part of the structure of discipline for children); Overby, *supra* note 69, at 27 (attacking the use of physical punishment and proclaiming that "[c]orporal punishment is not only less effective than positive reinforcement but is also potentially harmful and teaches children that physical aggression is an acceptable means of dealing with anger"); Stein, *supra* note 91, at 132 (advocating discipline based on anticipatory guidance, behavior modification, improved parent-child communication skills, and effective limit setting rather than physical punishment).

parent-child communication skills, and effective limit-setting is more appropriate for pediatric counseling.<sup>120</sup>

Similarly, T. Berry Brazelton, a leading pediatric authority on child development and the "Dr. Spock"<sup>121</sup> for the current generation of parents, has written, "*Physical punishment has very real disadvantages*. Remember what it means to a child to see you lose control and act physically aggressive. It means you believe in power and physical aggression."<sup>122</sup>

Finally, a task force on violent prevention in pediatrics concluded:

**Finding:** Corporal punishment has many adverse side effects, including increased probability of violent behavior and acceptance of violent behavior later in life; furthermore, it is no more effective than other modes of discipline in the short-term and less effective in the long-term.

**Recommendation:** *Pediatricians should work toward the ultimate goal of ending corporal punishment in homes and schools.*<sup>123</sup>

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120. Stein, *supra* note 91, at 132. *But see* Needlman, *supra* note 60, at 56 (observing that there are more effective techniques for disciplining children than corporal punishment and that pediatricians should help parents "renounce spanking or at least reserve it for extreme circumstances" but that "[t]here is no evidence that spanking per se is harmful").

Although experts in childhood discipline oppose corporal punishment, there is considerable support for corporal punishment among primary care physicians. In one statewide survey, the researcher found support for corporal punishment among 70% of family physicians and 59% of pediatricians. *See* McCormick, *supra* note 78, at 3163 (revealing that most family physicians support corporal punishment even though evidence suggests it can be harmful).

121. The reference is to Dr. Benjamin Spock, whose classic book, *BABY AND CHILD CARE*, had a 40th Anniversary Edition in 1985. *See* BENJAMIN SPOCK & MICHAEL B. ROTHENBERG, *BABY AND CHILD CARE* (40th Anniversary ed. 1985). While Dr. Spock was a reluctant advocate of limited corporal punishment for many years, he ultimately has come to disapprove of its use in child rearing. *See* BENJAMIN SPOCK, *DR. SPOCK ON PARENTING* 151-52 (1988) (stating that he originally avoided completely coming out against physical punishment due to his belief that it would disturb parents if a professional person implied he knew how to treat children better than the parents).

122. BRAZELTON, *supra* note 6, at 260.

123. *The Role of the Pediatrician in Violence Prevention*, *supra* note 55, at 580; *see also* Lawrence S. Wissow & Debra Roter, *Toward Effective Discussion of Discipline and Corporal Punishment During Primary Care Visits: Findings From Studies of Doctor-Patient Interaction*, 94 *PEDIATRICS* 587, 587 (1994) (discussing the harms from corporal punishment of children and methods for physicians to use in order to guide parents toward alternative methods of discipline).

The American Academy of Pediatrics "strongly opposes striking a child." *See* American Academy of Pediatrics, *Physical Punishment*, *CHILD HEALTH MONTH*, Oct. 1997 (visited Mar. 10, 1998) <<http://www.aap.org/advocacy/childhealthmonth/spank.htm>>.

These experts all emphasize an important point: whatever the benefits of corporal punishment in shaping childhood behavior, those benefits can be achieved with other methods of discipline.<sup>124</sup> Moreover, the other methods can provide their benefits without posing the risks of corporal punishment to the welfare of children immediately and later in life.<sup>125</sup>

## VII. THE LEGAL FRAMING OF CORPORAL PUNISHMENT

Given the problems with corporal punishment, we might expect the law to show little tolerance for it. Indeed, a few countries forbid corporal punishment by parents entirely. In 1979, the International Year of the Child, Sweden became the first country to prohibit corporal punishment of children.<sup>126</sup> Between 1983 and 1987, Finland, Denmark, and Norway also banned corporal punishment.<sup>127</sup> In these four countries, parents are not ordinarily prosecuted simply for a mild spanking—the bans were incorporated into the countries' civil codes and carry no penalties.<sup>128</sup> Rather, the Scandinavian countries have relied primarily on education about the dangers of corporal punishment and the availability of alternative methods of discipline to change behavior.<sup>129</sup> Instead of leading to greater intervention by the state into the family, the laws have apparently been followed by lower rates of intervention.<sup>130</sup> In 1989, Austria became the fifth country to ban corporal punishment of children.<sup>131</sup>

Despite the example of the Scandinavian countries and Austria, the law in this country has remained quite permissive of corporal punishment,<sup>132</sup> and the permissiveness reflects the way

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124. Refer to notes 86-110 *supra* and accompanying text (providing a number of effective alternatives to and ways to avoid the need for corporal punishment).

125. Refer to Part V *supra* (discussing the potential harmful effects of corporal punishment).

126. The ban on corporal punishment also includes a ban on "other injurious and humiliating treatment." NEWELL, *supra* note 53, at 70-73. The societal move against corporal punishment in Sweden began much earlier than 1979; by 1966, the law expressly permitting corporal punishment by parents had been repealed. *See id.* at 70-71.

127. *See id.* at 67-96.

128. Nevertheless, because corporal punishment of children is no longer an accepted exception to prohibitions on assault, occasional prosecutions for spanking are possible. *See id.* at 81 (reporting that in 1984, a Swedish father was fined a nominal amount for spanking his son).

129. *See id.* at 69; Joan Senzek Solheim, *A Cross-Cultural Examination of Use of Corporal Punishment on Children: A Focus on Sweden and the United States*, 6 CHILD ABUSE & NEGLECT 147, 152 (1982).

130. *See* NEWELL, *supra* note 53, at 70.

131. *See id.* at 67-69.

132. Refer to Part IV *supra* (discussing the law in the United States on corporal

we have chosen to conceptualize the issue. While we might consider corporal punishment from the perspective of the child, we have chosen instead to consider it from the perspective of the parents. Or, to put it another way, corporal punishment is viewed as an issue of parental rights rather than as an issue of children's rights. Either framework is plausible, but they lead to very different results.

From the parental perspective, corporal punishment implicates the fundamental right of parents to direct the upbringing of their children. The State may protect children from abuse and neglect and, therefore, may ensure that parents feed, educate, and secure health care for their children. Nevertheless, parents enjoy a broad range of discretion to decide how children should be raised. The constitutional dimension of this parental right was first enunciated by the Supreme Court in two cases in the 1920s. In *Meyer v. Nebraska*,<sup>133</sup> the Court discussed parental rights in the context of childhood education.<sup>134</sup> Robert Meyer was convicted of unlawfully teaching a ten-year old pupil in a parochial school to read German.<sup>135</sup> By teaching German to the student, Mr. Meyer violated a Nebraska law that prohibited the teaching of languages other than English to students who had not passed the eighth grade.<sup>136</sup> The law also required that classes in subjects other than language be taught exclusively in English.<sup>137</sup> The Supreme Court struck down the law, which was designed to weaken the ties of immigrant families to their native countries, on the grounds that it interfered with the freedom of teachers to pursue their occupations of choice and the freedom of parents to bring up their children, including the authority to determine the education of their children.<sup>138</sup>

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punishment by parents).

133. 262 U.S. 390 (1923).

134. *See id.* at 398-401 (stating that "the legislature ha[d] attempted materially to interfere . . . with the power of parents to control the education of their own [children]").

135. *See id.* at 396-97.

136. *See id.* at 397 (setting forth the relevant sections of the statute violated by Mr. Meyer).

137. *See id.*

138. *See id.* at 401-03 (affirming that the state has a right to promote public safety by attempting to inhibit American-born children from following foreign ideals, but that this right must be subject to certain fundamental rights of individuals). The Court acknowledged that the freedom of parents to control the education of their children is not infringed by state laws requiring compulsory attendance at some school and state curricular requirements for schools that the state supports. *See id.* at 402-03 (noting that those matters were not at issue).

The constitutional rights of parents were reaffirmed by the Court two years later in another case involving childhood education. In *Pierce v. Society of Sisters*,<sup>139</sup> a sectarian school and a military academy challenged an Oregon statute requiring education of children in public schools through at least the eighth grade.<sup>140</sup> According to the Court, the law

unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.<sup>141</sup>

In recent years, when explaining the scope of the Fourteenth Amendment's guarantee of liberty and/or privacy, the Court has repeatedly cited *Meyer* and *Pierce* as establishing a right of parents "to direct the education and upbringing of one's children."<sup>142</sup>

The right of parents to raise their children without governmental interference reflects a number of considerations. As the Supreme Court recognized in *Skinner v. Oklahoma*,<sup>143</sup> procreation is one of our fundamental rights.<sup>144</sup> For many persons, becoming a parent is the most important role they can assume, both in terms of expressing their individuality and in terms of making their contribution to society.<sup>145</sup> All of us will leave our legacy in different ways, and many people see their offspring as the core of their legacy.<sup>146</sup> Procreation is also an important way for people to express their love and commitment to another person. For many people, the ultimate intertwining of two individuals is their creating

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139. 268 U.S. 510 (1925).

140. See *id.* at 530-32 (describing the purpose of the Act and the nature of the schools challenging said Act).

141. *Id.* at 534-35.

142. *Washington v. Glucksberg*, 117 S. Ct. 2258, 2267 (1997); see also *Planned Parenthood v. Casey*, 505 U.S. 833, 849 (1992) (discussing the right of a person to make "basic decisions about family and parenthood"); *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (noting that the Court's "jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children"); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (observing that the individual's right of privacy extends to activities relating to "child rearing and education").

143. 316 U.S. 535 (1942).

144. See *id.* at 541 (describing procreation as "one of the basic civil rights of man").

145. See W. Penn Handwerker, *Politics and Reproduction: A Window on Social Change*, in *BIRTHS AND POWER* 1, 1 (W. Penn Handwerker ed., 1990) (noting that parents tend to perceive childbirth and the surrounding events as statements of individuality).

146. See A. F. ROBERTSON, *BEYOND THE FAMILY* 7 (1991) (explaining that because children raise their own children, they extend reproductive credit to the next generation).

and giving birth to a unique, new person. If procreation is to have its fullest meaning, people must not only be able to bear children, but also must be able to raise the children they have borne. Procreation would lose much of its meaning if children could be taken away immediately after birth and raised by the State.

Parental rights in child rearing also reflect the inability of children to exercise their own rights and our sense that we can trust parents most to look out for the interests of children.<sup>147</sup> Parental love leads people to undertake great sacrifices for their children, sacrifices that other people would likely not make.<sup>148</sup>

Finally, we defer to parental authority because we do not want the State making decisions about the raising of children. Family (and individual) autonomy reflects both the desire to rest important decisions in the hands of the family (or the individual) as well as the desire to take those same decisions out of the hands of the State.<sup>149</sup>

Given all of the strong reasons for parental authority, we defer to parents on matters of child rearing as long as the parental decisions are not clearly unreasonable.<sup>150</sup> Accordingly, parental choices for discipline are accepted as long as the discipline is not clearly harmful.<sup>151</sup> Because we cannot say that spanking is clearly unreasonable, at least when applied with mild force, we do not prohibit corporal punishment of children.<sup>152</sup> As discussed, empirical

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147. See *Parham*, 442 U.S. at 602 (noting that "natural bonds of affection lead parents to act in the best interests of their children"); Francis Barry McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 GA. L. REV. 975, 1017-18 (1988).

148. See Catherine L. Leone, *The Politics of Parenthood: Fairness, Freedom, and Responsibility in American Reproductive Choices*, in BIRTHS AND POWER 113, 117-18 (W. Penn Handwerker ed., 1990) (listing sacrifices made in the name of parenthood such as loss of freedom, "driving more carefully, curtailment of drinking alcohol, retiring from dangerous sports, deleting profanity from the vocabulary, and coming home earlier from social events").

149. See Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 782-84 (1989). Although concerns about governmental control play an important role in parental authority, it is important to note that the parental right is not simply a right against the State; it is also a right against private persons. If a child psychologist observed a misbehaving child in the park and felt that the child's parent was unable to control the child or that the parent was not around, the psychologist would not be free to spank the child to stop the misbehavior without the parent's consent.

150. See *Prince v. Massachusetts*, 321 U.S. 158, 165-67 (1944) (explaining that society's interest in protecting the welfare of children acts as a limitation on parental rights).

151. See *Sweaney v. Ada County*, 119 F.3d 1385, 1391-92 (9th Cir. 1997) (noting that, under *Prince*, parental rights are subject to limitation when parental decisions appear to jeopardize the health or safety of the child).

152. See, e.g., *Clark v. Clark*, 683 N.E.2d 800, 803 (Ohio Ct. App. 1996) (finding that although appellant's corporal punishment of his daughter was "unwarranted and clearly excessive under the circumstances, . . . it did not create a substantial risk of physical harm" and, thus, did not constitute child abuse).



evidence suggests that corporal punishment provides no benefit over alternative methods of discipline and that corporal punishment is always harmful.<sup>153</sup> Nevertheless, our understanding of the effects of corporal punishment remains sufficiently uncertain that courts might reasonably conclude they lack a firm enough basis to overcome the presumption in favor of parental autonomy in child rearing.<sup>154</sup>

An alternative to the parental perspective on corporal punishment is the child's perspective.<sup>155</sup> Instead of viewing the right at stake as the right of parents to discipline their children as they see fit, we could view the right at stake as the right of children to be free of unwanted touchings (*i.e.*, unwanted bodily contact).<sup>156</sup> This right is also of fundamental importance.<sup>157</sup> In all states, unwelcome touchings by another person constitute a battery, both under tort law and criminal law,<sup>158</sup> and the touching need not be harsh to amount to a battery.<sup>159</sup> Similarly, the Supreme Court has recognized that people are protected under the Constitution from unwelcome touchings committed by the State.<sup>160</sup>

The right to be free of unwanted touchings reflects our society's deep concern with the individual's need for bodily integrity.<sup>161</sup> Interferences with bodily integrity are profoundly violative of a person, and they compromise the freedom of individuals to

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153. Refer to Parts V & VI *supra*.

154. Refer to notes 79-82 *supra* and accompanying text.

155. See Patrick Henigan, Note, *Is Parental Authority Absolute? Public High Schools Which Provide Gay and Lesbian Youth Services Do Not Violate the Constitutional Childrearing Right of Parents*, 62 BROOK. L. REV. 1261, 1282-83 (1996) (detailing the growth in the constitutional rights of children as a limit on parental control).

156. See *Vacco v. Quill*, 117 S. Ct. 2293, 2301 (1997) (referring to the rights of bodily integrity and freedom from unwanted touching as "well established, traditional rights").

157. See *id.*

158. See KEETON ET AL., *supra* note 9, § 9 (describing the elements of a tortious battery); WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 7.15 (1986) (identifying the elements of a criminal battery).

159. Under tort law, any unwanted physical contact is a battery, although slight contact may yield little in damages. See KEETON ET AL., *supra* note 9, § 9. In most states, a criminal battery requires a physical injury or an unwanted sexual advance, but a minority of states do not require a physical injury for a nonsexual battery. See LAFAVE & SCOTT, *supra* note 158, § 7.15.

160. See *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 269-79 (1990) (discussing the history of the common law doctrine of informed consent and the view that it generally encompasses a competent person's right to refuse life sustaining medical treatment).

161. See *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891) (observing that "[n]o right is held more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others").

control their destiny.<sup>162</sup> As the Supreme Court has observed, the right to be free of unwanted physical invasions of privacy is "basic to a free society."<sup>163</sup> Unwanted touchings are also a sign of disrespect for the person. Accordingly, unwanted bodily invasions are prohibited even if designed to save the person's life.<sup>164</sup> From this perspective, there is no need to demonstrate that corporal punishment has harmful physical or psychological effects on the child.<sup>165</sup> The punishment itself is a serious harm.<sup>166</sup>

We might conclude that the child's perspective is less appropriate for corporal punishment than the parent's perspective, because children typically enjoy fewer rights and privileges than adults.<sup>167</sup> Children may not drive,<sup>168</sup> vote,<sup>169</sup> or purchase firearms.<sup>170</sup> However, the reasons why we limit children's rights<sup>171</sup> do not carry over very well to the right to be free of physical assault. We ordinarily limit children's rights because they do not have the maturity to exercise those rights on their own.<sup>172</sup> A two-year-old is

162. Cf. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 191-93 (1989) (chronicling the abuse a four-year-old boy endured, which resulted in permanent brain damage and severe mental retardation).

163. *Schmerber v. California*, 384 U.S. 757, 767 (1966) (quoting *Wolf v. Colorado*, 338 U.S. 25, 27 (1949), for the proposition that the Fourth Amendment protects one's privacy against "arbitrary intrusions by the police").

164. Thus, individuals have a right to refuse life-sustaining medical treatment. See generally *Cruzan*, 497 U.S. at 279 (noting that the Constitution grants a competent person the protected right to refuse lifesaving hydration and nutrition).

165. Refer to Part V *supra* (reviewing the potential for damage connected to corporal punishment).

166. See NEWELL, *supra* note 53, at 15.

167. For a thoughtful analysis of children's rights, see generally LAURA M. PURDY, *IN THEIR BEST INTEREST?* (1992).

168. See, e.g., ALA. CODE § 32-5-64 (1989) (prohibiting minors under 16 years old to drive, unless the minor is enrolled in a state approved driver training program); GA. CODE ANN. § 40-5-24 (1997) (allowing 15-year-olds to apply for an instruction permit); LA. REV. STAT. ANN. § 416.1 (West Supp. 1997) (making it unlawful for anyone under 17 years of age to drive between the hours of 11:00 p.m. and 5:00 a.m. Monday through Thursday, and between midnight and 5:00 a.m. Friday through Sunday); N.H. REV. STAT. ANN. § 263:16 (1993) (forbidding persons under 18 years of age to obtain a driver's license, with few exceptions).

169. See U.S. CONST. amend. XXVI, § 1 (guaranteeing U.S. citizens over 18 years of age the right to vote).

170. Many state statutes prohibit the selling of firearms to persons under 18 years of age. See, e.g., FLA. STAT. ANN. § 790.17 (West Supp. 1998); 720 ILL. COMP. STAT. § 5/24-3 (Michie Supp. 1997); MASS. GEN. LAWS ANN. ch. 140, § 131E (West 1991); N.J. STAT. ANN. § 2C:58-3(c)(4) (West 1995); OHIO REV. CODE ANN. § 2923.211 (Anderson 1996); R.I. GEN. LAWS § 11-47-35.2 (Supp. 1997).

171. See Bob Franklin, *Children's Political Rights*, in *THE RIGHTS OF CHILDREN* 24, 25-29 (Bob Franklin ed., 1986) [hereinafter *RIGHTS OF CHILDREN II*] (considering and rejecting paternalistic reasons for limiting children's rights); M.D.A. FREEMAN, *THE RIGHTS AND WRONGS OF CHILDREN* 1-2 (1983) (analyzing the reasons why children are not allowed to vote, which include incompetence, lack of experience, and irrationality).

172. See Franklin, *supra* note 171, at 27-28; FREEMAN, *supra* note 171, at 1-2.

simply not able to cast an informed ballot or even to cast a ballot at all.<sup>173</sup> With the right to be free of unwanted touchings, on the other hand, the child's immaturity, vulnerability, and lack of power all suggest the need for greater protection than for adults. It is precisely because children often cannot understand why they are being hit, because they are susceptible to serious injury, and because they cannot protect themselves that we should be especially reluctant to tolerate physical assaults of children.

From this perspective, the burden should lie with proponents of corporal punishment to demonstrate a real need for its use. If there is to be a role for corporal punishment, that role must be justified by some substantial benefit in order to overcome the presumption that people must not be assaulted without their consent.

We might try to justify corporal punishment on the ground that it is an important component of parental discipline, but that case has not yet been made. The evidence about the harms of corporal punishment may be open to question, but so is the evidence in support of a role for corporal punishment.<sup>174</sup> There are studies suggesting some benefit from spanking,<sup>175</sup> but, in the words of a leading proponent of corporal punishment, the data is "sketchy."<sup>176</sup> Moreover, the evidence supporting corporal punishment suggests a very limited role for its use, a role that is sharply at odds with what is permitted under state law.<sup>177</sup> The studies in support of corporal punishment suggest a benefit from spanking only when the child "is between ages 2 and 6," and the spanking "is limited to a maximum of two slaps to the buttocks with an open hand, . . . is used to supplement positive parenting, not to replace it, . . . [and] is used primarily to back up less aversive discipline responses, such as verbal correction or time-out."<sup>178</sup>

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173. Refer to note 169 *supra*.

174. Refer to Part V *supra*.

175. See generally Anthony M. Graziano & Karen A. Namaste, *Parental Use of Physical Force in Child Discipline*, 5 J. INTERPERSONAL VIOLENCE 449, 456 (1990) (reporting findings from their study in which a majority of the respondents thought their use of spankings was usually "helpful" to "very helpful").

176. Larzelere, *supra* note 80, at 204.

177. See Murray A. Straus & Carrie L. Yodanis, *Corporal Punishment in Adolescence and Physical Assaults on Spouses in Later Life: What Accounts for the Link?*, 58 J. MARRIAGE & FAM. 825, 826 (1996) (observing that corporal punishment is legal in all 50 states).

178. Larzelere, *supra* note 80, at 204 (advocating these conditions as the distinctions between abusive and beneficial forms of corporal punishment); see also Robert E. Larzelere, *Response to Oosterhuis: Empirically Justified Uses of Spanking: Toward a Discriminating View of Corporal Punishment*, 21 J. PSYCHOL. & THEOLOGY 142, 142-43 (1993). But see *id.* at 143 (observing that the combination of noncorporal punishment and reasoning is as effective as corporal punishment together with reasoning); Murray A. Straus, *Corporal Punishment by Parents*, in DEBATING

Finally, even if there is some benefit from spanking, we have already seen that alternatives are available to ensure appropriate discipline of children that avoid the potential harms of corporal punishment.<sup>179</sup>

As I have observed, how we come down on corporal punishment depends very much on how we frame the issue. If we frame it as an issue of parental rights,<sup>180</sup> with the burden on opponents of corporal punishment to demonstrate its harm convincingly, then that burden has not been met. If we frame the issue as one of children's rights, with the burden on proponents of corporal punishment to demonstrate its benefits convincingly, then that burden has also not been met.

Each of the two ways to frame the issue are plausible. Why, then, have we chosen to frame the issue as one of parental rights?

### VIII. EXPLAINING THE LEGAL FRAMEWORK

The choice of the parental perspective likely reflects two important features of our society. First, we undervalue children.<sup>181</sup> Second, we overvalue pain.<sup>182</sup>

Our society's undervaluation of children has been well documented. At one time, children were considered the chattel of their fathers.<sup>183</sup> Fathers were permitted to exploit the labor of their children by removing them from school and hiring them out to others.<sup>184</sup> They could also determine their children's marital

CHILDREN'S LIVES, *supra* note 6, at 197, 219-20 (responding to and disagreeing with Larzelere).

179. Refer to Part VI *supra*.

180. Refer to notes 133-42 *supra* and accompanying text (discussing two Supreme Court decisions affirming constitutional rights of parents to raise their children as they deem necessary). See also GARY B. MELTON, CHILD ADVOCACY 5-6 (1983) (reviewing court cases which traditionally have supported parental rights to raise their children as they deem necessary).

181. See Patricia Hewitt, *Foreword* to THE RIGHTS OF CHILDREN II, *supra* note 171, at vii, vii (describing the lack of attention given to children's rights).

182. Refer to notes 217-54 *infra* and accompanying text (analyzing society's notions about pain and suffering).

183. See Robert E. Shepherd, Jr., *The Abused Child and the Law*, in THE RIGHTS OF CHILDREN 174, 177 (Albert E. Wilkerson ed., 1973) (noting that under Roman law, fathers had absolute power over their children's lives, while old English law gave fathers the right to reasonably discipline their children); Barbara Bennett Woodhouse, "Who Owns the Child?": Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995, 1036-50 (1992) (describing the numerous rights fathers maintained over their children).

184. See Bob Franklin, *Introduction* to RIGHTS OF CHILDREN II, *supra* note 171, at 10, 10 (detailing the young age at which children were sent out to serve apprenticeships); Woodhouse, *supra* note 183, at 1046 (explaining the paternal right to

partners.<sup>185</sup> There has been considerable change in how we treat children.<sup>186</sup> Child labor laws have been passed, all children can receive a public education through the twelfth grade, and children are allowed to reach adulthood and choose their spouses themselves.<sup>187</sup> Nevertheless, we still do not see children fully as people who are entitled to the same rights as others.<sup>188</sup>

Indeed, even with some of our most fundamental rights—the provisions of the Bill of Rights—children receive short shrift.<sup>189</sup> The courts have seriously curtailed children's First Amendment rights of expression, including the core right of freedom in political expression.<sup>190</sup> For example, the Supreme Court gives school officials broad latitude in regulating the political speech of their students.<sup>191</sup> In a case involving speech in student government, the Court wrote that "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."<sup>192</sup> Similarly, the Sixth Circuit upheld

transfer children to others for child labor).

185. See Woodhouse, *supra* note 183, at 1046. Society's undervaluation of children has a long and disturbing pedigree. For a discussion of the treatment of children in Europe and North America from antiquity through the nineteenth century, see generally THE HISTORY OF CHILDHOOD (Lloyd deMause ed., 1974).

186. See FREEMAN, *supra* note 171, at 16 (commenting that children are freer today than they were a century ago).

187. An Iraqi-American man in Lincoln, Nebraska was recently charged with child abuse for marrying his 13-and 14-year-old daughters to Iraqi-Americans in the local community. See Don Terry, *Cultural Tradition and Law Collide in Middle America*, N.Y. TIMES, Dec. 2, 1996, at A10.

188. See Franklin, *supra* note 171, at 15 (contending that children are denied many rights which are considered by adults as essential for living a full, free life).

189. See, e.g., *Ingraham v. Wright*, 430 U.S. 651, 669-71 (1977) (holding that the Eighth Amendment's ban against cruel and unusual punishment does not apply to school children who are paddled).

190. See S. Elizabeth Wilborn, *Teaching the New Three Rs—Repression, Rights, and Respect: A Primer of Student Speech Activities*, 37 B.C. L. REV. 119, 120 (1995) (observing that "core political speech is no more protected in the public schools than a dirty limerick scrawled in a bathroom stall").

191. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) (upholding the suspension of a student for using sexual innuendo in the context of political discourse).

192. *Id.* at 683. In *Bethel*, the student had nominated a friend for a student government position by describing the friend as "firm in his pants," as someone who goes to "the climax" for everyone, and as someone who does not "come between" his fellow students and what is best for the school. See *id.* at 687 (Brennan, J., concurring). In addition to the suspension, the school disqualified the student as a candidate for graduation speaker. See *id.* at 678. In contrast, the state is restricted in the way it limits the content of the political speech of adults unless it can show that the speech is likely to incite or produce "imminent lawless action," *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), is "inherently likely to provoke violent reaction," *Cohen v. California*, 403 U.S. 15, 20 (1971), is defamatory, see *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), or is obscene, see *Miller v. California*, 413 U.S. 15 (1973).

the disqualification of a high school student's candidacy for his student council presidency because of a campaign speech, on the ground that school officials must have freedom to decide which pedagogical values to emphasize and how best to promote those values.<sup>193</sup>

The First Amendment right to freedom from censorship of the press has also been eviscerated for students.<sup>194</sup> In its leading case on the issue, the Supreme Court upheld a high school principal's decision to ban student newspaper articles discussing student pregnancy and the impact of parental divorce on students, employing the undemanding standard that the censorship be "reasonably related to legitimate pedagogical concerns."<sup>195</sup> Freedom of religious expression carries over weakly to children as well.<sup>196</sup> When the Supreme Court recognized the right of the Amish to stop the formal education of their children after the eighth grade in *Wisconsin v. Yoder*,<sup>197</sup> only Justice Douglas, in dissent, believed that if the children exhibited sufficient maturity

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193. See *Poling v. Murphy*, 872 F.2d 757, 762 (6th Cir. 1989). In *Poling*, the student was disqualified because he mocked the stutter of an assistant principal. See *id.* at 759-60. The student said in his campaign speech that "[t]he administration plays tricks with your mind and they hope you won't notice. For example, why does Mr. Davidson stutter while he is on the intercom? He doesn't have a speech impediment." *Id.* at 759.

To be sure, the Supreme Court has also limited the freedom of public employees to speak about matters that are not of "public concern" in the workplace. See *Connick v. Myers*, 461 U.S. 138, 146-49 (1983) (upholding the dismissal of an assistant district attorney after she circulated a questionnaire challenging the office's transfer policy).

194. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 274 (1988) (concluding that a principal acted reasonably in deleting two articles from a student newspaper).

195. *Id.* at 273. In contrast, censorship of newspapers outside the schools is highly disfavored. See *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (observing that prior restraint of the press is limited to "exceptional cases," including obstructions of a war effort, incitements to acts of violence, and publication of obscenity).

Under the *Hazelwood* standard, a lower court upheld a school's one-day suspension of a student for wearing a T-shirt with the words "Drugs Suck!" imprinted on the front, noting that the school's action served the legitimate educational goal of "teaching students the boundaries of socially appropriate behavior." *Broussard v. School Bd.*, 801 F. Supp. 1526, 1535 (E.D. Va. 1992). This standard leaves student speech with less protection than "a commercial for Hostess Twinkies." *Wilborn*, *supra* note 190, at 122. The government may not limit commercial speech unless its regulation "directly advances" a "substantial" government interest, and the regulation "is not more extensive than is necessary to serve that interest." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980) (declaring unconstitutional a New York law prohibiting electric utilities from advertising to promote the use of electricity).

196. See *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972) (holding that the Free Exercise Clause of the First Amendment, as made applicable to the States by the Fourteenth Amendment, prevents Wisconsin from requiring public education of Amish children until the age of 16).

197. 406 U.S. 205 (1972).

to choose for themselves, they should be heard as to their own preferences.<sup>198</sup>

The Supreme Court has gutted other provisions of the Bill of Rights when applying them to children, including the right to a trial by jury when children are prosecuted in juvenile court.<sup>199</sup> Due process rights for children being committed to mental institutions are virtually nonexistent—parents may commit their children without a hearing or any other kind of legal scrutiny, and children may not petition for discharge until they reach an adult age.<sup>200</sup> Fourth Amendment protections have been limited such that school officials can search the purses of children, even without suspicion of any violation of the law.<sup>201</sup> The official need only suspect a breach of a school rule.<sup>202</sup> Moreover, the Court has dispensed with the requirement of probable cause, requiring only a reasonable suspicion that the student violated a school rule.<sup>203</sup>

To the extent that we recognize the interests of children, we often do so not because we value children so much, but because we serve the interests of adults by recognizing children's interests.<sup>204</sup> A minor's right to an abortion ensures that fewer children will become dependent on the state for financial support. Rehabilitation of juvenile offenders spares society the costs of future dangerous criminals.<sup>205</sup> Child labor laws reduce the pool of available workers, thereby driving up the wages of adult employees.<sup>206</sup>

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198. See *id.* at 243-46 (Douglas, J., dissenting in part) (discussing the contexts in which the Court has granted children constitutional protection over their actions, and the need for a child to be heard from when a decision on the child's educational future is being made).

199. See *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971) (determining that a trial by jury is not a constitutional requirement in a juvenile adjudication). To be sure, it would not be feasible for children to be tried by a jury of peers, but there are benefits to a jury trial other than being judged by one's peers (e.g., the benefit of having multiple decision makers reach a consensus instead of a single decision maker deciding on his or her own).

200. See James W. Ellis, *Due Process for Adolescents*, in *DEBATING CHILDREN'S LIVES*, *supra* note 6, at 272, 278.

201. See *New Jersey v. T. L. O.*, 469 U.S. 325, 345 (1985).

202. See *id.* at 341-42.

203. See *id.* at 341.

204. See Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1, 5-6 (1986) (indicating that powerful social goals, such as control of crime and regulation of abortion, are the real focus of laws that affect children).

205. See Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 17 (1994) (emphasizing that rehabilitating juvenile offenders is actually geared towards utility for adults).

206. See Minow, *supra* note 204, at 6 (noting that child labor laws came about after organized labor realized their increased bargaining power with a smaller labor pool).

The undervaluation of children pervades not only the law but also other aspects of social policy. In a number of respects, we do not ensure a decent life for children.<sup>207</sup> For example, children are the most likely people to be living in poverty.<sup>208</sup> According to recent data, more than twenty percent of children live in poverty, a rate that is one-and-one-half to eight times higher than rates in other industrialized countries.<sup>209</sup> Furthermore, millions of children go hungry for some part of a typical month.<sup>210</sup> Inadequate education also plagues this country's youth.<sup>211</sup> We permit many of our urban public schools to be overrun by violence, to have overcrowded classrooms, to maintain low graduation rates, to suffer crumbling infrastructures, and to use inadequate textbooks and supplies.<sup>212</sup> In addition, we tolerate student achievement levels in mathematics and science that put American children behind children in most other industrialized countries in international comparisons.<sup>213</sup>

Because children are undervalued, we are insufficiently sensitive to potential harms to them. As we have seen, despite the fact that corporal punishment poses serious risks of psychological and behavioral problems for the child, the law gives parents considerable rein to employ corporal punishment as they see fit.<sup>214</sup>

The law's tolerance for corporal punishment reflects not only the undervaluation of children, but also an overvaluation of pain and other kinds of suffering. In the United States, pain is seen as

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207. See *id.* at 6-8 (giving the examples of child poverty, neglect of foster care, child suicide, and nutrition deficiency).

208. See U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1997, at 8 tbl.2, 15 tbl.14, 476 tbl.739 (117th ed. 1997) (indicating that 21.4% of children under 18 were living in poverty, whereas only 12.1% of adults were living in poverty).

209. See CHILDREN'S DEFENSE FUND, THE STATE OF AMERICA'S CHILDREN YEARBOOK 1996, at 2, 6 (1996).

210. See *id.* at 18.

211. See generally JONATHAN KOZOL, SAVAGE INEQUALITIES (1991) (documenting the educational shortcomings of cities such as St. Louis, New York, Chicago, San Antonio, Camden, and Washington, D.C.).

212. See Peter Applebome, *Enrollments Soar, Leaving Dilapidated School Buildings Bursting at the Frayed Seams*, N.Y. TIMES, Aug. 25, 1996, at 24 (discussing the fiscal strife that has led to inadequate educational facilities for America's youth); Jane Gross, *Los Angeles Schools: Hobbled and Hurting*, N.Y. TIMES, Feb. 16, 1993, at A1 (exposing the harsh realities of an education system that is not conducive to learning).

213. See OFFICE OF POLICY & PLANNING, U.S. DEP'T OF EDUCATION, INTERNATIONAL EDUCATION COMPARISONS 22-23 (1992); Chester E. Finn, Jr., *Why America Has the World's Dimmest Bright Kids*, WALL ST. J., Feb. 25, 1998, at A22 (describing data from a 1995 international comparison of students in mathematics and science in which U.S. twelfth-graders finished 19th out of 21 in mathematics and 16th out of 21 in science).

214. Refer to Parts IV & V *supra* (analyzing the relevant law).



playing an important role in character development, and this belief has deep roots in American culture.<sup>215</sup> Punishment—and fear of punishment—have traditionally played a strong role in Christianity, the dominant American religion.<sup>216</sup> Accordingly, punishment of children is often seen as consonant with Biblical teachings.<sup>217</sup> In seventeenth and eighteenth century America, Puritan thought was influential in child rearing, and strict discipline, including public whippings, was thought to ensure eternal salvation by promoting obedience to the child's parents.<sup>218</sup> This perspective had a strong influence on parenting in the United States through the early nineteenth century.<sup>219</sup> The role of punishment in Christianity is particularly striking in evangelical and fundamentalist Protestant theology in which there is an emphasis on humility and the breaking and conquering of a child's will.<sup>220</sup> Many Christian theologians believe that the infliction of pain fosters the important value of obedience to parent and God.<sup>221</sup> In their view, corporal punishment plays a substantial role in child rearing.<sup>222</sup>

The experience of other kinds of suffering has also been important in Christianity.<sup>223</sup> Jesus set a profound example with his

215. See Judge Leonard P. Edwards, *Corporal Punishment and the Legal System*, 36 SANTA CLARA L. REV. 983, 988-90 (1996) (demonstrating that corporal punishment has its roots in the Colonial period, and still remains an integral part of American family life).

216. See PHILIP GREVEN, SPARE THE CHILD 55-60 (1990) (expounding on external punishment as the root of fear and pain for over 200 years). Punishment and fear are important in other religions; I single out Christianity because of its dominant place in American society.

217. See *id.* at 46-54 (detailing the Biblical justifications of more than 2000 years of violence and assaults against children). At its extreme, the Bible calls for capital punishment of the disobedient child, see *Deuteronomy* 21:18-21, or the child who curses a parent, see *Exodus* 21:17.

218. See Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1915 (1991) (describing the harsh treatment of Puritan children, based on original sin, leading to an adult that is extremely sensitive to shame).

219. See Rex Forehand & Britton McKinney, *Historical Overview of Child Discipline in the United States: Implications for Mental Health Clinicians and Researchers*, 2 J. CHILD & FAM. STUD. 221, 222-23 (1993).

220. See GREVEN, *supra* note 216, at 65-72 (considering the breaking of a child's will as the focal point of Protestant child rearing).

221. See *id.* at 72-81 (stating that Christian advocates believe pain and punishment should begin early and continue until children learn obedience and submission to parental authority).

222. See *id.* This is not to say that corporal punishment is strongly endorsed throughout Protestant theology—it is common to see preferences for alternative methods of discipline, with corporal punishment being reserved for children who do not respond to the alternatives. See *id.* at 82-96 (reflecting on the moderate Christian belief in corporal punishment as a last resort).

223. See MARGARET PABST BATTIN, *THE LEAST WORST DEATH* 233-34 (1994) (interpreting Christian values on suffering as a means "to the beatific world beyond death").

concern for the suffering of others; he also set an important example with his own deep suffering, which culminated in his crucifixion and which he overcame in his resurrection.<sup>224</sup> Identification with Jesus therefore means not only avoiding behavior that would cause suffering for others and taking action to relieve the suffering of others; it also includes experiencing and overcoming suffering.<sup>225</sup> In this view, just as Jesus's suffering ultimately was for the salvation of others, so a person's suffering today can benefit others.<sup>226</sup> By volunteering for a task that involves suffering, for example, we can spare others from that task and the suffering it may cause.<sup>227</sup> Suffering can also be explained in terms of its role in facilitating moral or spiritual development.<sup>228</sup> By enduring a trial of suffering, the individual is able to achieve a higher stage of personal development.<sup>229</sup> To a large extent, finding value in suffering is a necessary corollary to the belief in the infinite goodness of God.<sup>230</sup> A good God, it is believed, would not subject innocent persons to senseless suffering.<sup>231</sup> Accordingly, there must be value in their suffering.<sup>232</sup>

The belief in a salutary role for pain and suffering is manifest in many other aspects of American society.<sup>233</sup> Consider for example the maxims "spare the rod and spoil the child"<sup>234</sup> and "no pain, no gain." These common phrases send the message that progress and self-improvement cannot be achieved without hardship,

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224. See JOHN BOWKER, PROBLEMS OF SUFFERING IN RELIGIONS OF THE WORLD 46-47 (1970) (relating Jesus's suffering and concern for others' suffering to the foundation of the Christian response to suffering).

225. See *id.* at 72-73 (stating the Christian premises upon which suffering is based).

226. See *id.*

227. See *id.* at 74.

228. See *id.* at 45-46.

229. See Mary C. Rawlinson, *The Sense of Suffering*, 11 J. MED. & PHIL. 39, 59 (1986) (asserting that suffering is essential to personal growth and development).

230. See *id.* at 51, 53-54 (examining the tendency to search for value in human suffering to support the belief in a benevolent God).

231. See *id.* at 51 (relating Nietzsche's belief that suffering helps to restore the appropriate divine order and, thus, the "suffering of the innocents" is justified).

232. See *id.* at 54 (exploring the need for Christians to find value in suffering to sustain their belief in God's goodness).

233. See BATTIN, *supra* note 223, at 234 (discussing the ideal that personal growth results from physical and mental suffering).

234. While this phrase is attributed to the Bible, it actually comes from a poem, "Hudibras," by Samuel Butler, written in 1664. SAMUEL BUTLER, HUDIBRAS 143 (London, Frederick Warne & Co. 1880) (1664) ("Love is a boy, by poets styl'd, Then spare the rod, and spoil the child."). In Proverbs, it is written that "he who spares his rod hates his son, But he who loves him disciplines him diligently." *Proverbs* 13:24. For further discussion of this passage, see Carey, *supra* note 1, at 1005-06 (noting that the Bible says only that a loving parent should discipline his child, but observing that the Bible does not mention the effect of a lack of discipline).

that pain helps build character.<sup>235</sup> Similarly, our society tends to be critical of people who seek "easy outs" for the relief of pain and suffering or who try to achieve their goals with the assistance of drugs.<sup>236</sup> For example, we are critical of people who use medications like diazepam (Valium) to relieve anxiety instead of "toughing it out" or undertaking therapy to grapple with the psychological causes of their anxiety, and we are suspicious of people who try to lose weight with drugs that suppress appetite instead of through exercise and greater self-control at the dining table.<sup>237</sup> We are also critical of athletes who use drugs to enhance their performances, often citing the health risks from the drugs,<sup>238</sup> despite the fact that we encourage athletes to take much greater health risks as part of their participation in sports. Professional football players are not supposed to take anabolic (tissue-building) steroids for greater muscle bulk because of the potential harms from doing so, but they are expected to play a violent game in which players are routinely, often seriously, injured.<sup>239</sup>

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235. See BATTIN, *supra* note 223, at 234 (noting that a variety of cultural truisms reflect a societal belief that physical or mental pain builds character).

236. See *id.* at 233-34 (revealing that Christians believe suicide is a cowardly attempt to avoid suffering).

237. See Robert Dunlop, *Physician's Perspective on Suffering*, in SUFFERING 143, 150 (Betty Rolling Ferrell ed., 1996) (asserting that physicians avoid recognizing and responding to suffering by "relabeling" patients as anxious rather than as actually suffering from pain). It turns out that obesity is probably better viewed as a chronic disease like diabetes or hypertension, for which long-term drug use is necessary for treatment, rather than simply as a failure of will power. See David E. Schteingart, *Phenylpropanolamine in the Management of Moderate Obesity*, in OBESITY 220, 220 (Theodore B. VanItallie & Artemis P. Simopoulos eds., 1995) (concluding that treatment for moderate obesity should include the use of drugs as well as diet, exercise, and behavioral therapy). To be sure, some drugs for obesity have caused serious side effects and have been pulled off the market. These instances demonstrate the need for safer drugs, not a need to abandon drug treatment for obesity altogether.

238. See Thomas H. Murray, *The Coercive Power of Drugs in Sports*, HASTINGS CENTER REP., Aug. 1983, at 24, 29-30 (advocating sanctions for the use of performance-enhancing drugs because they are harmful and lack any corresponding social benefit).

239. See Norman Fost, *Banning Drugs in Sports: A Skeptical View*, HASTINGS CENTER REP., Aug. 1986, at 5, 6 (reporting that the prohibition on steroid use due to health concerns is at odds with the reality that football itself is eminently more dangerous than the drugs). Indeed, football players are expected to play even when they have suffered previous injuries that cause substantial pain and put them at an increased risk for permanent injury. See Stewart E. Niles, Jr., & Roderick K. West, *In Whose Interest? The Return of the Injured Athlete to Competition*, 25 SPG Brief 8, 12 (1996) (commenting that athletes tend to play injured out of concern for their job security). Not surprisingly, many retired football players cannot run, or even walk, without limping. See Fost, *supra*, at 6 (noting that professional football players are frequently permanently disabled by the sport).

Opponents of drug use by athletes make other arguments, but those arguments also are not persuasive. For example, it is sometimes argued that drug use injects an unnatural element into sports, but we tolerate other unnatural additions, like the replacement of the bamboo pole with a fiberglass pole in pole-vaulting or the

Because pain is perceived as a virtue, it is not surprising that physicians have given insufficient attention to pain relief.<sup>240</sup> The debate over physician-assisted suicide has shed considerable light on the failure of the medical profession to treat pain aggressively in their patients, even if the patients are dying and addiction is not a concern.<sup>241</sup> In the SUPPORT study, a major study of medical care for seriously ill patients, family members reported that in fifty percent of cases of patients who died in the hospital and who were conscious before their death, the patients had complained of suffering moderate to severe pain at least half of the time during their last three days of life.<sup>242</sup>

The failure of physicians to treat pain properly is especially prevalent in the treatment of children.<sup>243</sup> The use of anesthesia for infants and children has lagged greatly behind its use in adults.<sup>244</sup> Indeed, as recently as 1992, researchers reported that infants undergoing cardiac surgery did better if they were deeply anesthetized rather than only lightly anesthetized as was the common practice.<sup>245</sup> To some extent, the withholding of anesthesia reflects fears of adverse effects of anesthetic drugs on fragile infants,

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development of special nutritional aids in the laboratory, like Gatorade. *See id.* at 7. In the end, arguments against drug use often rest on the idea that drug use by athletes is at odds with the essence of athletic competition, but that is just another way of saying that we think it is wrong when we see people looking for painless ways to succeed.

240. *See* Betty Rolling Ferrell, *Humanizing the Experience of Pain and Illness*, in SUFFERING, *supra* note 237, at 211, 215 (questioning why the United States' advanced and highly technological healthcare system has historically and consistently undertreated patients' pain); DAVID B. MORRIS, *THE CULTURE OF PAIN* 21-22 (1991) (discussing the long tradition of physicians' neglecting pain). *See generally* Symposium, *Appropriate Management of Pain: Addressing the Clinical, Legal, and Regulatory Barriers*, 24 J.L. MED. & ETHICS 285 (1996) (discussing barriers to better pain control and efforts to overcome those barriers).

241. *See* David Orentlicher, *The Legalization of Physician-Assisted Suicide*, 38 B.C. L. REV. 443, 453-54, 459 (1997).

242. *See* The SUPPORT Principal Investigators, *A Controlled Trial to Improve Care for Seriously Ill Hospitalized Patients: The Study to Understand Prognoses and Preferences for Outcomes and Risks of Treatments (SUPPORT)*, 274 JAMA 1591, 1594 (1995).

243. *See* Mark C. Rogers, *Do the Right Thing: Pain Relief in Infants & Children*, 326 NEW ENG. J. MED. 55, 55 (1992) (observing that infants and children commonly receive inadequate pain relief).

244. *See id.* (urging that children should be provided the same pain-free intra-operative care that adult patients are provided).

245. *See* K.J.S. Anand & P.R. Hickey, *Halothane-Morphine Compared with High-Dose Sufentanil for Anesthesia and Postoperative Analgesia in Neonatal Cardiac Surgery*, 326 NEW ENG. J. MED. 1, 8 (1992) (warning that the results of the experiment were inconclusive, but revealing that the results showed that neonates might benefit from deeper anesthesia during cardiac surgery).

but it also reflects insensitivity to the pain of the children.<sup>246</sup> In an editorial accompanying the study of anesthesia of infants during cardiac surgery, the author observed that infants and children were still often receiving insufficient or even no treatment for pain during minor surgical procedures and after major surgical procedures, practices that would not be tolerated for adults.<sup>247</sup> Insensitivity to pain in infants persists.<sup>248</sup> Only last year, researchers reported on a new approach for preventing pain during circumcision of newborn boys,<sup>249</sup> and an accompanying editorial noted that circumcision was still being performed without analgesia in the usual case.<sup>250</sup> While it is commonly believed that there is no harm to the infant from the pain of circumcision, there is evidence of alterations in sleeping, feeding, and crying patterns as well as increased sensitivity to painful experiences for several months after circumcision.<sup>251</sup>

To be sure, there has been a strong push by the medical profession for more aggressive treatment of pain, even to the point of sedating dying patients into unconsciousness,<sup>252</sup> and inadequate

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246. See Rogers, *supra* note 243, at 56 (remarking that doctors are more concerned with the potential adverse effects of pain-relieving drugs on children than they are about the adverse effects of exposing the children to pain unnecessarily).

247. See *id.* at 56 (reporting that minor surgical procedures, such as bone marrow aspiration, are routinely performed on children with little or no pain medication even though the same is not true for adult patients).

248. See *id.* at 55-56 (asserting that it is common practice to perform minor and major surgical procedures on infants and children without the benefit of adequate anesthesia or other pain relief).

249. See Anna Taddio et al., *Efficacy and Safety of Lidocaine-Prilocaine Cream for Pain During Circumcision*, 336 NEW ENG. J. MED. 1197, 1200 (1997) (reporting that the use of lidocaine-prilocaine cream safely and efficiently reduces the pain of circumcision and recommending that doctors use the cream during such a painful surgical procedure).

250. See Thomas E. Wiswell, *Circumcision Circumspection*, 336 NEW ENG. J. MED. 1244, 1244 (1997) (noting that infants undergoing circumcision are not usually given analgesics to ease the pain of the procedure because it is erroneously believed that infants do not feel, localize, or remember pain); see also Janice Lander et al., *Comparison of Ring Block, Dorsal Penile Nerve Block, and Topical Anesthesia for Neonatal Circumcision: A Randomized, Controlled Trial*, 278 JAMA 2157, 2157 (1997) (reporting that in some areas, 64% to 96% of neonatal circumcisions are done without anesthesia).

251. See Taddio et al., *supra* note 249, at 1201 (recounting that physicians do not utilize analgesics during neonatal circumcision because they believe the pain associated with the procedure is "inconsequential," but noting, however, that untreated pain from circumcision has been linked to abnormal sleeping, feeding, and crying patterns and to increased pain during routine vaccinations at 4 to 6 months of age).

252. See Nathan I. Cherny & Russell K. Portenoy, *Sedation in the Management of Refractory Symptoms: Guidelines for Evaluation and Treatment*, J. PALLIATIVE CARE, Summer 1994, at 31, 31 (describing the dying patient's desire for deep sedation to alleviate the intolerable pain associated with terminal cancer notwithstanding the concomitant decrease in interactional awareness).

relief of pain reflects a number of concerns, including fears of legal liability.

Nevertheless, an important factor in the failure to treat pain properly is a sense among many physicians that suffering has value and that patients and their families benefit from having endured a trial of pain.<sup>253</sup> Consider, for example, the following description of the death of a young child from a brain disease by Dr. Ira Byock, a physician who is a prominent proponent and practitioner of hospice care:

Michael's dying formed a crucible in which people were purified and forever altered. As he lay dying, his family was transformed from a collection of related people to a process. . . . And those of us on the periphery of the family circle contributed to transforming "community" into a coordinated process of committed caring.

One of the early lessons of Michael's dying had to do with the nature of tragedy. At first glance, his dying appeared to be a horrible tragedy: A little boy with no childhood or future was suffering and dying from something totally beyond anyone's control. But his own and his family's suffering and devastation shrank compared with the joy and growth he engendered.<sup>254</sup>

In discussing the death of another patient, a young man with AIDS, Dr. Byock addresses the concern about the family's burdens in taking care of a dying patient:

Sometimes, more than dying, people dread becoming dependent on caregivers and making them feel responsible for both financial and physical needs as well as the inevitable emotional demands. . . .

However, to speak of this time solely as a "burden" misrepresents the nature of the experience. Although a patient may feel that this care and attention is unduly taxing or unpleasant, caregivers frequently tell me that they regard this time as precious. The burden is rarely too heavy. Far more often, they say it feels like a sacred responsibility that they want to shoulder—that they *need* to shoulder. . . . Allowing a spouse or grown child to care for one becomes a final gift from the person dying.<sup>255</sup>

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253. Cf. Dunlop, *supra* note 237, at 150-51 (maintaining that physicians inadequately treat their patients' pain because they lack first-hand experience with suffering and training in pain control is minimal).

254. IRA BYOCK, *DYING WELL* 175 (1997).

255. *Id.* at 159-60. While there is some truth to what Dr. Byock writes, he makes a small part of the picture into a very big part. Nessa Coyle, a supportive care

As mentioned earlier, this tendency by Dr. Byock to glorify the experience of suffering has strong religious roots.<sup>256</sup> In the words of a Catholic priest active in the healing ministry:

The purpose of suffering is growth. . . . All suffering experiences can be growth experiences. Suffering often forces us to let go of situations, jobs, or people. It also opens the door to receiving a lot more as well. Adversity builds character. Crisis gives human beings a proof of their abilities that they probably wouldn't even try to use unless they were forced to. . . .

Suffering changes our perspective on life. . . . Suffering puts important things in focus. . . . When you're faced with accepting some type of permanent change that you can't avoid—even death—you start paying attention to the things that really are important in life. . . .

People who are suffering become much more sensitive, much more caring, and much more aware. Maybe it's the depth of pain that makes a person much more sensitive to others. When you are suffering, you empathize with everybody's suffering in the world.<sup>257</sup>

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nurse at the Memorial Sloan-Kettering Cancer Center in New York City, provides a more realistic appraisal of the family's burden. In reporting typical comments by family members, she writes:

Families become exhausted by attempting to meet both the needs of the patient and the needs of the family as a whole. These statements reflect the resultant irritability and stress.

Everything's such a production. Everything takes so long. To eat, to dress, everything.

...

Others look forward to the weekend[s], but I dread them.

...

This is all such a burden on me. I can't sleep, can't eat. I feel I'm cracking up. I can't cope. I'm the one who is here all the time. Had to do the income tax, have to dash out to shop and dash home. His brothers stay for a while and then say good-bye, good luck. My niece has her own life to lead. Everyone is getting tired. They have their own lives to lead.

Nessa Coyle, *Suffering in the First Person*, in *SUFFERING*, *supra* note 237, at 29, 44.

256. Refer to notes 217-32 *supra* and accompanying text (exploring the religious roots of the search for value in human suffering). See also Father Robert Smith, *Theological Perspectives*, in *SUFFERING*, *supra* note 237, at 159, 165-66 (observing that the "mystery of suffering" is a common theme in religious scriptures and literature).

257. Edward B. Pritchard, "What Am I Learning from This Suffering?", in *WHEN THE WORST THAT CAN HAPPEN ALREADY HAS* 78, 79-80 (Dennis Wholey ed., 1992).

I do not disagree that some people gain much from suffering. My concern begins when people generalize such gains to other persons who are suffering or when people cite the benefits from suffering as arguments against efforts to diminish suffering (e.g., as arguments against proposals to reduce corporal punishment of chil-

Because we overvalue pain and suffering, we are inclined to see greater virtue in corporal punishment than is justified by its actual benefits and harms. Indeed, we end up mistakenly viewing the pain caused by spanking as salutary to a child's social development rather than more appropriately as harmful to the child's psychological and behavioral well-being.

#### IX. CONCLUSION

If, as I have argued, we view corporal punishment from the perspective of parents rather than that of children because we undervalue children and overvalue pain, it follows that we need to reconsider our choice of perspective. By shifting to the child's perspective and rejecting *any* use of corporal punishment—even to the point of prohibiting corporal punishment as in Scandinavia and Austria—we would bring social policy more in line with the appropriate valuations of children and pain. We would also bring about at least two important social benefits. First, by reducing the use of corporal punishment, we would enhance the quality of childhood discipline. With the substitution of alternative means of discipline for corporal punishment, parents would be relying on disciplinary methods that appear to be more effective and less harmful to children. Second, shifting to the child's perspective would send an important message about the necessity of ending violence against children. It is difficult for society to send a clear message against the use of physical violence when it sanctions corporal punishment of children.



