

# WHERE AND HOW TO DRAW THE LINE BETWEEN REASONABLE CORPORAL PUNISHMENT AND ABUSE

DORIANE LAMBELET COLEMAN\*

KENNETH A. DODGE\*\*

SARAH KEETON CAMPBELL\*\*\*

## I

### INTRODUCTION

Nonaccidental physical injuries children suffer at the hands of their parents occur along a continuum that ranges from mild to severe. At the outer edges of this continuum, one might find, on the one hand, a slight swat to the buttocks, and on the other, a brutal beating. In the United States, the normative consensus appears to be that outsiders to the family are appropriately concerned only when the physical injury at issue causes serious harm; any injury short of a serious one is exclusively “family business.”

Consistent with this consensus, all states’ laws permit the use of “reasonable” corporal punishment;<sup>1</sup> simultaneously, they all prohibit nonaccidentally inflicted serious injury. The latter is generally denominated abuse, although some states classify milder but still impermissible injuries as neglect, or simply “inappropriate discipline.” Thus, being able to distinguish between reasonable corporal punishment and maltreatment—whether this is formally denominated abuse or neglect—is critical for the relevant actors: parents who use corporal punishment as a disciplinary tool, child protective

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\* Professor of Law, Duke Law School.

\*\* William McDougall Professor of Public Policy, Professor of Psychology and Neuroscience, and Director of the Center of Child and Family Policy, Duke University.

\*\*\* J.D., Duke Law School, M.P.P., Sanford School of Public Policy, Duke University.

1. As used here and throughout this article, the word “reasonable” is a legal term of art meaning “acceptable.” *See infra* IIA (setting out examples of corporal punishment legislation using this term). In law more generally, “reasonableness” describes a range of behavior that society or a particular community deems “normal” and thus not an appropriate basis for liability, guilt, or action otherwise. Its corollary in the social sciences is the term “normative,” which is used throughout this article in the empirical sense, meaning a behavior that is practiced and accepted by a significant proportion (that is, at least a quarter) of the population or subgroup at issue. *See also infra* note 8 (explaining the relationship between scientific normativeness and cultural and legal norms, including in particular parental autonomy norms).

services (CPS) staff who are required by statute to intervene in the family to protect children subject to or at risk of abuse, and courts adjudicating issues arising in connection with these cases. The integrity of the distinction and of the methodology employed to make it is also critical for a society that is prominently committed to both family autonomy and child welfare, and in particular to protecting the integrity of the family when it promotes (or at least does not harm) child welfare, and to intervening in the family when it fails in its related obligations.

Unfortunately, few if any states have sufficiently defined the relevant terms “reasonable corporal punishment” or “maltreatment” (abuse or neglect) to consistently guide the relevant actors (those in a single system) in their exercises of discretion; nor have they established a coherent methodology for sorting injuries along the continuum of nonaccidental physical injuries. That administrative regulations and policies promulgated by state and local CPS departments often narrow agency discretion helps CPS itself to be more consistent and may help families know what to expect when they are dealing with CPS. But because appellate courts do not appear to give much deference to agency interpretations of the statutory definitions, these regulations and policies do little to guide the courts’ own exercise of discretion. Moreover, to the extent that the law in statutes and judicial opinions is either less precise or even different from the law as it is applied by CPS, the public and parents are inevitably confused or misled. As a result, decisionmaking about whether an injury or incident remains in the realm of family business or has crossed the line into the impermissible varies, reflecting a multiplicity of purely personal viewpoints, religious and political ideologies, and academic or disciplinary training and requirements. In turn, institutional treatment of and outcomes for children and families are often inconsistent.<sup>2</sup>

The status quo has been defended or at least explained on several grounds. The vagueness of abuse definitions has been consistently upheld on policy grounds—specifically on the argument that it is important for authorities to retain flexibility to call injuries as they see them given that, particularly in a diverse society, abuse might appear in unexpected forms.<sup>3</sup> The difficulty of the

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2. Scott A. Davidson, *When is Parental Discipline Child Abuse? The Vagueness of Child Abuse Laws*, 34 U. LOUISVILLE J. FAM. L. 403, 403 (1995–1996) (“[T]he broad language of much of the legislation provides little guidance in situations in which the child’s punishment is closer to reasonable parental discipline. As a result, courts apply child abuse laws inconsistently in borderline cases.”); *id.* at 412 (noting that “parents who desire to obey the [vague] statute[s] could have difficulty in understanding whether it prohibits their method of abuse”); *id.* at 414–15 (“[V]ague child abuse statutes create uncertainty in the minds of mandated reporters.”); *id.* at 415 (“[I]dentifying and protecting abused children requires the coordinated efforts of those professionals required to report cases of abuse. This interdisciplinary involvement results in confusing and ambiguous definitions of child abuse. Consequently, professionals in the various disciplines often conclude differently about whether a parent has abused a child.”).

3. The first legal scholar to focus on the vagueness of child-abuse definitions and the extraordinary discretion this affords child-welfare authorities continues to be the most prominent voice on the issue. See Michael Wald, *State Intervention on Behalf of “Neglected” Children: A Search for*

definitional project has also been acknowledged. This difficulty stems both from the relatively mundane problem of how textually to craft the definitions so that they capture all and only what we want them to capture, and from the related (but infinitely more complex) problem of how to resolve the ideological tensions at play in this area.

Each of these explanations has merit. First, we do not want to be left with definitions so fine that they disallow necessary protective interventions based in different (nonnormative) or unprecedented and harmful parenting practices. Although such instances are infrequent, the CPS community's relatively recent experience with non-European immigrants who engage in unusual (for the United States) parenting practices, including family-formation practices, folk-medicine practices, and disciplinary practices,<sup>4</sup> demonstrates that concerns about flexibility are both real and legitimate.<sup>5</sup> Second, it is incredibly hard to craft precise statutory language; the annals of legislative history attest to the truth of this proposition. It is especially tricky to do so in an ethnically, religiously, and politically diverse setting like the United States, particularly when the context relates to the intersection of intimate family matters and the relationship of the state to the family. Legislators and elected judges operating in a legal context where definitions already exist are likely to be better off if they leave things alone; the alternative, at least politically, is unattractive: entering the culture war that inevitably would result from efforts to codify different rules that respectively privilege and de-privilege particular groups' parenting norms.

Nonetheless, the premise of this article is that the distinction between permissible and impermissible corporal punishment is too important to leave to the only loosely guided discretion afforded by modern child-abuse definitions. In particular, three negative effects of the status quo beg for at least a periodic reevaluation of the prospects for more-precise tools to make this distinction.<sup>6</sup>

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*Realistic Standards*, 27 STAN. L. REV. 985, 1001 (1975) ("Because the statutes do not reflect a considered analysis of what types of harm justify the risks of intervention, decision-making is left to the ad hoc analysis of social workers and judges."). See also Doriane Lambelet Coleman, *The Legal Ethics of Pediatric Research*, 57 DUKE L.J. 517, 559 (2007) [hereinafter Coleman, *Legal Ethics of Pediatric Research*] (discussing the "'know it when you see it' test for child maltreatment"); Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM. & MARY L. REV. 413, 428–29 (2005) [hereinafter Coleman, *Storming the Castle*] (discussing the vagueness of typical statutory definitions of child abuse, including this flexibility rationale, and citing cases that have used this rationale to reject constitutional "void for vagueness" challenges to the definitions); Davidson, *supra* note 2, at 409–11 (discussing the failure of vagueness challenges to child-abuse laws and the flexibility rationale that has supported the decisions).

4. See Alison Dundes Renteln, *Corporal Punishment and the Cultural Defense*, 73 LAW & CONTEMP. PROBS. 253, 258–61 (Spring 2010) (describing such unconventional disciplinary practices).

5. See Doriane Lambelet Coleman, *The Seattle Compromise: Multicultural Sensitivity and Americanization*, 47 DUKE L.J. 717, 717–18 (1998) (generally describing this immigration phenomenon).

6. Several legal scholars and student commentators have contributed to this evaluation over the years since states first began enacting mandatory reporting laws. Professor Michael Wald began the process. See generally Wald, *supra* note 3. See also Howard Davidson, *The Legal Aspects of Corporal*

We have already noted two of these effects: the law's failure to fulfill its expressive function (or the law's signaling problems) and inconsistent case outcomes. The third is the risk of error in both directions—false-positive and false-negative findings of maltreatment—and the consequences of resulting errors for children and families.<sup>7</sup> This risk is an inevitable result of the inconsistencies that plague the system. Importantly, errors (both ways) also occur because—other than those respecting egregious physical harm—the definitions do not codify a considered or generally accepted sense of the nature of the harm the state intends to prohibit. Again, this has been left mostly unresolved, either purposefully or by default. This means that the definitions fail to provide decisionmakers with information about the right kinds of cases to pursue. The ultimate objective of this article is to propose policy reforms that will ameliorate the risk of errors as well as the systemic inconsistencies and signaling problems already described.

We proceed toward this end on the assumption that reforms will be viable in the long run only if they are the product of a careful accommodation of the delicate political considerations at stake in matters of state–family relations and of the medical and social-science evidence that explains when and how children suffer harm. Specifically, we suggest policy reforms that (1) preserve the traditional structure and substance of reasonable corporal-punishment exceptions to child-abuse law, both of which are themselves premised on a generous reading of parental-autonomy norms,<sup>8</sup> and (2) require decisionmakers

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*Punishment in the Home: When Does Physical Discipline Cross the Line to Become Child Abuse?*, 17 CHILD. LEGAL RTS. J. 18 (1997); Davidson, *supra* note 2; Dyanne C. Greer, *Child Abuse and Discipline: A Parental and Prosecutorial Dilemma*, 17 CHILD. LEGAL RTS. J. 30 (1997); Kandice K. Johnson, *Crime or Punishment: The Parental Corporal Punishment Defense—Reasonable and Necessary, or Excused Abuse?*, 1998 U. ILL. L. REV. 413 (1998). Social scientists have separately explored the issue of how to define abuse. *See generally* JEANNE M. GIOVANNONI & ROSINA M. BECERRA, *DEFINING CHILD ABUSE* (1979); BARBARA LOWENTHAL, *ABUSE AND NEGLECT: THE EDUCATOR'S GUIDE TO THE IDENTIFICATION AND PREVENTION OF CHILD MALTREATMENT* (2001); MARK A. WINTON & BARBARA A. MARA, *CHILD ABUSE & NEGLECT: MULTIDISCIPLINARY APPROACHES* (2001). And a few scholars have taken a multidisciplinary approach to the problem. *See, e.g.*, Robert E. Larzelere et al., *Nonabusive Spanking: Parental Liberty or Child Abuse?*, 17 CHILD. LEGAL RTS. J. 7 (1997) (proposing a paradigm for determining how and where to draw the line between reasonable corporal punishment and abuse framed according to legal constraints and informed in relevant ways by science); Kimberlie Young, *An Examination of Parental Discipline as a Defense of Justification: It's Time for a Kinder, Gentler Approach*, 46 NAVAL L. REV. 1 (1999).

7. *See* Coleman, *Storming the Castle*, *supra* note 3, at 417–19 (discussing the problem of false-positive and false-negative findings of maltreatment in general); Davidson, *supra* note 2, at 418–19 (discussing this problem as applied to corporal-punishment cases in particular, noting that

many of the current child abuse statutes provide juries with unstructured and unguided discretion to distinguish between reasonable parental discipline and child abuse. Because this is often an equivocal judgment, some parents who do in fact abuse their children . . . escape the net in which legislation has attempted to catch them. . . . Conversely, the parents who are caught in the net when the child is really not in danger of future abuse are also victims of vague legislation.).

8. Norms are customary or widely held beliefs that may either influence or be influenced by law. Parental autonomy norms, in particular, are widely held beliefs about the primacy of parents and parental decisionmaking as against the state and decisions it might make in regards to the child. *See*

to take systematic and consistent account of all relevant and valid evidence, including medical and social-science evidence, that can shed light on the reasonableness of parents' actions. We adopt this approach for two reasons.

First, it is the reality on the ground that parental-autonomy norms interact and even sometimes compete with medical and social-science perspectives as the line is drawn in individual cases between reasonable corporal punishment and maltreatment. Although this article treats only the institutional actors, almost everyone involved in these cases uses one or the other or a hybrid approach to doing the line-drawing work required under the rules.<sup>9</sup> This includes parents who use corporal punishment as a disciplinary tool; their neighbors who have to decide whether to report them for child abuse; CPS workers who process reports, investigate cases, and decide whether to substantiate them; and judges who adjudicate claims of excessive corporal punishment.

Second, although legal reform is sometimes warranted in the face of the status quo, we do not believe that such confrontation is necessary here. It makes sense that parental-autonomy norms and scientific knowledge should govern the process of arriving at better definitions of reasonable corporal punishment and physical abuse, and of sorting individual incidents and injuries along the continuum of nonaccidental physical injuries. This approach best reflects what history and social science tells us is good for children: a child-rearing model that recognizes and establishes parents as the children's "first[,] best" caretakers<sup>10</sup> and that intervenes in the family only when necessary to protect the child from harm that would be greater than that inevitably caused by the state's own intervention.<sup>11</sup> This approach also reflects appropriate respect for parents' traditional role and the "rights and responsibilities" paradigm that has long governed American law in this area. Correspondingly, it acknowledges both that the state cannot replace parents as the children's "first[,] best" caretakers,

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*infra* III.A (describing parental-autonomy norms and how these have influenced the development of both federal constitutional and state laws governing decisionmaking about and on behalf of the child). Individual parenting practices may or may not be normative in the empirical sense, *see supra* note 1. Furthermore, nonnormative practices may or may not trigger state interference with parental autonomy. Formally, the trigger for state action is a sense that serious harm is being caused or risked by parental behavior. Although normativeness often properly influences that sense, it is not and should not always be dispositive. *See infra* notes 80, 207, 209–223 and accompanying text (discussing the role of normativeness as a factor in the decision whether to find reasonable corporal punishment or abuse).

9. Not everyone is implicated in this process, however. For example, some parents beat their children for reasons unrelated to discipline, some neighbors report parents who use corporal punishment not because they believe they are abusing their children but because they dislike them, and some social workers and judges discriminate against families based simply on their race or cultural background.

10. *See* SAMUEL M. DAVIS ET AL., CHILDREN IN THE LEGAL SYSTEM: CASES AND MATERIALS 1–2 (4th ed. 2009) (describing parents' constitutional authority and their status in this context as "first best" caretakers).

11. *See generally* Coleman, *Storming the Castle*, *supra* note 3 (describing the harm that state intervention in the family can do to children, even in circumstances where the states' motive is to protect them).

and that the state has a proper role to play when parents make too much of their rights and too little of their responsibilities, causing a net loss to their children in the process.

Given these considerations and our objectives—to ameliorate systemic inconsistencies, signaling problems, and false-positive and false-negative errors—our principal suggestion is for policymakers to codify “functional impairment” as the harm the state intends to prohibit. The term, adapted from the medical sciences, refers to short- or long-term or permanent impairment of emotional or physical functioning in tasks of daily living.<sup>12</sup> (Currently, most states’ maltreatment definitions prohibit practices and injuries that may lead to functional impairment.)<sup>13</sup> Correspondingly, we encourage adoption of functional impairment as the standard for evaluating the reasonableness of the force used and thus for drawing the line between reasonable corporal punishment and abuse. We promote this standard to ensure that the state has the authority to intervene in the family in the face of good evidence that a child has suffered or risks suffering important disabilities, and to restrict state authority to intervene merely to mediate suboptimal conditions. Relatedly, this standard serves to assure, to the extent possible, that the public’s wisdom regarding the normative use of corporal punishment is balanced with medical and scientific knowledge of harm to the child.

Basing decisionmaking about the reasonableness of corporal punishment on a combination of parental-autonomy norms and scientific evidence about harm, as this functional-impairment test would do, is not new. For example, many maltreatment statutes and regulatory schemes are expressly premised on both a respect for family privacy and a focus on child well-being. And California’s Attorney General has suggested that scientific knowledge about the effectiveness of corporal punishment as a disciplinary tool should factor into the

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12. E. Jane Costello et al., *The Great Smoky Mountains Study of Youth Functional Impairment and Serious Emotional Disturbance*, 12 ARCHIVES GEN. PSYCHIATRY 1137, 1137 (1996). See generally, AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994) (DSM-IV); Bedirhan Ustun & Cille Kennedy, *What Is “Functional Impairment”? Disentangling Disability From Clinical Significance*, 8 WORLD PSYCHIATRY 82, 82 (2009) (“Functional impairment refers to limitations due to the illness, as people with a disease may not carry out certain functions in their daily lives.”); *id.* at 83 (stating “the DSM-IV term ‘functional impairment’ is not specifically defined. It is used to mean limitations in the *social* and *occupational* spheres of life”) (emphasis in original); *id.* (clarifying that a “disorder must be associated with either distress or [functional impairment]” before a diagnosis can be rendered). Consistent with this definition, “harm” throughout this article is thus defined as serious immediate or delayed impairment in functioning, including physical injury, emotional injury, and behavioral maladjustment. See also *infra* III.B and notes 193–195 (elaborating on this concept and applying it to the problem of sorting reasonable corporal punishment from abuse).

13. See *infra* II.A (setting out and discussing examples of typical state provisions). See also *supra* note 12 (describing how functional impairment operates in this way in the more-typical medical context).

evaluation of whether it is legally reasonable to spank a toddler.<sup>14</sup> However, these initiatives are not systematic and often lack rigor; they do not necessarily reflect a considered evaluation and reconciliation of the relevant norms and scientific knowledge, or of whether basing a decision on either or both in combination makes sense in a given situation. Nor have they ameliorated the negative effects that are our target: the failure of the law to fulfill its expressive function, inconsistent case analyses and outcomes, and false-positive and false-negative errors. We hope that in its multidisciplinary approach and system descriptions, and in its related suggestions for definitional and methodological reform, this article will begin to do some of this work. In the process, we hope that it will dissolve some of the long-standing conceptual and communications impasses among the various affected disciplines.

The article proceeds as follows: Part II describes what is known about how the relevant institutional actors—legislatures, CPS, and courts—currently find and define the line between reasonable and unlawful corporal punishment.<sup>15</sup> Part III separately describes the parental-autonomy norms and scientific knowledge that currently compete for primacy in the discourse about corporal punishment and, as far as we can tell, largely contribute to decisions about the lawfulness of particular incidents “on the ground.” Part IV begins with an argument for definitional and methodological changes that reflects both parental-autonomy norms and scientific knowledge and follows with specific suggestions for policy reform. These suggestions include proposals for redefining reasonable and unlawful corporal punishment and for sorting cases along the continuum of nonaccidental physical injuries.

## II

### HOW THE RELEVANT LEGAL ACTORS DEFINE AND DRAW THE LINE BETWEEN REASONABLE CORPORAL PUNISHMENT AND ABUSE

The three legal institutions responsible for where and how the states draw the line between reasonable corporal punishment and abuse are the state legislatures, which announce and define allowances and prohibitions in the first instance; CPS agencies and professionals, also known as departments of social services or DSS, which administer the legislative mandates and thus most directly engage families and children; and the courts, which are charged with interpreting legislation in the last instance, and which thus act as a check on decisions made by CPS. In an effort to develop a comprehensive sense of how each of these institutions makes decisions in this area and, in particular, if and

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14. 80 Op. Cal. Att’y Gen. No. 97-416 (1997). California law permits reasonable corporal punishment but defines this narrowly as “age-appropriate spanking to the buttocks.” CAL. WELF. & INST. CODE § 300 (2006).

15. Because it is beyond the scope of this article to consider how children and parents are treated once maltreatment has been found, we do not discuss actors such as therapists and family counselors, who are also important but who are involved only after this point.

how they might differ in their approaches, we conducted three studies. The first involved a cataloging and examination of all the states' civil legislation defining child abuse and reasonable corporal punishment. The second involved a series of interviews with CPS professionals, including CPS directors, supervisors, and frontline social workers in counties in several states across the country. Our interviews were designed to establish the degree and nature of the discretion CPS professionals have as they evaluate cases involving parental claims of reasonable corporal punishment. The third study involved a cataloging and examination of all of the states' published judicial opinions in civil cases concerning the definition of child abuse and the evaluation of reasonableness in the corporal-punishment setting. The results of this data collection are described below.

### A. Legislatures

All United States jurisdictions have statutory definitions of child abuse consistent with the medical model of child abuse, which focuses specifically on the immediate and short-term physical effects of abuse on the child.<sup>16</sup> Child-abuse definitions typically appear in both the criminal and civil sections of a state's statutory code.<sup>17</sup> Definitions in the states' civil codes—which are the focus of this article—typically appear in mandatory child-maltreatment-reporting statutes or in juvenile-court-jurisdiction statutes. The former provide guidance to mandated reporters and the latter establish the basis for the state to exercise jurisdiction over the child and family.<sup>18</sup>

#### 1. Features of Typical Statutory Abuse Definitions

In general, states define physical abuse of a child to include harm or threatened harm to a child's health or welfare, nonaccidental physical injury, or serious physical injury inflicted by an act or omission of a parent or another adult responsible for the child's care. Regardless of their terminology, the definitions focus on harm or injury to the child. Most employ the terms physical harm or physical injury.<sup>19</sup> Additionally, many states classify as abuse acts or omissions that create a *risk* or *substantial risk* of physical injury or harm. Several states require not only a finding of physical injury but also a

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16. CHILDREN'S BUREAU, U.S. DEP'T HEALTH & HUMAN SERV., DEFINITIONS OF CHILD ABUSE AND NEGLECT 2 (2007), available at [http://www.childwelfare.gov/systemwide/laws\\_policies/statutes/define.pdf](http://www.childwelfare.gov/systemwide/laws_policies/statutes/define.pdf). Medical models focus on the child, specifically on the physical consequences of the parental conduct for the child, rather than on the motivation of the parent. See CLIFFORD K. DORNE, AN INTRODUCTION TO CHILD MALTREATMENT IN THE UNITED STATES: HISTORY, PUBLIC POLICY AND RESEARCH 89–110 (Willow Tree Press 3d ed. 2002) (1962) (describing the emergence of the medical model of child abuse in the United States).

17. See Child Welfare Information Gateway, Definitions of Child Abuse and Neglect (2010), <http://www.childwelfare.gov/can/defining/state.cfm>. This website provides definitions applicable in the civil law context.

18. *Id.*

19. *E.g.*, IOWA CODE ANN. § 232.68(2)(a) (West 2006) (“[a]ny nonaccidental physical injury”).



determination that the injury harms the child or impairs the health of the child.<sup>20</sup> On the other hand, in Arkansas, certain intentional or knowing acts constitute abuse whether or not the child sustains physical injury. For example, a parent who “[s]trik[es] a child six . . . years of age or younger on the face or head” or “[i]nterfer[es] with a child’s breathing,” among other acts, has abused his or her child under the statute regardless of injury to the child.<sup>21</sup>

A few states define abuse to include only nonaccidental physical injuries that are “serious.” For example, Pennsylvania defines child abuse as “[a]ny recent act or failure to act . . . which causes non-accidental *serious* physical injury to a child under 18 years of age” or “which creates an imminent risk of serious physical injury to a child under 18 years of age.”<sup>22</sup> The statute further defines “serious physical injury” to mean an injury that “causes a child severe pain; or significantly impairs a child’s physical functioning, either temporarily or permanently.”<sup>23</sup> North Carolina also employs the language “serious physical injury.”<sup>24</sup>

Although state statutory definitions of physical abuse are similar in that they emphasize harm to the child or nonaccidental physical injury, minor variations among definitions exist. The most notable variation among definitions is their level of specificity. Just over half of state definitions contain only broad language and fail to provide specific examples of injuries or acts constituting physical abuse or to elaborate otherwise on the meaning of physical harm or injury. For example, Iowa’s definition provides that “[c]hild abuse or abuse means any non-accidental physical injury, or injury which is at variance with the history given of it, suffered by a child as the result of the acts or omissions of a person responsible for the care of the child.”<sup>25</sup> In contrast, other states enumerate within their definitions specific injuries or acts that constitute physical abuse or otherwise expand on the definition of physical harm or physical injury. For example, Arkansas’ statutory definition provides a list of “intentional or knowing acts, with physical injury and without justifiable

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20. *E.g.*, 325 ILL. COMP. STAT. ANN. 5/3(a) (West 2001 & Supp. 2007) (defining an abused child as “a child whose parent or [other responsible party] inflicts . . . physical injury, by other than accidental means, which causes death, disfigurement, impairment of physical or emotional health, or loss or impairment of any bodily function”); MD. CODE ANN., FAM. LAW § 5-701(b)(1) (LexisNexis 2006) (defining abuse as “the physical . . . injury of a child . . . under circumstances that indicate that the child’s health or welfare is harmed or at substantial risk of being harmed”).

21. ARK. CODE ANN. §§ 12-18-103(2)(A)(vii)(a), 12-18-103(2)(A)(vii)(c) (2009).

22. 23 PA. CONS. STAT. ANN. §§ 6303(b)(1)(i), 6303(b)(1)(iii) (West 2001) (emphasis added).

23. § 6303(a)(1)–(2).

24. N.C. GEN. STAT. ANN. § 7B-101(1)(a) (West 2004 & Supp. 2006).

25. IOWA CODE ANN. § 232.68 (West 2006). Likewise, North Carolina defines an “abused juvenile” as “[a]ny juvenile less than 18 years of age whose parent, guardian, custodian, or caretaker inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means; creates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means, [or] uses or allows to be used upon the juvenile cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior.” N.C. GEN. STAT. ANN. § 7B-101 (West 2004 & Supp. 2006).

cause”<sup>26</sup> that constitute abuse, as well as a list of “intentional or knowing acts, with or without physical injury”<sup>27</sup> that constitute abuse. Among the acts that constitute abuse with a showing of physical injury are “[t]hrowing, kicking, burning, biting, or cutting a child; [s]triking a child with a closed fist; [s]haking a child; or [s]triking a child on the face or head.”<sup>28</sup> Similarly, Florida’s statute provides that abuse is “any willful act or threatened act that results in any physical . . . injury or harm that causes or is likely to cause the child’s physical, mental, or emotional health to be significantly impaired.”<sup>29</sup> It then enumerates injuries that can harm a child’s health or welfare. The enumerated injuries range from willfully inflicted “sprains, dislocations, or cartilage damage” to “intracranial hemorrhage or injury to other internal organs.”<sup>30</sup>

Definitions with a greater degree of specificity provide additional guidance to CPS workers and judges who are charged with determining whether a given act or injury constitutes physical abuse. In some cases, the act or injury may fall precisely within one of the enumerated classes. In others, decisionmakers may be able to compare the suspicious act or injury to one of the enumerated classes to determine if it is sufficiently similar.<sup>31</sup> Statutes containing enumerated lists typically specify that the lists are illustrative and not exclusive, thereby reserving for decisionmakers a certain measure of discretion.<sup>32</sup>

Finally, a few states use both the abuse and neglect classifications for unlawful physical injuries to a child, sorting cases between these classifications not according to the act or omission causing the injury, but rather according to the relative degree of severity of the injury itself. For example, New York explicitly includes “excessive corporal punishment” within its statutory-neglect definition.<sup>33</sup> Thus, it defines an abused child as one who suffers “physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of

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26. ARK. CODE ANN. §§ 12-18-103(2)(A)(vi) (2009).

27. *Id.* at §§ 12-18-103(2)(A)(vii) (2009). *See supra* note 21 and accompanying text (setting this clause in context and noting its outright prohibition of strikes to the face or interference with the breathing of a child).

28. ARK. CODE ANN. §§ 12-18-103(2)(A)(vii)(a)–(d) (2009).

29. FLA. STAT. ANN. § 39.01(2) (West 2003 & Supp. 2008).

30. *Id.* at §§ 39.01(31)(a), 30.01(31)(d). Illinois defines physical abuse as the infliction of nonaccidental physical injury that causes “death, disfigurement, impairment of physical or emotional health, or loss or impairment of any bodily function.” 325 ILL. COMP. STAT. ANN. § 5/3(a) (West 2001 & Supp. 2007).

31. *E.g.*, *Stella M. v. Daniel T.-W.*, 1997 WL 634580, at \*4 (Wis. Ct. App. Oct. 16, 1997) (failing to find abuse because “red marks on a child’s buttocks are [not] in the same category as burns and severe or frequent bruising” when “physical injury” was defined to include lacerations, fractured bones, burns, internal injuries, severe or frequent bruising, or great bodily harm).

32. *E.g.*, FLA. STAT. ANN. § 39.01(31)(a) (West 2003 & Supp. 2008) (explaining that the list of injuries to follow is not all-inclusive).

33. § 371(4-a)(i)(B).

bodily organ.”<sup>34</sup> And it classifies as neglected a child whose physical condition has been impaired or harmed, but not injured seriously enough to create a substantial risk of death or protracted disfigurement or impairment.<sup>35</sup> Other states adopting this approach have done so either informally or by administrative regulation. For example, North Carolina’s CPS agencies employ a decision tree that requires classifying as neglect by inappropriate discipline any instance of corporal punishment that transgresses the agencies’ reasonableness criteria but that does not meet its abuse standards.<sup>36</sup>

## 2. Statutory Allowances for Reasonable Corporal Punishment

Statutory definitions of physical abuse appearing in state family- or juvenile-court codes commonly except reasonable measures of physical discipline administered by parents.<sup>37</sup> This exception reflects the longstanding common-law privilege of discipline, which provides that “[a] parent is privileged to apply such reasonable force or to impose such reasonable confinement upon his child as he reasonably believes to be necessary for its proper control, training, or education.”<sup>38</sup>

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34. N.Y. SOC. SERV. LAW § 371(4-b)(i) (McKinney 2003 & Supp. 2007) (emphasis added).

35. § 371(4-a)(i).

36. See N.C. GEN. STAT. ANN. § 7B-101(15) (West 2004 & Supp. 2006) (defining neglect to include inappropriate discipline); see also § 7B-101(11a) (West 2004 & Supp. 2006) (defining the family-assessment response). In January 2006, all North Carolina counties adopted a version of the Multiple Response System, which separately provides that CPS must track less-severe instances of inappropriate discipline or unreasonable corporal punishment onto a nonadversarial “family assessment” track. This move reinforces North Carolina’s commitment to distinguishing instances of corporal punishment that are properly classified as abuse (and tracked accordingly, onto the adversarial-investigative track) from those that are to be classified as neglect. Several other states have a version of the MRS, including Missouri, Michigan, and Washington, see <http://www.ncsl.org/default.aspx?TabId=17800>, but their neglect definitions do not explicitly include inappropriate discipline. In Michigan, for example, CPS workers can classify cases into five categories, depending on the sufficiency of the evidence and risk level. Michigan Dep’t of Human Serv., Children’s Protective Services Investigation Process, [http://www.michigan.gov/dhs/0,1607,7-124-5452\\_7119\\_7194-159484--,00.html](http://www.michigan.gov/dhs/0,1607,7-124-5452_7119_7194-159484--,00.html) (last visited Nov. 6, 2009). If evidence indicating low-risk abuse or neglect is sufficient, CPS officials can require community-based services without listing the perpetrator in an abuse or neglect registry. Even if the evidence is insufficient, CPS officials can still offer services on a voluntary basis.

37. Even in states that lack physical-discipline exceptions within their family or juvenile-court codes, courts have recognized a parent’s physical-discipline privilege based on a statutory privilege found in the criminal code or a common-law privilege. For example, the Connecticut Court of Appeals recognized that a criminal statute granting parents a privilege to use reasonable physical force to correct their child “demonstrate[d] the public recognition of the parental right to punish children for their own welfare” and thus expressed the “state’s policy of allowing reasonable corporal punishment.” *Lovan C. v. Dep’t of Children and Families*, 860 A.2d 1283, 1288 (Conn. App. Ct. 2004). Likewise, despite Iowa’s lack of a statutory exception for reasonable physical discipline, the state’s Supreme Court recognized that “[t]he law clearly gives parents who are so inclined the right to inflict reasonable corporal punishment in connection with the rearing of their children.” *In re W.G.*, 349 N.W.2d 487, 487 (Iowa 1984). In sum, parents in all states may physically discipline their children provided that such discipline does not cross the line to become physical abuse.

38. RESTATEMENT (SECOND) OF TORTS § 147 (1965); see also MODEL PENAL CODE § 3.08 (2001). State common law is law as it has evolved and continues to evolve in the state courts. For examples of judicial decisions reflecting the traditional common-law corporal-punishment privilege, see *State v. Lefevre*, 117 P.3d 980, 984 (N.M. Ct. App. 2005) (“[A] parent has a privilege to use moderate or

Twenty-one states, along with the District of Columbia, except reasonable physical discipline from their statutory definitions of physical abuse. These provisions typically use the term “reasonable” to describe legally acceptable corporal punishment, although some employ the term “excessive” to describe corporal punishment that has crossed the line of acceptability.<sup>39</sup> For example, the District of Columbia’s statute provides that abuse “does not include discipline administered by a parent, guardian, or custodian to his or her child; provided, that the discipline is reasonable in manner and moderate in degree and otherwise does not constitute cruelty.”<sup>40</sup> The statute then provides an illustrative list of specific acts that are unacceptable forms of discipline for purposes of the exception. Among these acts are “burning, biting, or cutting a child” and “nonaccidental injury to a child under the age of 18 months.”<sup>41</sup> Similarly, in Florida, physical discipline can be considered excessive when it results in “significant bruises or welts,” among other enumerated injuries.<sup>42</sup>

Finally, in addition to requiring that discipline be reasonable in nature and degree, several states’ statutes formally require decisionmakers to evaluate as a threshold matter whether the injury or incident was disciplinary in nature; the consequences flowing from that evaluation differ, depending on the jurisdiction.<sup>43</sup> The most common of these provisions expressly codifies the two-pronged, common-law standard requiring parents seeking refuge under the privilege or exception to prove, first, that discipline was reasonably necessary or appropriate under the circumstances and, second, that the nature and degree of force used itself was reasonable. For example, Hawaii’s statute provides that

[t]he use of force upon or toward the person of another is justifiable [when] . . . (a) [t]he force is employed with due regard for the age and size of the minor and is reasonably related to the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of the minor’s misconduct; and (b) [t]he force used is not designed to cause or known to create a risk of causing

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reasonable physical force, without criminal liability, when engaged in the discipline of his or her child . . . [but] [t]he physical force cannot be cruel or excessive if it is to be justified.”); *Anderson v. State*, 487 A.2d 294, 297 (Md. Ct. Spec. App. 1985) (“As a defense . . . to what would otherwise be an assault and battery, an individual *in loco parentis* may sometimes, but not always, establish that the force used upon the child was privileged as necessary and proper to the exercise of domestic authority.”).

39. Fourteen states and the District of Columbia provide that reasonable physical discipline is not abuse. CHILDREN’S BUREAU, *supra* note 16, at 5. The fourteen states are Arkansas, Colorado, Florida, Georgia, Indiana, Minnesota, Mississippi, Missouri, Ohio, Oklahoma, Oregon, South Carolina, Texas, and Washington. *Id.* In addition to these explicit exceptions for reasonable physical discipline, seven other states implicitly exclude reasonable physical discipline by providing that *excessive* corporal punishment is abuse: Illinois, Nevada, New Jersey, New York, Rhode Island, West Virginia, and Wyoming.

40. D.C. CODE § 16-2301(23)(B)(1) (2001 & Supp. 2007).

41. §§ 16-2301(23)(B)(1)(I), 16-2301(23)(B)(1)(IV).

42. FLA. STAT. ANN. § 39.01(4)(k) (West 2003 & Supp. 2008).

43. The requirement of a disciplinary motive is inherent in the allowance, see *infra* notes 44–46 and 129–145 and accompanying text; the text of most exceptions and an apparent deference to parents’ sense of the circumstances leads decisionmakers generally to focus only on the reasonableness of the nature and degree of force used.

substantial bodily injury, disfigurement, extreme pain or mental distress, or neurological damage.<sup>44</sup>

At least one state, Ohio, appears to provide parents with statutory authority to cause a child more harm in disciplinary contexts than in nondisciplinary contexts; its corporal-punishment exception provides that physical discipline that is “excessive under the circumstances and creates a substantial risk of *serious* physical harm to the child”<sup>45</sup> constitutes abuse, whereas acts other than physical discipline constitute abuse whenever they “harm the child’s health or welfare.”<sup>46</sup>

## B. Child Protective Services

Although state legislatures are responsible for defining maltreatment in the first instance, the law on the ground is mostly set by the CPS professionals charged with investigating and supervising the investigation of maltreatment reports.<sup>47</sup> Specifically, CPS professionals are responsible for determining whether particular factual situations described in the reports qualify as abuse or neglect, or are appropriately classified as reasonable corporal punishment.<sup>48</sup> The vagueness inherent in most statutory definitions—including specifically in disciplinary exemptions that, without more, permit “reasonable” and disallow “excessive” corporal punishment—assures that, absent additional constraints, individual CPS professionals and departments have quite a lot of discretion as to the methodology they use to do this triage and as to where they ultimately draw the line between reasonable and unlawful corporal punishment. Even when CPS decisionmaking is administratively constrained, however, personal and community ideology continues to play a considerable role in this process.

### 1. The Factors that Influence CPS Decisionmaking

Consistent with prevailing statutory language, when evaluating whether an act of corporal punishment was reasonable or abusive, CPS most typically

44. HAW. REV. STAT. ANN. § 703-309 (1) (West 2009). Other states have similar statutes. *E.g.*, DEL. CODE ANN. tit. 11, §468(1) (2009) (Delaware); MO. ANN. STAT. § 563.061(1) (West 2009) (Missouri); S.C. CODE ANN. § 20-7-490(2)(ii) (2006) (South Carolina).

45. OHIO REV. CODE ANN. § 2919.22(B)(3) (West 2006). Section 2919 is part of Ohio’s penal code. It is included here because the definition of physical abuse for purposes of juvenile-court jurisdiction defines an abused child as one endangered as defined in section 2919.22. *See* § 2151.031(B).

46. § 2151.031(D). Thus, physical discipline must *seriously* harm the child—not just *harm* the child—before it rises to the level of abuse. “Serious physical harm” is defined in the statute to include physical harm involving the following: a substantial risk of death, some permanent or temporary substantial incapacity, permanent or temporary substantial disfigurement, or acute pain. § 2901.01(5)(a)–(e).

47. This law is effectively dispositive because CPS decisions in individual cases mostly go uncontested. *See* GIOVANNONI & BECERRA, *supra* note 6, at 59 (explaining that “appellate cases in neglect matters have been unusually rare” and that this can be attributed to “the lack of sophistication and financial resources of the majority of parents affected”).

48. DORNE, *supra* note 16, at 153–54.

considers the nature and degree of the immediate physical harm to the child.<sup>49</sup> The extent to which that injury may have long-term or even permanent physical consequences will generally affect the CPS determination, particularly in those jurisdictions that require a serious or severe injury either statutorily or by custom. Depending on the jurisdiction and the individual decisionmaker, however, such consequences may not be required; indeed, a common CPS practice holds that a bruise lasting for more than twenty-four hours is sufficient to meet the maltreatment standard.<sup>50</sup> Relatedly, to the extent that an immediate but not serious or severe physical injury implicates a risk of more-serious harm in the future, CPS may choose to denominate that original injury abuse. In fact, for some CPS agents and departments, risk is one of the most important criteria.<sup>51</sup>

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49. All interviewees remain anonymous, at their request. Telephone interview by Erin Vernon, Duke University School of Law, with a county CPS supervisor, Duplin County, N.C. (June 26, 2009) (on file with Law and Contemporary Problems, hereinafter, L & CP); telephone interview by Erin Vernon with a county CPS frontline investigator, Johnson County, Kan. (June 18, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS director, Fulton County, Ga. (June 25, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS director, Adams County, Neb. (June 16, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS supervisor, Adams County, Neb. (June 17, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS frontline investigator, Dallas County, Or. (June 23, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS supervisor, Dallas County, Or. (June 22, 2009) (on file with L & CP); interview by Kenneth A. Dodge and Doriane Lambelet Coleman with a county CPS frontline investigator, Durham County, N.C. (Feb. 16, 2009) (on file with L & CP); interview by Kenneth A. Dodge and Doriane Lambelet Coleman with a county CPS supervisor, Durham County, N.C. (Feb. 16, 2009) (on file with L & CP); interview by Kenneth A. Dodge and Doriane Lambelet Coleman with a county CPS director, Durham County, N.C. (Feb. 16, 2009) (on file with L & CP).

50. See American Academy of Pediatrics, Committee on Child Abuse and Neglect, *When Inflicted Skin Injuries Constitute Child Abuse*, 110 PEDIATRICS 644, 644 (2002), available at <http://aappolicy.aappublications.org/cgi/reprint/pediatrics;110/3/644.pdf> (“One practical criterion often used is that any inflicted injury that lasts more than twenty-four hours constitutes significant injury (i.e., physical abuse).”) (citing IOWA DEPARTMENT OF HUMAN SERVICES, EMPLOYEES’ MANUAL (1997), available at <http://www.extension.iastate.edu/Publications/PM1810.pdf> (listing “[r]eddening of surface tissue lasting more than 24 hours” as a “[p]hysical sign of possible child abuse”). The relevance of a bruise lasting for more than twenty-four hours varies across jurisdictions and agencies and there may even be an equivocal standard within a single agency. For instance, in one county in North Carolina, bruises lasting for longer than twenty-four hours were described as both sufficient and insufficient on their own to justify a finding of maltreatment. See interview by Kenneth Dodge and Doriane Coleman with a county CPS supervisor, Durham County, N.C. (February 13, 2009) (on file with L & CP). In Nebraska, the existence of a bruise for more than twenty-four hours is enough to ensure an investigation but is not enough on its own to result in an abuse or neglect finding. See telephone interview by Erin Vernon with a county CPS director, Adams County, Neb. (June 16, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS supervisor, Adams County, Neb. (June 17, 2009) (on file with L & CP). Moreover, in Oregon, a bruise lasting more than twenty-four hours prioritizes the investigation, but in some cases a bruise that lasts less than twenty-four hours may be enough to substantiate abuse. See telephone interview by Erin Vernon with a county CPS frontline investigator, Dallas County, Or. (June 23, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS supervisor, Dallas County, Or. (June 22, 2009) (on file with L & CP).

51. See interview by Kenneth A. Dodge and Doriane Lambelet Coleman with a county CPS director, Durham County, N.C. (Feb. 16, 2009) (on file with L & CP) (listing risk as the second most important factor); see telephone interview by Erin Vernon with a county CPS director, Adams County,

Other common criteria include chronicity, or the frequency with which a particular child is subject to corporal punishment,<sup>52</sup> the location of the injury on the child's body,<sup>53</sup> the child's age<sup>54</sup> and special-needs status,<sup>55</sup> whether an object was used,<sup>56</sup> and the immediate or long-term emotional and developmental

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Neb. (June 16, 2009) (on file with L & CP) (most important factor in safety analysis); telephone interview by Erin Vernon with a county CPS supervisor, Adams County, Neb. (June 17, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS frontline investigator, Dallas County, Or. (June 23, 2009) (on file with L & CP); interview by Erin Vernon with a county CPS supervisor, Duplin County, N.C. (June 26, 2009) (on file with L & CP).

52. *See* interview by Erin Vernon with a county CPS supervisor, Duplin County, N.C. (June 26, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS frontline investigator, Johnson County, Kan. (June 18, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS director, Fulton County, Ga. (June 25, 2009) (on file with L & CP); telephone interview by Erin Vernon, with a county CPS supervisor, Adams County, Neb. (June 17, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS frontline investigator, Dallas County, Or. (June 23, 2009) (on file with L & CP); telephone interview by Erin Vernon with county CPS supervisor, Dallas County, Or. (June 22, 2009) (on file with L & CP); interview by Kenneth A. Dodge and Doriane Lambelet Coleman with a county CPS supervisor, Durham County, N.C. (Feb. 16, 2009) (on file with L & CP); interview by Kenneth A. Dodge and Doriane Lambelet Coleman with a county CPS director, Durham County, N.C. (Feb. 16, 2009) (on file with L & CP).

53. *See* interview by Erin Vernon with a county CPS supervisor, Duplin County, N.C. (June 26, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS frontline investigator, Johnson County, Kan. (June 18, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS director, Fulton County, Ga. (June 25, 2009) (on file with L & CP); *see* telephone interview by Erin Vernon with County CPS Director, Adams County, Neb. (June 16, 2009) (on file with L & CP); telephone interview by Erin Vernon with county CPS supervisor, Adams County, Neb. (June 17, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS frontline investigator, Dallas County, Or. (June 23, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS supervisor, Dallas County, Or. (June 22, 2009) (on file with L & CP); interview by Kenneth A. Dodge and Doriane Lambelet Coleman with a county CPS supervisor, Durham County, N.C. (Feb. 16, 2009) (on file with L & CP); interview by Kenneth A. Dodge and Doriane Lambelet Coleman with a county CPS director, Durham County, N.C. (Feb. 16, 2009) (on file with L & CP).

54. *See* telephone interview by Erin Vernon, with a county CPS frontline investigator, Johnson County, Kan. (June 18, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS director, Fulton County, Ga. (June 25, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS director, Adams County, Neb. (June 16, 2009) (on file with L & CP); telephone interview by Erin Vernon with county CPS supervisor, Adams County, Neb. (June 17, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS frontline investigator, Dallas County, Or. (June 23, 2009) (on file with L & CP); telephone interview by Erin Vernon with county CPS supervisor, Dallas County, Or. (June 22, 2009) (on file with L & CP); interview by Kenneth A. Dodge and Doriane Lambelet Coleman with a county CPS supervisor, Durham County, N.C. (Feb. 16, 2009) (on file with L & CP); interview by Kenneth A. Dodge and Doriane Lambelet Coleman with a county CPS director, Durham County, N.C. (Feb. 16, 2009) (on file with L & CP).

55. *See* telephone interview by Erin Vernon, with a county CPS frontline investigator, Dallas County, Or. (June 23, 2009) (on file with L & CP); telephone interview by Erin Vernon, with a county CPS supervisor, Adams County, Neb. (June 17, 2009) (on file with L & CP).

56. *See* telephone interview by Erin Vernon with a county CPS frontline investigator, Johnson County, Kan. (June 18, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS director, Fulton County, Ga. (June 25, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS director, Adams County, Neb. (June 16, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS supervisor, Adams County, Neb. (June 17, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS supervisor,

ramifications of the physical harm.<sup>57</sup> Like risk, these criteria can contribute to a finding of abuse even in cases in which the immediate physical injury, standing alone, is relatively moderate and thus would otherwise be classified as reasonable.<sup>58</sup> For example, evidence of chronicity, the use of an object such as a belt or a switch, the child's fear of the parent or anxiety about the safety of the home, or an injury in a location other than the buttocks (harm to the head or neck is particularly provocative in this regard) may cause CPS to classify as abuse a bruise lasting for more than twenty-four hours, even if that same agency would normally decline to intervene based on the injury alone.<sup>59</sup>

Finally, in the evaluation of individual incidents and injuries, CPS may consider parents' rights and family privacy, including parents' motivation for using corporal punishment and parents' ethnic or cultural background. Parents' rights and family privacy may be considered as essential factors to be balanced against harm to the child or as relatively insignificant in light of the agency's mandate to focus on child welfare.<sup>60</sup> Parents' motivation is more or less relevant

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Dallas County, Or. (June 22, 2009) (on file with L & CP); interview by Kenneth A. Dodge and Doriane Lambelet Coleman with a county CPS frontline investigator, Durham County, N.C. (Feb. 16, 2009) (on file with L & CP); interview by Kenneth A. Dodge and Doriane Lambelet Coleman with a county CPS supervisor, Durham County, N.C. (Feb. 16, 2009) (on file with L & CP); interview by Kenneth A. Dodge and Doriane Lambelet Coleman with a county CPS director, Durham County, N.C. (Feb. 16, 2009) (on file with L & CP).

57. *See* telephone interview by Erin Vernon with a county CPS supervisor, Adams County, Neb. (June 17, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS frontline investigator, Dallas County, Or. (June 23, 2009) (on file with L & CP); telephone interview by Erin Vernon with county CPS frontline investigator, Johnson County, Kan. (June 18, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS director, Fulton County, Ga. (June 25, 2009) (on file with L & CP); interview by Kenneth A. Dodge and Doriane Lambelet Coleman with a county CPS frontline investigator, Durham County, N.C. (Feb. 16, 2009) (on file with L & CP); telephone interview by Kenneth A. Dodge and Doriane Lambelet Coleman with a county CPS supervisor, Durham County, N.C. (Feb. 16, 2009) (on file with L & CP); interview by Kenneth A. Dodge and Doriane Lambelet Coleman with a county CPS director, Durham County, N.C. (Feb. 16, 2009) (on file with L & CP).

58. *See, e.g.*, telephone interview by Erin Vernon with a county CPS frontline investigator, Johnson County, Kan. (June 18, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS supervisor, Adams County, Neb. (June 17, 2009) (on file with L & CP).

59. *See, e.g.*, interview by Kenneth Dodge and Doriane Coleman with a county CPS supervisor, Durham County, N.C. (February 16, 2009) (on file with L & CP).

60. *See* interview by Erin Vernon with a county CPS supervisor, Duplin County, N.C. (June 26, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS frontline investigator, Johnson County, Kan. (June 18, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS director, Fulton County, Ga. (June 25, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS director, Adams County, Neb. (June 16, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS supervisor, Adams County, Neb. (June 17, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS frontline investigator, Dallas County, Or. (June 23, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS supervisor, Dallas County, Or. (June 22, 2009) (on file with L & CP); interview by Kenneth A. Dodge and Doriane Lambelet Coleman with a county CPS frontline investigator, Durham County, N.C. (Feb. 16, 2009) (on file with L & CP); interview by Kenneth A. Dodge and Doriane Lambelet Coleman with a county CPS supervisor, Durham County, N.C. (Feb. 16, 2009) (on file with L & CP); interview by Kenneth A. Dodge and Doriane Lambelet Coleman with a county CPS director, Durham County, N.C. (Feb. 16, 2009) (on file with L & CP).



to agencies or social workers depending on the extent to which they believe the inquiry should focus entirely on medical harm to the child; when motivation matters in the analysis, parents may be permitted to cause more harm than they would when it is not a consideration.<sup>61</sup> Relatedly, CPS professionals may consider the family's ethnic or cultural background, as in assessing whether a particular form of corporal punishment is normative in the family's community.<sup>62</sup> As with parental motivation, however, those who focus primarily on medical harm to the child will tend to discount or ignore diversity of parenting practices.<sup>63</sup>

## 2. Exercising and Constraining Discretion

The factors that a particular CPS social worker or agency considers in drawing the line between reasonable corporal punishment and abuse, and the weight the factors are given, depend on two circumstances: the extent to which the agency or social worker is administratively (by regulation, policy, or protocol) constrained and the decisionmaker's own community norms, disciplinary training, and personal ideology. The more elaborate the administrative constraints, the less likely it is that divergent norms, training, and ideology will influence the decision. However, because it is impossible to eliminate entirely the need for CPS to exercise discretion—at the margins, the line between reasonable corporal punishment and abuse is “uncertain and wavering” at best<sup>64</sup>—norms, training, and ideology play a role even within

61. See telephone interview by Erin Vernon with a county CPS frontline investigator, Johnson County, Kan. (June 18, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS director, Fulton County, Ga. (June 25, 2009) (on file with L & CP).

62. See interview by Kenneth A. Dodge and Doriane Lambelet Coleman with a county CPS frontline investigator, Durham County, N.C. (Feb. 16, 2009) (on file with L & CP).

63. See, e.g., interview by Kenneth A. Dodge and Doriane Lambelet Coleman with a county CPS supervisor, Durham County, N.C. (Feb. 16, 2009) (on file with L & CP).

64. See telephone interview by Erin Vernon with a county CPS frontline investigator, Johnson County, Kan. (June 18, 2009) (on file with L & CP); interview by Kenneth A. Dodge and Doriane Lambelet Coleman with a county CPS supervisor, Durham County, N.C. (Feb. 16, 2009) (on file with L & CP). The phrase “uncertain and wavering line” comes from Justice William S. Andrews' famous dissent in *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 104 (N.Y. 1928), in which he describes the trouble judges have deciding whether a defendant was a proximate cause of an accident. He explains that this decision sometimes involves imprecise line-drawing because

[t]here are no fixed rules to govern our judgment. There are simply matters of which we can take account . . . Many things contribute to the spread of the conflagration—the force of the wind, the direction and width of the streets, the character of intervening structures, other factors. We draw an uncertain and wavering line, but draw it we must as best we can.

*Id.* The decision where to draw the line between reasonable corporal punishment and maltreatment has been described similarly. See, e.g., interview by Kenneth Dodge and Doriane Coleman with a CPS director, Durham County, N.C. (Feb. 16, 2009) (on file with L & CP) (expressing disagreement with the idea that a continuum spans reasonable corporal punishment and abuse because this suggests, erroneously, that there is a single place where professionals draw the line; explaining that a complicated set of factors must be considered instead and that even using these factors, “rough cuts” still need to be made in certain cases; and noting that these involve subjectivity and common sense on the part of the professionals involved).

tightly constrained programs. This gap between statutory requirements and “on the street” practice is well known in political science and public-policy analysis more generally.<sup>65</sup>

CPS agencies and social workers across the country vary in the extent to which they are administratively constrained as they evaluate individual cases of alleged abuse. Until recently, CPS decisionmaking was relatively unconstrained, resulting in a landscape where social workers’ personal orientations influenced results.<sup>66</sup> In jurisdictions following this approach, a social worker or agency holding particularly strong views (one way or the other) on the moral or religious foundations for corporal punishment or on the relevance of any emotional or developmental impacts, might render decisions about the reasonableness of individual instances of corporal punishment (at least in part) according to those views. The current trend is to the contrary: jurisdictions at either the state or the county level tend to adopt elaborate regulatory schemes designed to standardize, to the extent possible, the decisionmaking process and the scenarios that will and will not constitute unlawful corporal punishment.<sup>67</sup>

Some administrative protocols for substantiating maltreatment include only immediate physical factors such as the age and size of the child and the severity, duration, and location of the mark.<sup>68</sup> Protocols may also take into consideration other observable or quantifiable factors like the object used, the number of hits or strikes, and the chronicity, but may exclude most or all emotional and developmental factors.<sup>69</sup> Increasingly common among these new regulatory

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65. See generally MICHAEL LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES* (1980).

66. See Wald, *supra* note 3, at 1001 (“Because the statutes do not reflect a considered analysis of what types of harm justify the risks of intervention, decisionmaking is left to the ad hoc analysis of social workers and judges.”); *supra* notes 2–3 (describing this phenomenon). Cf. GIOVANNONI & BECERRA, *supra* note 6, at 11 (“There is strong evidence that these professionals feel this burden [of interpretation] keenly and are extremely dissatisfied with the ambiguous criteria under which they must operate.”). Research in the social sciences also supports the influence of personal and professional orientations on social workers’ maltreatment classifications. See Vicki Ashton, *The Effect of Personal Characteristics on Reporting Child Maltreatment*, 28 *CHILD ABUSE & NEGLECT* 985, 986 (2004).

67. See telephone interview by Erin Vernon with a county CPS frontline investigator, Johnson County, Kan. (June 18, 2009) (on file with L & CP); interview by Kenneth A. Dodge and Doriane Lambelet Coleman with a county CPS director, Durham County, N.C. (Feb. 16, 2009) (on file with L & CP); interview by Kenneth A. Dodge and Doriane Lambelet Coleman with a county CPS supervisor, Durham County, N.C. (Feb. 16, 2009) (on file with L & CP).

68. See telephone interview by Erin Vernon with a county CPS director, Adams County, Neb. (June 16, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS supervisor, Adams County, Neb. (June 17, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS frontline investigator, Johnson County, Kan. (June 18, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS frontline investigator, Dallas County, Or. (June 23, 2009) (on file with L & CP); see telephone interview by Erin Vernon with a county CPS supervisor, Dallas County, Or. (June 22, 2009) (on file with L & CP).

69. See telephone interview by Erin Vernon with a county CPS director, Adams County, Neb. (June 16, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS supervisor, Adams County, Neb. (June 17, 2009) (on file with L & CP) (both Nebraska interviewees said they do not use the child’s emotional development in their maltreatment assessment); telephone interview by Erin Vernon with a county CPS director, Fulton County, Ga. (June 25, 2009) (on file with

schemes are those that focus most broadly on the physical, emotional, and developmental implications of the child's injury<sup>70</sup> and that involve a list of factors (differently weighted and sometimes integrated) that social workers must address in their investigations and evaluations.<sup>71</sup> Unlike the approach that takes into consideration only immediate physical factors, this approach involves a more-complex analysis of whether a particular incident involves acceptable or unlawful corporal punishment; that is, in addition to considering the medical nature of the immediate physical injury, it places significant value on risk and on the nonphysical implications of physical injuries.<sup>72</sup>

For example, North Carolina, which has a state-supervised, county-administered CPS system, has established at the state level a decision tree that requires county CPS agencies and their social workers to evaluate not only the degree (severity) and nature of the physical injury at issue, but also factors such as the injury's location on the body, whether an object was used, whether the injury is evidenced by a bruise lasting for more than twenty-four hours, the number of times the child was hit, the child's developmental age, the family's history with corporal punishment (chronicity) and with CPS, the child's sense of safety in the home and with the offending parent, the injury's emotional and developmental implications (including school-related implications), and the risk of future harm.<sup>73</sup> Kansas' Department of Child Protective Services' investigation protocol similarly contains a fairly long list of factors including medical facts such as the severity and location of the injury as well as developmental implications, including a child's ability to succeed in school and his or her emotional response, which must be considered during each investigation.<sup>74</sup>

Notwithstanding these sometimes elaborate constraints, social workers continue to be influenced by considerations external to the protocols. These considerations may be in direct contravention of the protocols, or they may

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L & CP) (according to interviewee, Georgia does not consider a child's ability to be successful at school as a factor in maltreatment investigations); telephone interview by Erin Vernon with a county CPS frontline investigator, Dallas County, Or. (June 23, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS supervisor, Dallas County, Or. (June 22, 2009) (on file with L & CP) (both Oregon interviewees said they "sort of" considered a child's emotional development, but emphasized they really consider that factor in neglect cases as opposed to physical maltreatment cases).

70. See telephone interview by Erin Vernon with a county CPS frontline investigator, Johnson County, Kan. (June 18, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS frontline investigator, Dallas County, Or. (June 23, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS director, Adams County, Neb. (June 16, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS supervisor, Adams County, Neb. (June 17, 2009) (on file with L & CP).

71. See telephone interview by Erin Vernon with a county CPS frontline investigator, Johnson County, Kan. (June 18, 2009) (on file with L & CP).

72. See *id.*; interview by Kenneth A. Dodge and Doriane Lambelet Coleman with a county CPS supervisor, Durham County, N.C. (Feb. 16, 2009) (on file with L & CP).

73. See interview by Kenneth A. Dodge and Doriane Lambelet Coleman with a county CPS director, Durham County, N.C. (Feb. 16, 2009) (on file with L & CP).

74. See telephone interview by Erin Vernon with a county CPS frontline investigator, Johnson County, Kan. (June 18, 2009) (on file with L & CP).

simply supplement formal assessment criteria as social workers exercise their remaining discretion. External considerations include factors that may be part of other protocols inapplicable to the threshold maltreatment assessment, community norms, and personal histories, training, and ideology. For example, when prompted with a list of factors and asked if each was considered during the investigation, CPS officials frequently responded in the affirmative, despite a factor's absence from the official protocol.<sup>75</sup> A Kansas frontline investigator explicitly stated that she considered temporary parental stress, even though it is not a factor in the policy manual. She went on to explain that she tries to take in every possible consideration.<sup>76</sup> Additionally, interviews conducted with eleven CPS officials in five states suggest that regardless of each state's particular protocols and regulations, risk of future harm is a significant factor in evaluating whether a particular instance of corporal punishment is reasonable.<sup>77</sup> Some CPS officials acknowledge that they are taking factors pertinent to the post-substantiation safety assessment into account as they evaluate the threshold question of maltreatment, in part because conducting assessments concurrently is more efficient.<sup>78</sup> These additional factors include the parent's level of control in the situation, any temporary stressors present in the home, how the current situation affects future situations, and the risk of future incidents.<sup>79</sup>

Community culture and norms also influence even those social workers whose decisions are constrained by formal factors, protocols, or decision trees. For example, community attitudes toward corporal punishment often affect the criminal investigation, and if criminal charges are not filed, social workers must

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75. *See id.*

76. *See id.*; telephone interview by Erin Vernon with a county CPS supervisor, Adams County, Neb. (June 17, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS frontline investigator, Dallas County, Or. (June 23, 2009) (on file with L & CP).

77. *See* interview by Erin Vernon with a county CPS supervisor, Duplin County, N.C. (June 26, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS frontline investigator, Johnson County, Kan. (June 18, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS director, Fulton County, Ga. (June 25, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS director, Adams County, Neb. (June 16, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS supervisor, Adams County, Neb. (June 17, 2009) (on file with L & CP); telephone interview by Erin Vernon, with a county CPS frontline investigator, Dallas County, Or. (June 23, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS supervisor, Dallas County, Or. (June 22, 2009) (on file with L & CP); interview by Kenneth A. Dodge and Doriane Lambelet Coleman with a county CPS director, Durham County, N.C. (Feb. 16, 2009) (on file with L & CP). Risk is considered relevant to the determination of maltreatment not only because abuse is expressly defined to include both harm and a risk of harm, but also because, as a practical matter, a finding of significant risk permits CPS to intervene in the family to protect the child from future harm.

78. *See* telephone interview by Erin Vernon with a county CPS supervisor, Adams County, Neb. (June 17, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS frontline investigator, Dallas County, Or. (June 23, 2009) (on file with L & CP).

79. *See* telephone interview by Erin Vernon with a county CPS supervisor, Adams County, Neb. (June 17, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS director, Adams County, Neb. (June 16, 2009) (on file with L & CP).

consider how such attitudes may weaken their civil maltreatment case.<sup>80</sup> One social worker in Oregon, who has worked in both a rural county and an urban county, is particularly sensitive to community ideology and its subsequent effect on judicial decisions.<sup>81</sup> She found that judges in urban communities are much less lenient toward parents' use of corporal punishment compared with judges in rural communities. She attributed this to the election of judges based on the electorate's ideological views and to judges' subsequent preoccupation with reelection. Although formally she considers the same factors whether investigating in a rural or urban community, she does consider how specific factors and evidence will be viewed by a particular court or judge.<sup>82</sup> Removing a child may not be helpful if a judge will ultimately return the child to the parent. Consequently, social workers consider what a particular judge will do, and that consideration may change how they proceed with the family.<sup>83</sup>

Finally, personal histories, training, and ideology may continue to influence social workers' exercise of discretion, regardless of the nature of the administrative constraints under which they are placed. For example, all of the CPS officials interviewed emphasized the importance their jurisdiction's substantiation protocols place on the child's sense of safety in the home, but several cautioned that this criterion requires a thorough evaluation of why the child is afraid.<sup>84</sup> In exercising the discretion required for this evaluation, one frontline investigator in Kansas explained her feeling that a child's fear of a parent is an important factor that should be taken seriously.<sup>85</sup> In contrast, some investigators think the fear of being punished is insufficient.<sup>86</sup> One North

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80. See telephone interview by Erin Vernon with a county CPS frontline investigator, Dallas County, Or. (June 23, 2009) (on file with L & CP).

81. See *id.*

82. See *id.*

83. See *id.*

84. See interview by Erin Vernon with a county CPS supervisor, Duplin County, N.C. (June 26, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS frontline investigator, Johnson County, Kan. (June 18, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS director, Fulton County, Ga. (June 25, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS director, Adams County, Neb. (June 16, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS supervisor, Adams County, Neb. (June 17, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS frontline investigator, Dallas County, Or. (June 23, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS supervisor, Dallas County, Or. (June 22, 2009) (on file with L & CP); interview by Kenneth A. Dodge and Doriane Lambelet Coleman with a county CPS frontline investigator, Durham County, N.C. (Feb. 16, 2009) (on file with L & CP); interview by Kenneth A. Dodge and Doriane Lambelet Coleman with a county CPS supervisor, Durham County, N.C. (Feb. 16, 2009) (on file with L & CP); interview by Kenneth A. Dodge and Doriane Lambelet Coleman with a county CPS director, Durham County, N.C. (Feb. 16, 2009) (on file with L & CP).

85. See telephone interview by Erin Vernon with a county CPS frontline investigator, Johnson County, Kan. (June 18, 2009) (on file with L & CP).

86. See interview by Erin Vernon with a county CPS supervisor, Duplin County, N.C. (June 26, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS frontline investigator, Johnson County, Kan. (June 18, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS supervisor, Dallas County, Or. (June 22, 2009) (on file with L & CP).

Carolina CPS supervisor in a rural county hesitated to consider fear a good indicator of abuse.<sup>87</sup> She explained by describing her experience with corporal punishment growing up: “When I was a child and my daddy said I was going to get beat when I got home, I was certainly scared and fearful of going home, but this is not abuse.”<sup>88</sup> A particularly provocative example of the relevance of personal and professional perspectives involves social workers’ views of the relevance of family privacy and parents’ rights to the maltreatment determination. Specifically, although all interviewees acknowledged CPS’s responsibility to respect family privacy, including parents’ right to use corporal punishment to discipline their children, they also explained their view that their job is to protect children from harm, not to protect parents’ privacy rights. They further explained that this obligation encompasses both children’s physical welfare and their emotional and developmental well-being, and that well-being should be understood, on the basis of social science evidence, to be relevant to proving unlawful discipline.<sup>89</sup> Implicit in their perspective is the view that the child’s and parents’ interests are not obviously coterminous and that family privacy and parental rights are not necessarily good for children.

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87. See interview by Erin Vernon with a county CPS supervisor, Duplin County, N.C. (June 26, 2009) (on file with L & CP).

88. *Id.* The relevance of parental motivation appears similarly to be influenced by social workers’ personal perspectives. For example, in one North Carolina county, the CPS supervisor believed parental motivation did not matter when investigating an incident, whereas the frontline worker in the same county thought it was significant. See interview by Kenneth A. Dodge and Doriane Lambelet Coleman with a county CPS frontline investigator, Durham County, N.C. (Feb. 16, 2009) (on file with L & CP); interview by Kenneth A. Dodge and Doriane Lambelet Coleman with a county CPS supervisor, Durham County, N.C. (Feb. 16, 2009) (on file with L & CP). In contrast, in a county in Oregon, the director thought parental motivation was a “very important” factor while the frontline investigator placed far less importance upon that particular factor. See interview by Kenneth A. Dodge and Doriane Lambelet Coleman with a county CPS frontline investigator, Durham County, N.C. (Feb. 16, 2009) (on file with L & CP); interview by Kenneth A. Dodge and Doriane Lambelet Coleman with a county CPS supervisor, Durham County, N.C. (Feb. 16, 2009) (on file with L & CP). Social workers in rural counties are often personally familiar with the families in the community and thus may have preconceived notions about a particular family which can affect how the investigation proceeds. See telephone interview by Erin Vernon with a county CPS supervisor, Dallas County, Or. (June 22, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS director, Fulton County, Ga. (June 25, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS frontline investigator, Johnson County, Kan. (June 18, 2009) (on file with L & CP).

89. See interview by Erin Vernon with a county CPS supervisor, Duplin County, N.C. (June 26, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS frontline investigator, Johnson County, Kan. (June 18, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS director, Fulton County, Ga. (June 25, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS director, Adams County, Neb. (June 16, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS supervisor, Adams County, Neb. (June 17, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS frontline investigator, Dallas County, Or. (June 23, 2009) (on file with L & CP); telephone interview by Erin Vernon with a county CPS supervisor, Dallas County, Or. (June 22, 2009) (on file with L & CP); interview by Kenneth A. Dodge and Doriane Lambelet Coleman with a county CPS frontline investigator, Durham County, N.C. (Feb. 16, 2009) (on file with L & CP); interview by Kenneth A. Dodge and Doriane Lambelet Coleman with a county CPS supervisor, Durham County, N.C. (Feb. 16, 2009) (on file with L & CP); interview by Kenneth A. Dodge and Doriane Lambelet Coleman with a county CPS director, Durham County, N.C. (Feb. 16, 2009) (on file with L & CP).

### C. Courts

Courts act as a check on CPS decisions to intervene in the family. Depending on the jurisdiction, trial courts may be specially denominated family, juvenile, or dependency courts. They approve (or not) CPS decisions to declare children in need of protection, either temporarily, during the pendency of an investigation, or for a longer term, following substantiation of maltreatment. Trial-court involvement in the CPS process is routine, thus establishing trial-court judges as critical players of the law as it is practiced on the ground. Appellate courts have authority to review trial-court decisions. However, very few trial-court decisions are appealed by either party. Not many parents have the will or the resources to appeal adverse decisions.<sup>90</sup> And CPS agencies may face political and procedural hurdles that make appeals difficult for them too.<sup>91</sup> As a result, although appellate courts are formally superior institutions and responsible for making common law, they are less relevant on a day-to-day basis than trial courts.

Although trial courts may be more likely than appellate courts to render decisions favorable to CPS because of their ongoing working relationship with its professionals, both trial and appellate courts retain wide discretion in determining whether an act of physical discipline constitutes unlawful physical abuse. This discretion is attributable both to the broad and imprecise language found in most statutory definitions of physical abuse and to the fact that judges are free either to be guided by<sup>92</sup> or to disregard unreasonable agency interpretations of that language.<sup>93</sup> Ultimately, because of this broad discretion, but also probably because of their different disciplinary orientation, judges have developed their own approaches to drawing the line between reasonable physical discipline and unlawful physical abuse. These approaches vary from state to state and judge to judge. Nevertheless, a careful analysis of the relevant cases shows that, in general, courts consider many of the same factors as CPS does, including the degree and severity of the child's injury, the child's real and developmental age, the manner of discipline, and whether a pattern of abuse (chronicity) is present. Importantly, though, this analysis also demonstrates that courts are more likely than CPS to consider parent-focused factors, such as the

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90. See *supra* note 47.

91. Because CPS professionals often have long-term working relationships with the particular trial-court judges assigned to review their maltreatment decisions, accommodations may be made on both sides, but especially by CPS. See *supra* notes 80–82 and accompanying text. CPS may also be inhibited by states' sometimes-stingy procedural requirements for appeals.

92. See, e.g., *In re interest of J.P.*, 692 N.E.2d 338, 346 (Ill. App. Ct. 1998) (“We are guided by the Illinois Administrative Rules . . . [which suggest] considering such factors as the child's age, the severity of the injury, the location of the injury, whether an instrument was used, and the pattern and chronicity of similar incidents of harm to the child.”).

93. 2 AM. JUR. 2D *Administrative Law* § 77 (2007); see also *Sokol v. Kansas Dep't of Soc. & Rehab. Serv.*, 981 P.2d 1172, 1177 (Kan. 1999) (“[I]n reviewing questions of law, the trial court may substitute its judgment for that of the administrative agency, although ordinarily the court will give great deference to the interpretation of statutes and regulations of the enforcing agency.”).

parent's right to use physical discipline and the parent's motivation for doing so in a particular case, and less likely than CPS to consider an injury's emotional and developmental sequelae. Indeed, depending on the jurisdiction, these parent-focused factors may predominate.

#### 1. Factors Common to Judicial and CPS Decisionmaking

*a. Severity of injury.* Consistent with state statutes that typically define physical abuse in terms of harm or injury to the child, courts drawing the line between reasonable corporal punishment and unlawful physical abuse focus heavily on the degree and severity of the child's physical injury. The level of harm or injury necessary for an act of physical discipline to constitute abuse depends largely on each state's statutory definition of abuse. Courts commonly consider such factors as whether medical treatment was required, how much pain the child experienced, and whether the injury resulted in disfigurement or impairment.<sup>94</sup> Courts are reluctant to find that bruising alone is severe enough to constitute physical abuse.<sup>95</sup> In fact, some courts have specifically rejected CPS rules and regulations that permit a finding of abuse when a child experiences a bruise lasting more than twenty-four hours.<sup>96</sup> In general, courts appear more willing to find physical abuse when punishment results in multiple or very large bruises, bruises with a deep or intense color, bruises lasting a week or more, bruises that are especially painful, or bruises on a location other than the child's buttocks.<sup>97</sup> At least some courts demand more before they are willing to find

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94. See, e.g., *T.G. v. Dep't of Children and Families*, 927 So. 2d 104 (Fla. Dist. Ct. App. 2006) (holding that evidence was insufficient to establish abuse when physical discipline resulted in bruising but the agency failed to produce evidence that the bruises required medical attention); *In re Miles*, 2002 WL 1065704, at \*1 (Ohio Ct. App. May 22, 2002) (per curiam) (holding that evidence was insufficient to establish abuse when a mother's fiancé bit her nine-year-old child because there was no evidence "that acute pain resulted of any lasting duration to result in substantial suffering, or that [the pain] lasted for an extended period of time or was intractable"). But see *In re F.S.*, 806 N.E.2d 1087, 1094–95 (Ill. App. Ct. 2004) (explaining that there is no requirement that injuries necessitate medical treatment in order to constitute abuse).

95. See, e.g., *Ark. Dep't of Human Serv. v. Caldwell*, 832 S.W.2d 510, 513 (Ark. Ct. App. 1992) (explaining that evidence of bruising as a single factor "standing alone and applied as a litmus test, without consideration of all the attendant circumstances, is [not] an appropriate measure to be used in all cases for determining whether an allegation of abuse is to be sustained").

96. For example, the Iowa Supreme Court rejected a CPS rule that reddening of the skin lasting for twenty-four hours or more is a physical injury per se. *Hildreth v. Iowa Dep't of Human Serv.*, 550 N.W.2d 157, 158–60 (Iowa 1996) (explaining that "welts, bruises, or similar markings are not physical injuries per se but may be and frequently are evidence from which the existence of physical injury can be found"). Florida courts have also rejected an agency policy requiring investigators to confirm reports of abuse when bruises are visible twenty-four hours after the discipline is administered. *B.R. v. Dep't of Health and Rehab. Serv.*, 558 So. 2d 1027, 1028 (Fla. Dist. Ct. App. 1989); see also, e.g., *In re O.C.*, 934 So. 2d 623, 627–28 (Fla. Dist. Ct. App. 2006) (finding that a four-inch bruise on a child's buttocks was insufficient to support a finding of physical abuse and noting that "case law has established . . . that a single incident of a serious bruise on the buttock of a child, perhaps caused by corporal punishment, will not support a finding of dependency" and that "some evidence of a pattern of excessive corporal punishment or a single punishment resulting in a more serious injury is required").

97. Compare *Cobble v. Comm'r of Dep't of Social Serv.*, 719 N.E.2d 500, 503, 508 (Mass. 1999) (finding evidence insufficient to establish abuse when a father disciplined his son by striking him on the buttocks with a belt resulting in temporary red marks that lasted approximately ten minutes), with *In re*



that the requisite “serious” injury has occurred. For example, the North Carolina Court of Appeals held that bruises on a child’s arm and upper buttocks lasting for several days were insufficient to establish that the child, who had been beaten with a belt, was abused. The court explained that abuse involves “an injury more severe than a bruise as a result of a spanking.”<sup>98</sup> And it provided as examples of incidents and injuries that did pass muster: choking, hitting with fists and glass objects, pulling out hair, and burning.<sup>99</sup>

*b. The age and developmental stage of the child.* The cases suggest that courts are more inclined to classify a disciplinary measure as abuse when the act is administered against a young child or one with physical or mental disabilities.<sup>100</sup> The courts’ consideration of these characteristics can be explained in two ways. First, a spanking administered against a young child or a child with physical disabilities may cause a more-serious physical injury and more-serious long-term consequences to emotional development than the same spanking administered against an older or physically healthy child.<sup>101</sup> In this sense, the age and condition of a child is simply part of a court’s consideration of the degree and severity of the child’s injury. Second, a young child or a child with a mental or emotional disability may lack the capacity to understand the purpose of the discipline or appreciate its deterrent effect.<sup>102</sup> A spanking that has no disciplinary value because the child lacks the capacity to understand its purpose is more likely to be unreasonable or excessive.

*c. Manner of discipline.* Courts often consider how much force and how many strikes parents employ when they administer physical discipline, as well as

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L.T.R., 639 S.E.2d 122, 126 (finding physical abuse when stepfather hit his four-year-old stepson with a brush causing a “dark, six-inch bruise, which lasted well over one week, on his right thigh” which caused visible discomfort several days later), and *J.S. v. Dep’t of Pub. Welfare*, 565 A.2d 862, 864 (Pa. Commw. Ct. 1989) (finding abuse of a five-year-old child when spanking caused “black and blue marks over her entire buttocks area causing severe pain”), and *S.C. Dep’t of Social Serv. v. Father and Mother*, 366 S.E.2d 40, 41 (S.C. Ct. App. 1988) (finding abuse when a thirteen-year-old child sustained “purple bruises covering almost the entire back of her left thigh and a part of the back of her right leg, extending to her knee”).

98. *In re C.B., J.B., Th.B., & Ti.B.*, 636 S.E.2d 336, 338 (N.C. Ct. App. 2006).

99. *Id.*

100. This inclination is consistent with recent moves in some jurisdictions to classify all physical discipline of children under a certain age as per se unreasonable. In 2004, the Canadian Supreme Court prohibited corporal punishment for children under the age of two or over the age of twelve. *Canadian Found. for Children, Youth and the Law v. Canada*, [2004] 1 S.C.R. 76, 2004 SCC 4 (Can.). Additionally, a California legislator sponsored a bill that would have made spanking a child under the age of three a misdemeanor but abandoned it due to a lack of political support. Jesse McKinley, *Lawmaker Ends Effort to Make Spanking a Crime*, N.Y. TIMES, Feb. 23, 2007, at A15.

101. *See, e.g., In re Rogers*, 1989 WL 98423, at \*2 (Ohio Ct. App. Aug. 24, 1989) (emphasizing that paddling with a board could “create pain that would be unbearable or nearly so to a two-year-old child”).

102. *See Dep’t of Health and Human Serv. v. R.C.*, 2007 S.W.3d WL 416776, at \*7 (Ark. Feb. 8, 2007) (finding abuse when a four-year-old child suffering from cerebral palsy received a spanking causing eight to ten bruises); *Lovan C. v. Dep’t of Children and Families*, 860 A.2d 1283, 1290 (Conn. Ct. App. 2004) (relevant factors include “the amount of force used and the child’s age, size and ability to understand the punishment”).

whether they use an object such as a belt or paddle.<sup>103</sup> The cases suggest that courts view with more suspicion a parent who uses extreme force to strike a child repeatedly with a paddle or belt than one who swats a child a couple of times with an open hand; correspondingly, such discipline is more likely to be found to exceed the bounds of reasonableness.<sup>104</sup> To some extent, these factors simply correspond to the degree or severity of harm inflicted on the child. As one court pointed out, an object may create a barrier between the parent and child and prevent the parent from realizing how hard he is striking the child.<sup>105</sup> Uncontrolled, forceful striking or the use of an object to strike a child also might increase the risk of severe injury if the child squirms or otherwise moves as the discipline is being administered.<sup>106</sup> Interestingly, there is some evidence that parents choose to discipline with an object instead of a hand because they believe doing so is *less* harmful to the child. For example, a parent may choose to use a spoon or another object to administer a spanking because doing so makes it less likely that their children will perceive hitting with hands as an acceptable way to solve problems.<sup>107</sup> Some courts also infer something about the parent's motive or intent from the parent's choice of disciplinary method. Whereas courts may view injuries resulting from a measured, restrained spanking as just the "regrettable result" of well-intentioned corporal punishment, more-extreme methods of punishment are viewed suspiciously because they suggest that a parent actually intends to injure his child.<sup>108</sup>

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103. See, e.g., *In re Mercer*, 2005 WL 914671, at \*4 (Ohio Ct. App. Apr. 21, 2005) (considering the "[n]ature of manner of the discipline administered, and the measure of discipline").

104. See *In re F.W.*, 634 N.E.2d 1123, 1129 (Ill. App. Ct. 1994) (urging parents to "understand that a swat on a child's buttocks with an open hand and the 'paddling' of a child with belts, cords, or ropes are intrinsically distinct exercises of corporal punishment" and warning that "parents using boards, belts, cords, or ropes as weapons to inflict corporal punishment may encounter an unwillingness on the part of DCFS and the courts to regard their conduct as reasonable"). But see *In re J.P.*, 692 N.E.2d 338, 346 (Ill. App. Ct. 1998) ("[T]he use of an object, especially when the court finds that the object was not 'terribly offensive' or 'heinous' should not blind a court to the many other factors which should and must be considered when weighing the evidence.>").

105. *Hildreth v. Iowa Dep't of Human Serv.*, 550 N.W.2d 157, 160 (Iowa 1996) ("The laws of physics are such that when even a moderate degree of force is administered through an instrument that makes contact with only a small area of the body, the pressure visited upon that point may be more than will reasonably be anticipated.>").

106. See *City of Philadelphia v. Dep't of Pub. Welfare*, 767 A.2d 10, 11 (Pa. Commw. Ct. 2001) (A mother bruised her son's forearm and back with a pool stick when he tried to shield himself from her strikes to the buttocks).

107. One mother told a child-services caseworker that she used a wooden spoon to discipline her child because she believed it was wrong to hit with the hand, which should represent love. *In re J.P.*, 692 N.E.2d 338, 339 (Ill. App. Ct. 1998). Another parent explained that he preferred to use an object instead of his hand because he did not want to teach his children that "the way to solve things is by hitting with the hand." *In re B.B.*, 598 N.W.2d 312, 316 (Iowa Ct. App. 1999).

108. See, e.g., *P.R. v. Dep't of Pub. Welfare*, 801 A.2d 478, 487 (Pa. 2002) (holding that an agency must show that a parent's conduct in administering corporal punishment was a "gross deviation from the standard of care that a reasonable person would observe in the same situation" to establish that injuries inflicted as a result of corporal punishment constitute abuse; the court found that the decision to use a belt with a buckle was not such a gross deviation). In an earlier case, however, a Pennsylvania court held that a mother abused her daughter when she continued to strike her daughter with a belt as

*d. Pattern of abuse or chronicity.* Courts frequently consider whether an act of physical discipline is an isolated event or part of a larger pattern of arguably unreasonable discipline.<sup>109</sup> If the individual injuries are relatively minor, a pattern, or chronicity, may cause them to be classified as abuse.<sup>110</sup> Courts may place importance on a pattern of abuse because they fear that an escalation of violence in the future could put the child at risk. Though courts seem less likely than CPS workers explicitly to consider a child's risk of future harm or injury, courts' emphasis on the history of unreasonable physical discipline in the household indicates some concern for the child's safety in the event that the child remains in the home.

## 2. Nonphysical Sequelae and Parent-Focused Factors

*a. Emotional and developmental effects.* Unlike CPS, which as an institution is increasingly incorporating the emotional and developmental effect of physical injuries into their assessment whether a particular incident of corporal punishment is abuse, courts appear rarely to consider the possibility that physical discipline may be emotionally or psychologically damaging to the child. A review of appellate-court decisions suggests that lower-court records contain little or no information about the emotional and developmental effects of physical discipline on the child.<sup>111</sup> Even when these effects are recognized, however, courts are still likely to give them very little weight.<sup>112</sup> One judge has

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her daughter ran up the stairs. *B.J.K. v. Dep't of Pub. Welfare*, 773 A.2d 1271 (Pa. Commw. Ct. 2001). See also *In re Peter G.*, 6 A.D.3d 201, 206 (N.Y. App. Div. 2004) (finding physical discipline reasonable absent a "showing that the father's actions were extreme or unnecessarily degrading or prompted by rage or administered solely for self-gratification").

109. See, e.g., *In re O.C.*, 934 So. 2d 623, 627–28 (Fla. Dist. Ct. App. 2006) (requiring either "evidence of a pattern of excessive punishment" or a more-serious single incident to constitute abuse).

110. *Id.*

111. Only a handful of the cases reviewed contained any references to emotional or developmental effects. See, e.g., *In re D.C.*, 596 P.2d 22 (Alaska 1979) (per curiam) (recounting testimony from a psychiatric social worker indicating that the home situation was causing major psychological problems for the child); *In re T.F.*, 2005 WL 288996, at \*4 (Cal. Ct. App. Feb. 7, 2005) (recounting testimony from a counselor indicating that "children appeared to be happy with the mother"); *In re S.K.*, 564 A.2d 1382 (D.C. Ct. App. 1989) (per curiam) (recounting expert testimony that the child's mental illness was exacerbated by physical discipline); *O.S. v. Dep't of Children and Families*, 821 So. 2d 1145 (Fla. Dist. Ct. App. 2002) (recounting evidence that child was self-mutilated). Illinois courts appear to consider the emotional and psychological effects more frequently than do courts in other states. See *In re F.W.*, 634 N.E.2d 1123, 1129 (Ill. Ct. App. 1994) (noting that it is appropriate for the court to consider the "psychological effects of the discipline on the child"). It is impossible without doing a thorough search of case files to determine the information lower courts had at their disposal. These files are difficult to locate and, depending on the case, may be sealed. A review of appellate decisions is a good substitute for this search because they are based on evidence included in the record below. The experience of parties to and judges sitting on cases in the lower courts is consistent with our reading of these appellate decisions. See *infra* note 155 and accompanying text.

112. *In re BB*, 598 N.W. 2d 312, 318 (Iowa Ct. App. 1999) (Sackett, C.J., concurring specially) (departing from the majority's conclusion that excessive corporal punishment caused a child to adopt his parents' aggressive approach to problem-solving because "this is not a conclusion to reach without any statistical evidence" and "experience ha[d] shown [the judge] that even young men who are not spanked at home fight at school").

surmised that this bias is because judges in general lack the expertise to evaluate evidence related to the emotional or psychological impact of physical discipline on a child.<sup>113</sup> Whatever the case, interviews with CPS professionals in one North Carolina county suggest that emotional- and developmental-impact evidence rarely makes it into the record notwithstanding its importance because neither the lawyers (for the state or the parents) nor the judges involved are interested in these facts; they simply want to know the circumstances in which the immediate physical injury occurred and the relevant medical details.<sup>114</sup>

*b. Parent's motivation.* Related to the circumstances in which the injury occurred, and in contrast with the practice of at least some CPS professionals, courts often consider a parent's motivation for administering physical discipline when they evaluate the reasonableness of the disciplinary act. Specifically, some courts consider whether the disciplinary act was "rendered necessary" by the child's actions.<sup>115</sup> This approach requires courts to evaluate the nature and gravity of the child's behavior and the parent's attempts to address the behavior without resorting to physical discipline.<sup>116</sup> The child's age and developmental stage should also be relevant to this inquiry because punishment is pointless (and only potentially harmful) if the child is unable to appreciate its intended lesson. At bottom, the parental-motivation inquiry suggests that courts—unlike some CPS professionals—are not strictly focused on physical harm to the child. They are often willing to view physical discipline, even physical discipline that causes minor physical injury to the child, as reasonable, provided the parent's

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113. Cindy S. Lederman, *Healing in the Place of Last Resort: The Role of the Dependency Court Within Community-Based Efforts to Prevent Child Maltreatment*, in PREVENTING CHILD MALTREATMENT: COMMUNITY APPROACHES 172, 173 (Kenneth A. Dodge & Doriane Lambelet Coleman eds., 2009).

114. Interviews by Kenneth A. Dodge and Doriane Lambelet Coleman with county CPS frontline investigator and director, Durham County, N.C. (Feb. 16, 2009) (on file with L & CP).

115. *People ex rel. C.F.*, 708 N.W.2d 313, 317 (S.D. 2005). South Dakota employs a two-pronged analysis to determine whether an act of discipline is unlawful or reasonable. The first prong asks whether the "corrective measure utilized was 'rendered necessary' by the child's actions," while the second prong asks "whether the force used was 'reasonable in manner and moderate in degree.'" *Id.* Connecticut and Ohio also appear to use a version of this two-pronged analysis. *See Lovan C. v. Dep't of Children and Families*, 86 Conn. App. 290, 299 (Conn. App. Ct. 2004) ("In a substantiation of abuse hearing, if it is shown that a child has sustained a non-accidental injury as a result of parent administered corporal punishment, the hearing officer must determine whether the punishment was reasonable and whether the parent believed the punishment was necessary to maintain discipline or to promote the child's welfare."); *In re Horton*, 2004 WL 2674562, at \*7 (Ohio Ct. App. Nov. 23, 2004) (determining whether a child is abused requires an inquiry into "(1) the excessiveness (or lack thereof) and necessity (or lack thereof) of the corporal punishment appellant inflicted, and (2) whether the punishment created a substantial risk of serious physical harm"). An opinion issued by the California Attorney General also suggested that this is the proper analysis. 80 Op. Cal. Att'y Gen. No. 97-416 (1997) ("[T]he punishment must be necessary and not excessive in relation to the individual circumstances.").

116. *See In re T.A.*, 663 N.W.2d 225, 230 (S.D. 2003) (finding physical discipline unnecessary because the boy's "parents failed to intervene in any manner before resorting to spanking" and did not attempt alternative forms of discipline).

disciplinary act was a legitimate attempt to correct the child's misbehavior.<sup>117</sup> If the evidence suggests that a parent was instead acting viciously out of anger or cruelty, however, courts are not willing to afford parents the same discretion.<sup>118</sup> Many courts that do not explicitly evaluate the "necessity" of the disciplinary act still take into account the parent's motivation by considering whether the parent employed physical discipline in a manner indicative of her desire to help, not harm, the child.<sup>119</sup> Specifically, courts consider whether the parent-administered discipline in a controlled manner, whether the parent was angry when he or she administered the discipline, and whether any evidence suggests a malicious intent.<sup>120</sup>

*c. Parent's right to use physical discipline.* Finally, when evaluating whether a finding of abuse is warranted, courts commonly refer to a parent's right to administer reasonable physical discipline.<sup>121</sup> The courts' explicit recognition of this right as part of an attempt to draw the line between physical abuse and reasonable physical discipline suggests that—unlike some CPS agencies and professionals, who view their role primarily as saving children from their parents<sup>122</sup>—courts are focused either on simultaneously protecting children and preserving parents' disciplinary autonomy, or, in some cases, primarily on the latter.<sup>123</sup>

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117. See *M.O. v. Dep't of Health and Rehab. Serv.*, 575 So. 2d 1352 (Fla. Dist. Ct. App. 1991) (per curiam) (emphasizing that the discipline employed by parents was part of a therapeutic plan developed with the help of an outside expert).

118. See, e.g., *In re Maurice S.*, 1994 WL 149549, at \*3 (Neb. Ct. App. Apr. 26, 1994) (finding abuse when father was angry at his son and "specifically ordered [him] to remove his sweater to ensure the punishments were painful" and when nothing suggested that the child was "defiant or otherwise uncontrollable or incorrigible").

119. See, e.g., *Raboin v. N.D. Dep't of Human Serv.*, 552 N.W.2d 329 (N.D. 1996) (noting that parents only used corporal punishment as a last resort and in a structured manner); *State ex rel. L.P.*, 981 P.2d 848 (Utah Ct. App. 1999) (considering whether parent's action was a good faith effort to maintain discipline or, rather, a malicious intent to cause harm); *Ables v. Rivero*, 2003 WL 356446, at \*6 (Va. Ct. App. Feb. 19, 2003) (explaining that it is unreasonable to use physical discipline for the "exhibition of uncontrolled passion").

120. See cases cited *supra* note 119.

121. See, e.g., *In re J.P.*, 692 N.E.2d 338, 345 (Ill. Ct. App. 1998) ("It is clear that a parent has the 'right' to corporally discipline his or her child, a right derived from our constitutional right to privacy. But this right, like any other, must be exercised in a 'reasonable' manner.") (citations omitted).

122. Interview by Kenneth A. Dodge and Doriane Lambelet Coleman, with a county frontline investigator, Durham County, N.C. (Feb. 16, 2009) (on file with L & CP) (describing the goal as helping families and explaining that classifying an injury as maltreatment provides the basis to accomplish this goal; emphasizing that CPS exists to protect children, not parents' rights); Doriane Lambelet Coleman, *Innovations in Child Maltreatment Prevention: Resolving the Tension Between Effective Assistance and Violations of Privacy*, in PREVENTING CHILD MALTREATMENT, *supra* note 113 at 156, 158 (noting that "the social work community has a long history of thinking about itself as engaged in the business of 'child saving' and particularly about its prophylactic interventions in the lives of children and families as 'helping'").

123. Appellate court judges in particular seem to be inclined toward privileging parents' rights above harm to the child, as they are more likely, certainly more so than CPS professionals, to interpret a statutory requirement of physical injury or serious physical injury to require egregious harm or damage to the child. See, e.g., *In re C.B., J.B., Th.B., & Ti.B.*, 636 S.E.2d 336, 338 (N.C. Ct. App. 2006) (providing as illustrations of incidents and outcomes meeting the definition a parent who chokes,

## III

## THE GOVERNING PARADIGMS FOR DECISIONMAKING

The legal actors responsible for determining where and how to draw the line between reasonable and unlawful corporal punishment—CPS agents and courts—are influenced by one of two paradigms, or by a more or less ad hoc combination. The first of these paradigms reflects parental-autonomy norms, and the second, scientific knowledge about the circumstances that cause children harm. The extent to which one or another of the paradigms governs the approach of particular individuals or institutions appears at least in part to reflect political or personal orientation, disciplinary training, or both.<sup>124</sup> In view of our prescriptive project in part IV, which seeks intentionally to reconcile norms and knowledge and to propose policy reforms that reflect that reconciliation, this part lays the groundwork for effective multi- and interdisciplinary engagement by describing, first from the relevant disciplinary perspectives, the nature and significance of each of these approaches.

## A. Parental-Autonomy Norms

Parental-autonomy norms reflect society's widely held view that parents have the right to raise their children as they see fit, without outside interference from the government or others. Described variously as "parental autonomy," "parents' rights," and "family privacy,"<sup>125</sup> these norms—incorporated in long-standing American political philosophy, constitutional theory, and law—provide that a metaphorical (closed) circle or geographic boundary surrounds the family, in which parents are sovereigns and children, subjects of their

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punches, and burns a child and who pulls out her hair, and rejecting as insufficient CPS's evidence of beatings with a belt causing bruises on the buttocks and elsewhere on the body that last for several days coupled with the child's fear of returning home to the offending parent).

124. For a useful summary of the long-standing collaboration and clash between social workers and the law in this area, see GIOVANNONI & BECERRA, *supra* note 6 at 66–69. Specifically, *id.* at 66: "Together, the social welfare agencies and legal system constituted a curious commingling of the exercise of legal authority and the rendering of social service, with much overlap and blurring of roles. That tensions should arise in any system with such unclear role definitions is inevitable."; *id.* at 67 (noting that, early on, "[s]ocial workers came under criticism for their lack of knowledge about the law and legal procedures"); *id.* at 68 (suggesting that proponents of law and social work may be "more polarized" today than in the early twentieth century, and that "the potential for polarization . . . inheres in the conflicting interests of the parties in the situation"); and *id.* at 68–69 (describing the conflicting interests as being, on the one hand and for social workers, saving children from bad parents even when the evidence to justify this does not yet meet legal muster, and on the other hand and for the law, protecting parents' rights to the custody of their children).

125. James G. Dwyer, *Parental Entitlement and Corporal Punishment*, 73 LAW & CONTEMP. PROBS. 189, 194–206 (Spring 2010); Martha Albertson Fineman, *What Place for Family Privacy?*, 67 GEO. WASH. L. REV. 1207, 1210–11 (1999) (family privacy means the right to freedom from state interference that belongs to the family as a unit or entity, rather than to its included individuals); Barbara Bennett Woodhouse, *The Dark Side of Family Privacy*, 67 GEO. WASH. L. REV. 1247, 1254 (1999) (family privacy is essentially the same thing as parental autonomy since, "[w]hen we adopt a theoretical framework that endows any 'unit' of persons with 'autonomy,' or a 'right' to be free of state intervention, in practice, we are conferring unregulated authority on the dominant member within this closed community of persons").

sovereignty.<sup>126</sup> Within this scheme, parents have both the right to physical custody of their children and the right to make decisions for and about them and their welfare.<sup>127</sup> The latter is part of a bundle of adult decisionmaking rights that are known especially in constitutional jurisprudence as decisional autonomy.<sup>128</sup>

When discipline is appropriate and how it is meted out are considered to be well within parents' decisional autonomy. As one court explained, "The duty to discipline the child carries with it the right to chastise and to prescribe a course of conduct designed for the child's development and welfare. This in turn demands that the parents be given a wide sphere of discretion."<sup>129</sup> Although the United States Supreme Court has never had occasion to rule on whether corporal punishment is included among parents' federal constitutional rights, this disciplinary option is well-established under state law.<sup>130</sup> Specifically, states have long provided parents with an exception to tort- and criminal-law prohibitions against physical assaults when they can establish a disciplinary motive for the assault and when the assault itself is "reasonable."<sup>131</sup> Twentieth-century case law is thus replete with holdings like this one: "A parent has the right to punish a child within the bounds of moderation and reason, so long as he or she does it for the welfare of the child."<sup>132</sup> The states' approach has its

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126. Lee E. Teitelbaum, *The Family as a System: A Preliminary Sketch*, 1996 UTAH L. REV. 537, 541–42 (1996) (recalling colonial history that described the family as "distinct from that other entity, the state, . . . [which] must be given some decisional space," and describing a married couple as "form[ing] a precinct that stands apart from and is ordinarily closed to state authority"); *id.* at 546 (rejecting the conventional idea of "the family . . . as an island or refuge").

127. Coleman, *Legal Ethics of Pediatric Research*, *supra* note 3, at 546–48.

128. See Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1202–05 (1998) (describing the constitutional concept of decisional privacy).

129. *Borst v. Borst*, 41 Wash. 2d 642, 656 (Wash. 1952)(en banc.).

130. See *supra* II.A (describing states' statutory privilege). State law is significant in this context because its traditional forms typically influence the contours of constitutional doctrine. Coleman, *Legal Ethics of Pediatric Research*, *supra* note 3 at 548–49. In other words, even though the Supreme Court has not decided the question, given long-standing state-law tradition, it is generally assumed that if the Court did have occasion to do so, it would rule that corporal punishment is within the bounds of parental autonomy. See also Davidson, *supra* note 2, at 406 ("The United States Supreme Court has recognized the parental right reasonably to discipline children by stating, 'the statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition.'") (quoting *Parham v. J.R.*, 442 U.S. 584, 603 (1979)); Leonard P. Edwards, *Corporal Punishment and the Legal System*, 36 SANTA CLARA L. REV. 983, 991 n.48 (1995–1996) (discussing the Supreme Court cases that, read together, support the assumption that parents have a constitutional right to use corporal punishment as a form of discipline).

131. See *Newby v. United States*, 797 A.2d 1233, 1242–43 (D.C. 2002) (explaining that "the basic conception of the parental discipline defense" requires a "genuine disciplinary purpose" and the use of only "moderate" or "reasonable" force); RESTATEMENT (SECOND) OF TORTS § 147 (1965) (providing that "[a] parent is privileged to apply such reasonable force or to impose such reasonable confinement upon his child as he reasonably believes to be necessary for its proper control, training, or education"); Edwards, *supra* note 130, at 983–84 (explaining the disciplinary exception to battery law).

132. Edwards, *supra* note 130, at 997 (describing the holding in *Carpenter v. Commonwealth*, 44 S.E.2d 419 (Va. 1947)). See also, e.g., *Gillett v. Gillett*, 335 P.2d 736 (Cal. Ct. App. 1959) (noting that a parent "may administer reasonable punishment with impunity, but when he exceeds that limit and does so willfully he commits a battery and is civilly liable for the consequences"); *Diehl v. Commonwealth*,

origins in “the Colonial period, [when] . . . [corporal] punishment was thought to be a ‘desirable and necessary instrument of restraint upon sin and immorality,’ as well as having a regenerative effect on the child’s character.”<sup>133</sup> This view derived in turn from traditional English doctrine, which holds that a parent “may lawfully correct his child, being under age, in a reasonable manner, for this is for the benefit of his education.”<sup>134</sup> Modern maltreatment law has adopted this common-law exception.<sup>135</sup>

In general, parental autonomy is viewed as being good for society, good for parents, and good for children. Political philosophy and constitutional theory teach that parental autonomy is good for society because the family is considered to be the fundamental—as in first and foundational—social unit of society. This is the concept of the family as a village within a town, within a county, within a state, within the country; the village being primarily and in the first instance responsible for bringing up the young to become well-adjusted, productive individuals and citizens.<sup>136</sup> Parental autonomy is also said to be good for society because children need to be raised by some adult(s), and neither the state itself nor any other individual or group of adults can replace parents as “first best caretakers,”<sup>137</sup> and because society’s interest in the perpetuation of heterogenic democracy is best fulfilled when an ideologically diverse group of individuals raises the children.<sup>138</sup> Parental autonomy is viewed as being good for

385 S.E.2d 228, 230 (Va. App. Ct. 1989) (“[W]hile a parent has the right to discipline his or her child the punishment must be within the bounds of moderation. If the parent exceeds due moderation, he or she becomes criminally liable.”).

133. Edwards, *supra* note 130, at 988 (“Since a child’s original nature was considered evil, corporal punishment enabled the child to become a fit person, and any failure was seen as a matter of inadequate application.”). Modern thought on the need for and benefits of corporal punishment is remarkably unchanged. *See, e.g., id.* at 990 (explaining the modern view that “the principle effect of corporal punishment is that children learn to obey and respect authority. Further, it builds character, prevents bad behavior from reoccurring, and improves discipline.”).

134. 1 WILLIAM BLACKSTONE, COMMENTARIES \*542.

135. *See supra* II.A .

136. *See* Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. 955, 965 (1993) (noting the historical construction of the family as “a little commonwealth”); HERMAN HUMPHREY, DOMESTIC EDUCATION (1840), *reprinted in* 1 CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY 351–52 (Robert Bremner ed., 1970) (“Every family is a little state, or empire within itself . . . Every Father is the constituted head and ruler of his household. God has made him the supreme earthly legislator over his children . . . .”); William E. McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030, 1076–77 (1930) (noting that the family is a “domestic government” and that “the head of the family is clothed with broad authority . . . similar to that of a sovereign”); *see also* LAURENCE THOMAS, THE FAMILY AND POLITICAL SELF 83–129 (arguing from Rousseau that “[t]he family is the first model of political societies”).

137. *Meyer v. Nebraska*, 262 U.S. 390, 401–03 (1923) (discussing the downsides of alternative child-rearing models); DAVIS ET AL., *supra* note 10, at 1 (describing the law’s view of parents as children’s “first best” caretakers”); Coleman, *Storming the Castle*, *supra* note 3 at 536–37 (using this principle in the context of child welfare investigations).

138. Dailey, *supra* note 136, at 959 (“[T]he family acts as an important institutional check on the power of the state to mold citizens in its own image.”); *id.* at 996 (“[P]arental authority . . . is necessary for the development of responsible individuals who have been raised with a sense of belonging to distinct and diverse moral traditions.”).



parents because it honors the “natural bonds of affection” that tie them to their children and also because it compensates them for taking on the responsibilities of parenting.<sup>139</sup> Finally, parental autonomy is viewed as being good for children because, among the adults and institutions that might be imagined as caregivers, parents, guided by their natural bonds of affection, are most likely to take the best care of their own children and to do the best job raising them to be successful adults.<sup>140</sup> That aspect of parental autonomy that sees the family as sovereign territory is specifically viewed as being good for children because, when parent and child are bonded, interference by outsiders to the relationship harms their emotional and developmental well-being.<sup>141</sup>

The theories that support parental autonomy have changed significantly over time. Throughout the nineteenth century, children were generally considered to be one with or the property of their parents (generally of their fathers).<sup>142</sup> By the end of the twentieth century, however, these unity and property models of the parent–child relationship were considered anachronistic. Today, children are generally believed to be proper subjects of individualism, albeit with an evolving capacity for mature, thoughtful decisionmaking.<sup>143</sup> The concept of the family as sovereign territory protected against interference by a circle of privacy has not changed, although the right of the state to break the

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139. *Lehr v. Robertson*, 463 U.S. 248, 257 (1983) (“[T]he Court has emphasized the paramount interest in the welfare of children and has noted that the rights of parents are a counterpart of the responsibilities they have assumed.”); *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (“Parents generally, ‘have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations.’”) (quoting *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925)); see also GIOVANNONI & BECERRA, *supra* note 6, at 34–35 (quoting Blackstone, who wrote that “[t]he duty of parents for the maintenance of their children is a principle of natural law; an obligation . . . laid down on them not only by nature herself . . . in bringing them into the world: for they would be in the highest manner injurious to their issue, if they only gave their children life, that they might afterwards see them perish.”); Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 *YALE L.J.* 293, 297–98 (1988) (describing the traditional view of “parenthood as exchange”).

140. As Emily Buss has written,

[A] legal system that shows strong deference to parents’ child-rearing decisions serves children well. Parents’ strong emotional attachment to their children and considerable knowledge of their particular needs make parents the child-specific experts most qualified to assess and pursue their children’s best interests in most circumstances. In contrast, the state’s knowledge of and commitment to any particular child is relatively thin. A scheme of strong constitutional rights shields the parent expert from the intrusive second-guessing of the less expert state.

“*Parental Rights*,” 88 *VA. L. REV.* 635, 647 (2002). See also DAVIS et al., *supra* note 10, at 1 (noting that the arrangement established under the doctrine of parental autonomy is “assumed . . . [to] serve both the interests of children and of society”).

141. See Coleman, *Storming the Castle*, *supra* note 3, at 520–21, 536–37; JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 19–20, and *passim* (1973) (arguing that interference in or disruption of a bonded parent–child relationship can cause harm to the child).

142. Edwards, *supra* note 130, at 986–89 (discussing this theoretical background and its application in the corporal punishment context); Barbara Bennett Woodhouse, *From Property to Personhood: A Child-Centered Perspective on Parents’ Rights*, 5 *GEO. J. ON FIGHTING POVERTY* 313, 313 (1998).

143. Coleman, *Legal Ethics of Pediatric Research*, *supra* note 3, at 615–16; GIOVANNONI & BECERRA, *supra* note 6 at 32–36.

circle and to enter into the family to protect its vulnerable members has increased substantially.<sup>144</sup>

Legal doctrine has changed correspondingly. Parents can no longer lease their children's services out to others for the duration of their childhoods, nor choose whether or not to school them, nor impose what in some cases once amounted to a parentally inflicted death penalty for disrespect and other important transgressions.<sup>145</sup> The boundaries of family privacy are now drawn at a point that balances parents' interests and rights with those of children and the state. Thus, parents' rights to force children to work for hire have been curtailed according to their developmental capacity for such work and to assure that they have the time to go to school and to rest so that they are at least competent at that enterprise.<sup>146</sup> Parents' right to choose where their children are educated is intact, but gone is their right not to educate their children at all, because children need an education to be successful citizens.<sup>147</sup> Finally, although "[i]t is clear that a parent has the 'right' to corporally discipline his or her child, a right derived from our constitutional right to privacy[,] . . . this right . . . must be exercised in a 'reasonable' manner."<sup>148</sup> Reasonableness has always been the standard, of course, but because its legal iteration is tied to social norms, as these norms evolve to countenance less harm and, at least in some circumstances, to narrow the forms of acceptable corporal punishment, parental autonomy and the boundaries of family privacy have been correspondingly reduced.<sup>149</sup>

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144. See, e.g., Coleman, *Storming the Castle*, *supra* note 3, at 533 (describing "the need for the state to intrude into the circle of family privacy when a child likely needs to be rescued"); David D. Meyer, *The Constitutionalization of Family Law*, 42 FAM. L.Q. 529, 529-30 (2008) (discussing "the circle of family privacy protection" in the current context).

145. Coleman, *Legal Ethics of Pediatric Research*, *supra* note 3, at 615-17.

146. DAVIS et al., *supra* note 10, at 16-17, 32.

147. See *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923) ("The power of the state to compel attendance at some school . . . is not questioned."); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925):

No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

148. *In re J.P.*, 692 N.E.2d 338, 345 (Ill. Ct. App. 1998).

149. Murray A. Straus, *Prevalence, Societal Causes, and Trends in Corporal Punishment by Parents in World Perspective*, 73 LAW & CONTEMP. PROBS. 1, 22-29 (Spring 2010) (explaining that social science research has documented recent rapid and marked changes in social norms and cultural acceptance regarding the frequency and manner of corporal punishment of children in both American society and worldwide); Edwards, *supra* note 130, at 985, 1000, 1008, 1019 (describing evolving attitudes about corporal punishment, parental rights, and child abuse, and noting specifically that "American society has tolerated less and less severe forms of corporal punishment during the last generation."). Two criteria traditionally have informed the reasonableness of parental behavior and, thus, the legal limits of parental autonomy. One criterion is the degree of harm to the child. See *supra* II.C.1.a and *infra* III.B. The other criterion is cultural norms as these evolve over time. Regardless or independent of degree of harm to the child, parental autonomy tends to be respected as long as a parental practice does not stretch too far beyond culturally specific notions of normativeness. Norms are defined both by statistical frequency and cultural tolerance. Thus, parental autonomy is allowed if the practice is not too

Lawyers and the judiciary, particularly appellate judges, are well versed in the legal doctrine of parental autonomy and its philosophical underpinnings. Indeed, if the question before the court involves, in some respect, a parent's right to make a child-rearing decision, the constitutional doctrine of parental autonomy will and should be front and center. For the court, this doctrine embodies "first principles" and as such is the law that applies to the case. This is true whether the question is presented as a federal constitutional claim<sup>150</sup> or as a state-law claim that itself reflects this constitutional norm.<sup>151</sup> Finally, because federal constitutional law formally preempts all other laws—including government-issued regulations, policies, or protocols—inconsistent perspectives on the factors that should influence where and how the line between reasonable corporal punishment and abuse is drawn are largely irrelevant to the legal process.<sup>152</sup>

For present purposes, this means that lawyers and the judiciary will always be inclined to test CPS interventions designed to protect the welfare of the child against the right of family privacy or parental autonomy, and they will generally read child-abuse definitions and corporal-punishment exceptions through this lens. Thus, for example, judges in jurisdictions where the governing statute requires a finding of "serious" abuse before punishment is unlawful may read "serious" most seriously, to require that CPS show that the injury was life-threatening or at least permanently disfiguring. In such jurisdictions, "mere" bruising, even bruising lasting for several days and in circumstances where the child was afraid to return home, might be an insufficient basis to allow CPS to breach the circle of family privacy.<sup>153</sup> Relatedly, CPS interventions based in

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unusual; that is, as long as the behavior is also practiced by at least some other accepted members of the society. Official tolerance may also increase the statistical normativeness of a corporal-punishment practice; tolerance and normativeness undoubtedly reciprocally influence each other. Corporal punishment to the buttocks, for example, is allowed partly because it is statistically normative. In the United States, the majority of children between ages two and five have been corporally punished, even though parents report using corporal punishment relatively rarely, peaking at one and a half times per month when children are two years old and decreasing to less than once per month by the time children are twelve years old. M.A. Straus and J.H. Stewart, *Corporal Punishment by American Parents: National Data on Prevalence, Chronicity, Severity, and Duration, in Relation to Child and Family Characteristics*, 2 CLINICAL CHILD & FAM. PSYCHOL. REV. 5, 59–60 (1999). Male circumcision is also statistically normative, even though it causes the sort of harm to the child that would otherwise qualify as abuse. See Doriane Lambelet Coleman, *The Seattle Compromise: Multicultural Sensitivity and Americanization*, 47 DUKE L.J. 717, 757 n.185 (1998); Dwyer, *supra* note 125, at 201–04. In contrast, corporal punishment to the genitals would receive much closer scrutiny by authorities simply because it is less common, whether or not it causes actual harm to the child.

150. A claim that the state has violated a parent's constitutional right of parental autonomy would be brought under the Fourteenth Amendment and, if the claim was religiously grounded, also under the First.

151. A claim that the state has violated a parent's right to use corporal punishment to discipline a child would be brought under the common-law or statutory-discipline exception relevant to the proceedings in issue, that is, tort law, criminal law, or civil-maltreatment law.

152. See U.S. CONST. art. VI. See also ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 392 (3d ed. 2006).

153. See, e.g., *In re C.B. J.B., Th.B., & Ti.B.*, 636 S.E.2d 336, 338 (N.C. Ct. App. 2006).

concerns that are perceived to be inconsistent with the right of family privacy or parental autonomy are not likely to be upheld. It appears, for example, that judges tend to reject as unlawful interventions that rest (or appear to rest) primarily on CPS concerns about the child's emotional and developmental welfare, preferring instead to focus on the physical harm caused by the injury at issue in the case.<sup>154</sup>

Florida family-court judge Cindy Lederman has suggested that judges' tendency to focus on physical harm is due at least in part to the fact that most are neither trained to appreciate the correlation between physical injury and emotional and developmental welfare nor provided by litigants with evidence-based science that would permit them to evaluate claims of this sort.<sup>155</sup> Moreover, most litigants probably do not provide the basis for courts to understand how this kind of evidence might actually be compatible with the right of family privacy and parental autonomy, particularly with its boundaries. In other words, litigants do not appear to work systematically to make the evidence of emotional and developmental welfare relevant to the courts, given the courts' particular orientation and doctrinal constraints. As a result, it sometimes appears that CPS intervenes in the family to protect a child based on a combination of concerns, including about the child's emotional and developmental welfare, only to have the court reject the intervention because the physical injury is viewed as insufficient (standing alone) to permit it.

#### B. Scientific Knowledge of Harm to the Child

Beyond parental-autonomy norms, a reasonable manner of corporal punishment is defined scientifically by the degree of harm caused or risked. In cases of extreme physical injury, serious harm is immediately obvious through the observation (sometimes by a medical expert) of welts, bruises, or bleeding. In other cases, harm must be inferred on the basis of medical and scientific knowledge of the likely effects of a particular kind of assault. This knowledge, and the corresponding legal judgment of whether an assault constitutes physical abuse, has evolved over time. Decisionmakers, perhaps especially CPS professionals, have increasingly defined serious harm to include delayed internal injuries, long-term disability, and even psychological or emotional disorders. And they have increasingly relied on scientific research to conclude whether a particular parent's behavior is likely to cause "serious harm" to the

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154. *See id.* (focusing exclusively on physical evidence and implicitly excluding as irrelevant to the determination whether reasonable corporal punishment or abuse had occurred, evidence concerning the chronicity of the corporal punishment, and the children's related fear of returning home to their father); *supra* notes 111–114 and accompanying text (describing one CPS agency's experience with the courts' disinterest in emotional and developmental evidence, notwithstanding the relevance of this evidence to its own determinations).

155. Lederman, *supra* note 113, at 173 and *passim*.

victim, as well as whether a child's symptoms are likely to have been caused by parent's abusive behavior or by some other source, such as an accidental fall.<sup>156</sup>

Shaken Baby Syndrome (SBS), also known as abusive head trauma and the leading cause of abuse-related deaths in the United States each year, provides a model for the way scientific evidence has been used effectively by CPS and in the legal system.<sup>157</sup> Frustrated parents of crying babies under the age of twelve months sometimes shake the baby back and forth or up and down in an effort to stop the crying. This behavior can indeed place the infant into a trancelike state. Although no adverse effect on the infant may be apparent immediately, recent medical research has shown that the long-term consequences can be devastating due to an infant's unique and fragile anatomy.<sup>158</sup> Infants are born with weak neck muscles that cannot hold up a large head, which is prone to jostle back and forth uncontrollably while being shaken. Infants' brains are soft and malleable, like unset gelatin, in contrast with adults' brains, which are more like set gelatin. Rapid back-and-forth head movement from shaking can rupture blood vessels and nerves throughout the brain, tearing and destroying brain tissue. Although immediate symptoms may be minimal, over weeks the infant may develop irritability, lethargy, tremors, vomiting, retinal detachment, and seizures, and in some situations, may even lapse into a coma or die. Babies who survive the experience with none of these consequences may still suffer cerebral palsy or mental retardation, effects that may not become evident until after age six.<sup>159</sup> One influential study determined that seventy-two percent of known victims suffer permanent neuro-developmental abnormalities or death.<sup>160</sup>

The anatomy and long-term consequences of internal head injury due to shaking have been discovered only over the past twenty-five years. Because there is no blunt injury, SBS is difficult to detect, so the phenomenon has been doubted.<sup>161</sup> Medical reports as recent as 1987 claimed that shaking could not be

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156. See D. L. Chadwick et al., *Annual Risk of Death Resulting From Short Falls Among Young Children: Less Than 1 in 1 Million*, 121 PEDIATRICS 1213 (2008).

157. See *id.* (focusing exclusively on physical evidence and implicitly excluding as irrelevant to the determination whether reasonable corporal punishment or abuse had occurred, evidence concerning the chronicity of the corporal punishment, and the children's related fear of returning home to their father); *supra* notes 111–122 and accompanying text (describing one CPS agency's experience with the courts' disinterest in emotional and developmental evidence, notwithstanding the relevance of this evidence to its own determinations).

158. See American Academy of Pediatrics, Committee on Child Abuse and Neglect, *Shaken Baby Syndrome: Rotational Cranial Injuries Technical Report*, 108 PEDIATRICS 206, 208 (2001).

159. H. T. Keenan, et al., *A Population-Based Comparison of Clinical and Outcome Characteristics of Young Children With Serious Inflicted and Noninflicted Traumatic Brain Injury*, 114 PEDIATRICS 633, 638 (2004); J. Punt et al., *The 'Unified Hypothesis' of Geddes et al. is Not Supported by the Data*, 7 PEDIATRIC REHABILITATION 173, 173 (specifically addressing cerebral palsy as a delayed outcome).

160. K. M. Barlow, E. Thomas, & R. A. Minns, *Neurological and Neuropsychological Outcome of Non-Accidental Head Injury*, 3 EUR. J. OF PAEDIATRIC NEUROLOGY A139 (1999) (Abstract).

161. Mark Donohoe, *The Evidence Base for Shaken Baby Syndrome: Meaning of Signature Must be Made Explicit*, 329 BRIT. MED. J. 741, 741 (2004).

the cause of permanent injury.<sup>162</sup> But these reports later proved inaccurate because they were based on experiments with primates, who have stronger neck muscles than infants.<sup>163</sup> More-recent research using experiments on pig brains (a more scientifically accurate comparison), infant autopsies, and longitudinal follow-up of known cases have combined to validate the syndrome.<sup>164</sup>

SBS is now well-accepted by courts as a medical diagnosis,<sup>165</sup> and shaking a baby is increasingly litigated as physical abuse in the juvenile and criminal courts.<sup>166</sup> The history of SBS is important for corporal-punishment cases generally because it establishes the role of scientific evidence in the identification of parental behavior (sometimes even normative parental behavior) as abuse. “Serious harm,” which is the criterion for abuse in most jurisdictions, includes not only immediately obvious physical injury but also internal brain damage and long-term psychological and cognitive disability. Because legal cases cannot wait for an ultimate outcome, which might not be apparent for years, published scientific research suffices as evidence that a particular parental behavior is abusive.

Scientific evidence on the consequences of other forms of corporal punishment has also accumulated over the past twenty-five years.<sup>167</sup> This evidence has contributed to an understanding that even apparently moderate forms of corporal punishment like SBS—moderate in the sense that a severe physical injury is not apparent to the average layperson—can have harmful effects that merit intervention, and to a more-comprehensive sense of the consequences of severe corporal punishment.<sup>168</sup> These effects are stronger if the child is young, if the parent-child relationship lacks a grounding in warmth, and if the corporal punishment is repeated across time. Rather than discovering a

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162. A. Duhaime, et al., *The Shaken Baby Syndrome: A Clinical, Pathological, and Biomechanical Study*, 66 J. NEUROSURGERY 409, 414 (1987).

163. Mary E. Case, *Abusive Head Injury in Infants and Young Children*, 9 LEGAL MED. 83 (2007).

164. Keenan et al; *supra* note 159 at 636; R.A. Minns, ‘*Shaken Baby Syndrome: Theoretical and Evidential Controversies*, 35 J. ROYAL C. PHYSICIANS EDINBURGH 5, 8–10 (2005).

165. *E.g.*, State v. McClary, 541 A.2d 96, 102 (Conn. 1988) (holding that SBS is a well accepted medical diagnosis); State v. Lopez, 412 S.E.2d 390, 393 (S.C. 1991).

166. Brian K. Holmgren, Assistant District Attorney General, Davidson County, Tennessee, Irresponsible Expert Testimony, <http://www.dontshake.org/sbs.php?topNavID=3&subNavID=28&navID=115> (last visited Nov. 11, 2009).

167. This literature distinguishes the experience of physical abuse from the experience of corporal punishment, although corporal punishment is usually graded on a continuum of severity and chronicity that ends in abuse. Indeed, eleven states (Florida, Illinois, Montana, Nebraska, New Jersey, New York, North Dakota, Ohio, Rhode Island, South Carolina, West Virginia) and the District of Columbia declare that “excessive corporal punishment” constitutes child maltreatment, and an additional eleven states declare that corporal punishment is maltreatment if it is “cruel” (Connecticut, Colorado, Nebraska, New Mexico, Ohio, South Dakota), “unlawful” (California), “excessive or unreasonable” (Wyoming), “severe” (New Jersey), “cruel and inhuman” (Kansas), or “extreme” (Maine). Howard Davidson, *The Legal Aspects of Corporal Punishment in the Home: When Does Physical Discipline Cross the Line to Become Child Abuse?*, 17 CHILD. LEGAL RIGHTS J., 18, 20, 23–25 (1997).

168. L. J. Berlin et al., *Correlates and Consequences of Spanking and Verbal Punishment for Low-Income White, African-American, and Mexican-American Toddlers*, 80 CHILD DEV. 1403, 1411–12 (2009).

cut-off level below which corporal punishment has no ill effects, scientists interpret the research findings as indicating that corporal punishment experiences have a cumulative effect that grows proportionately with the amount and severity of punishment. Furthermore, the relation between corporal punishment and poor child outcomes is an empirical one, meaning that not every case of corporal punishment is followed by child maladjustment.

A review of eighty-eight empirical studies involving 36,309 children has shown that children who have been subjected to moderate corporal punishment display, on average, more-immediate compliance with parental directives but also higher levels of aggressive, delinquent, and antisocial behavior than do children who have not been corporally punished.<sup>169</sup> The causal direction of this association has been called into question<sup>170</sup> because antisocial children might well elicit more corporal punishment or because the same genes that make parents use aggression toward their children may be responsible for their child's aggression, apart from any causal link between the parenting and the child's behavior.<sup>171</sup> Indeed, when common genes are controlled, the causal impact of corporal punishment on the child's aggression is lessened but still present.<sup>172</sup>

Other longitudinal studies have followed corporally punished and noncorporally punished children over years to examine growth in antisocial behavior and the onset of new outcomes due to corporal punishment. With these empirical controls in place, the impact of corporal punishment on American children can now be estimated with greater confidence. Two recent, rigorously conducted studies illuminate the picture. One study, which followed 3,001 white, African American, and Mexican low-income toddlers from ages one to three, found that, even after controlling for fussiness or other factors that might lead a parent to spank a young child, the experience of being spanked even modestly caused children to become more aggressive and to have lower cognitive development (as measured by the well-validated Bayley Scales of Infant Development).<sup>173</sup> A second study followed two cohorts of children: the first, a group of 499 children followed from ages five to sixteen; the second, a group of 258 children followed from ages five to fifteen. This study found that in both cohorts, chronic mild spanking in children from ages five to nine led to increased antisocial behavior problems in adolescence.<sup>174</sup> It must be noted that

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169. Elizabeth Thompson Gershoff, *Corporal Punishment by Parents and Associated Child Behaviors and Experiences: A Meta-Analytic and Theoretical Review*, 128 PSYCHOL. BULL. 539, 541 (2002).

170. Diana Baumrind, Robert E. Larzelere & Philip A. Cowan, *Ordinary Physical Punishment: Is it Harmful? Comment on Gershoff (2002)*, 128 PSYCHOL. BULL. 580, 585 (2002).

171. Sara R. Jaffee et al., *The Limits of Child Effects: Evidence for Genetically Mediated Child Effects on Corporal Punishment but Not on Physical Maltreatment*, 40 DEVELOPMENTAL PSYCHOL. 1047, 1053 (2004).

172. *Id.* at 1053–56.

173. Berlin et al., *supra* note 168, at 1412.

174. Jennifer E. Lansford et al., *Trajectories of Physical Discipline: Early Childhood Antecedents and Developmental Outcomes*, 80 CHILD DEV. 1385, 1397–1401 (2009).

the children who suffered these outcomes were regularly spanked mildly over a long period of time, which was not the case in other studies where the child subjects experienced mild spanking very infrequently.<sup>175</sup> The best scientific evidence thus indicates that the impact of regular mild spanking on a child aged one to nine appears, on average, to be significantly adverse but modest in magnitude.<sup>176</sup> In general, children who have been regularly, mildly corporally punished by parents are likely to become less cognitively skilled and more aggressive over time and to use aggression in solving future problems, including in raising *their* children; rarely, however, do they become criminally violent as a result of mild corporal punishment alone.<sup>177</sup>

Nuances complicate this picture, however: First, mild corporal punishments do not have a uniform impact on child outcomes across all contexts and circumstances. The parent's behavior per se is less significant than the meaning of the behavior as interpreted by the child.<sup>178</sup> This meaning is determined by the family context, including chronicity of the act, the contingency of the act on the child's misbehavior, mitigating factors such as temporary stress and the child's instigation of the act, and exacerbating factors such as parents' taunting and psychological abuse. Thus, empirical studies demonstrate that corporal punishment can be helpful, unimportant, or harmful to the child's development, depending on the meaning ascribed by the child. A limit on this conclusion is that, beyond a certain level of severity of corporal punishment, harmful outcomes are likely to accrue to the child no matter what context surrounds the act or how it is interpreted by the child.<sup>179</sup> This level is not always clear but may be a defining characteristic of physical abuse.

Second, not all corporal punishments are administered in the same way, and the different ways have different impacts. Although it would be simpler if detrimental corporal-punishment behaviors could be defined by specific behaviors, research studies indicate that the behavior itself is less prognostic than the behavior in its context. Multiple studies have shown that when corporal punishment is administered calmly for teaching purposes within a family context of parent-child warmth, its negative consequences for the child are minimal; in contrast, when administered in anger, impulsively, or out of control, corporal punishment is more likely to lead to adverse consequences in

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175. Straus & Stewart, *supra* note 149, at 64–66.

176. Kirby Deater-Deckard et al., *Physical Discipline among African American and European American Mothers: Links to Children's Externalizing Behaviors*, DEVELOPMENTAL PSYCHOL. 1065, 1069–70 (1996).

177. As explained *infra* note 180 and in the accompanying text, these outcomes (that is, lowered cognitive skills, increased aggressive behavior, and increased use of aggression when parenting) for the corporally punished child qualify as functional impairments according to established medical practice.

178. Deater-Deckard et al., *supra* note 176, at 1069–70.

179. *Id.* at 1070.



the child, including increased anxiety and aggressive behavior.<sup>180</sup> When corporal punishment is administered capriciously, inconsistently, and with accompanying verbal and psychological abuse, its impact is more harmful. One reason for these differences is that the child is likely to interpret the parent's actions differently in these various contexts. When mild corporal punishment is administered calmly for teaching purposes, the child is likely to understand the parent's positive intent, whereas when it is administered harshly, inconsistently, and angrily, the child is more likely to interpret the act as rejection and to react with anxiety and increased deviant behavior over time.<sup>181</sup>

Third, cross-cultural studies across the world have shown that the cultural normativeness of corporal punishment alters the impact that it has on a child.<sup>182</sup> If a corporal-punishment behavior is relatively common in a culture (such as mild spanking with a bare hand one to three times across the buttocks, as in the United States), then the child is more likely to understand its teaching value and is less likely to develop adverse reactions than if the corporal-punishment behavior is highly unusual (such as placing hot pepper on a child's tongue, which is unusual in the United States but more common in other cultures). Studies have revealed that spanking has less-deleterious effects in Kenya and India, where it is ubiquitous, than in China and Thailand, where it is relatively rare.<sup>183</sup> Ironically, as corporal punishment becomes less common in American society, parents who continue to engage in this practice may find that it begins to have stronger adverse effects on their children.<sup>184</sup>

In contrast with the nuanced and paradoxical effects of mild corporal punishment, corporal punishment that is cruel or severe has been found in multiple studies to have deleterious consequences. These consequences are diversely manifested and vary across children but can be summarized as disability, or "functional impairment," a term adapted from medical sciences.<sup>185</sup> In psychiatry, a symptom such as alcohol consumption, sadness, or repetitive odd behavior is not diagnostic of a disorder unless it is accompanied by

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180. Kenneth Dodge, V. C. McLoyd & Jennifer E. Lansford, *The Cultural Context of Physically Disciplining Children*, in EMERGING ISSUES IN AFRICAN AMERICAN FAMILY LIFE: CONTEXT, ADAPTATION, AND POLICY 245 (V.C. McLoyd, N.E. Hill & Kenneth Dodge eds., 2005).

181. *Id.* The moderating factors that affect the impact of parental corporal punishment on a child's outcome are very similar to the factors that judges use to decide whether a parental behavior is abusive. Judges may already intuitively understand the factors that determine the harmfulness of a behavior, although the systematic use of scientific evidence would ensure more uniform application of this knowledge.

182. Jennifer E. Lansford et al., *Physical Discipline and Children's Adjustment: Cultural Normativeness as a Moderator*, 76 CHILD DEVEL. 1234, 1244 (2005).

183. *Id.*

184. *See supra* note 149 and accompanying text (describing this trend). Lest one conclude that if severe corporal punishment were to become ubiquitous its adverse impact would be nil, cross-cultural studies have shown that there is a residual effect of a cultural norm that endorses such punishment of children: such societies are likely to have higher rates of adult violence and even war. Jennifer E. Lansford & Kenneth Dodge, *Cultural Norms for Adult Corporal Punishment of Children and Societal Rates of Endorsement and Use of Violence*, 8 PARENTING: SCI. & PRACTICE 257, 266-67 (2008).

185. *See supra* note 12 and accompanying text (defining functional impairment).

impairment in completing the tasks of daily life, such as holding down a job and maintaining relationships. Applied to corporal punishment, if the consequences for the child include functional impairment, then the parental actions are serious enough to be characterized as physical abuse.

Long-term follow-ups of children found by CPS to have been maltreated indicate that they are likely to suffer a variety of functional impairments, including an increased tendency to commit violent crime, to abuse alcohol and drugs, to acquire sexually transmitted diseases, to suffer from depression, and to victimize their own children.<sup>186</sup> Although these studies bring the certainty that comes with identifying and following children whose physical abuse has been officially substantiated, they are complicated by the problem that the interventions accompanying official substantiation (such as removal from the home and labeling the child as abused) might be the actual adverse causal agent rather than the abuse per se.

Another group of studies has followed community samples of children who were identified by researchers as having been severely corporally punished; the identification in these studies was made based on confidential interviews with the children's parents.<sup>187</sup> Their design contrasts children who have experienced severe corporal punishment with those who have experienced either no corporal punishment or only mild corporal punishment. Like the long-term follow-ups of children found by CPS to have been maltreated, these studies also reveal that physically maltreated children are likely to suffer numerous adverse outcomes, including being arrested for violent as well as nonviolent offenses, dropping out of school, becoming a teenage parent, and being fired from employment.<sup>188</sup> These outcomes hold across cultural groups and family contexts, suggesting a fairly universal adverse impact of the experience of physical abuse.<sup>189</sup>

In sum, scientific findings have established that the experience of corporal punishment has consequences for the child. For mild and normative levels of corporal punishment, these consequences may include, on the positive end, immediate compliance with parental commands and, on the negative end, increased anxiety, aggressive behavior, decreased academic success, and lower self-esteem.<sup>190</sup> The cost-benefit ratio of these consequences seems adverse to some observers but acceptable to others. In this society and according to the law, the decision about the acceptability of this parental behavior rests with the parent under the principle of parental autonomy to the extent that the

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186. Ruth Gilbert et al., *Child Maltreatment: Burden and Consequences in High-Income Countries*, 373 LANCET 68, 76–77 (2009).

187. Kenneth A. Dodge, J.E. Bates & G.S. Pettit, *Mechanisms in the Cycle of Violence*, 250 SCI. 1678, 1678 (1990); Jennifer E. Lansford et al., *Early Physical Abuse and Later Violent Delinquency: A Prospective Longitudinal Study*, 12 CHILD MALTREATMENT 233, 233 (2007).

188. *Id.* at 238.

189. *Id.* at 240.

190. Gershoff, *supra* note 169, at 549–50; Chih (Peter) L. Chen, *Is There a Right Way to Discipline a Child*, 16 J. CONTEMP. LEGAL ISSUES 105, 106–07 (2007).

consequences, on average, do not exceed the threshold that would lead to functional impairment. Depending on the severity, chronicity, or context of corporal punishment, however, parental behavior can also harm the child, including to the level of functional impairment, and that thus should be identified as physical abuse.

Except in obvious and very extreme cases, developmental science cannot guide the identification of specific parental behaviors that will lead inevitably to the child's functional impairment. It cannot be concluded, for example, that six swats to the buttocks will lead to impairment but four will not, or that one swat to a two-year-old will lead to impairment but several swats to a seven-year-old will not. The problem is not only that prediction is probabilistic; but a confident prediction comes also from understanding the meaning of the behaviors rather than the behaviors themselves.<sup>191</sup> Here, developmental science can be informative. Corporal punishment is likely to lead to functional impairment to the extent that the child (even a toddler or infant) experiences and interprets the parent's actions as rejecting, hateful, or threatening.

Guidelines for the decisionmaker come from features of both the parent's behavior and the child's reaction. Parents' corporal-punishment behaviors are relatively likely to lead to the child's functional impairment if the punishment is committed in the heat of anger or out of control (such as alcohol-induced behavior); if it communicates rejection of the child (as when accompanied by hateful words); if it is intentionally cruel, not embedded in a broader relationship of trust and security between parent and child, or if not obviously intended to help the child learn a specific lesson; if it indicates no understanding of the child's ability to receive the message of the behavior; or if it is not preceded by the child's misbehavior.

On the child's end, parental corporal-punishment behaviors are relatively likely to lead to functional impairment if the child experiences fundamental attachment insecurity (indicated by overdependence, avoidance, or dissociative behaviors), if the child indicates a strong fear of being alone with the parent, or if the child communicates feeling hated or rejected by the parent. Although being fearful of corporal punishment itself is not sufficient to constitute a functional impairment, a resulting disruption of the child's secure attachment to a parent is. Of course, children sometimes lie or fail to communicate clearly, and so clinical judgment by a skilled professional may be particularly helpful to this process.

In the end, the decision whether a parent's behavior constitutes physical abuse may be best construed as a judgment by a scientifically informed expert. This judgment is not arbitrary, however, and can be made based on the meaning

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191. See Kenneth Dodge, John D. Coie & Donald Lynam, *Aggression and Antisocial Behavior in Youth*, in 3 HANDBOOK OF CHILD PSYCHOLOGY: SOCIAL, EMOTIONAL, AND PERSONALITY DEVELOPMENT 719 (Nancy Eisenberg ed., 6th ed. 2006); see generally Kenneth Dodge, *Translational Science in Action: Hostile Attributional Style and the Development of Aggressive Behavior Problems*, 18 DEV. & PSYCHOPATHOLOGY 791 (2006).

that the behavior communicates to the child and the meaning that the child makes of the pattern.

#### IV.

#### RECONCILING NORMS AND KNOWLEDGE AND PROPOSALS FOR POLICY REFORM

This article began with the premise that modern child-abuse definitions have three negative effects that require periodic reconsideration: (1) The definitions fail to fulfill the expressive or signaling function of the law; that is, they fail to give meaningful guidance to the relevant legal actors. (2) The definitions yield inconsistent case outcomes. And (3) they risk unacceptable errors, including both false-positive and false-negative findings of maltreatment. Part II elaborated on these points, describing what is known about where and how legislatures, CPS, and the courts draw the line between reasonable and unlawful corporal punishment. Part III described the normative and scientific assumptions that sometimes operate in tandem and sometimes compete for primacy as this line is drawn, in particular by the courts and CPS. This last part begins with an argument for reforms to ameliorate the negative effects of modern child-abuse definitions that reflect both parental-autonomy norms and scientific knowledge, and follows with specific suggestions for policy reform.

##### A. An Argument for an Intentional Reconciliation of Norms and Knowledge

Law governing where and how to draw the line between reasonable corporal punishment and abuse ought to reflect a reconciliation of parental-autonomy norms and scientific evidence about the circumstances that cause children real harm. These two paradigms together should govern the development of the operative legal definitions and process because, separately and at times in combination, they are the approaches currently used by the relevant legal actors. In contemporary American society, which values both parental autonomy and healthy child development, it makes good policy sense to respect parents' decisions about disciplining their children and to permit intervention in the family only when children are harmed or in jeopardy of harm. Moreover, intervention in the family itself causes or risks harm to children and families and thus ought to be avoided unless supported by reliable indicia that intervention will do more good than harm.<sup>192</sup>

Reconciling these paradigms should not be ad hoc or based on intuition or presumed knowledge. Rather, it ought to be intentional: parental-autonomy norms should take primacy when they are firmly entrenched in legal theory and doctrine. Conversely, they should yield when they are not so entrenched and when relevant and reliable scientific evidence indicates that deference will cause real harm to children. Relevant and reliable scientific evidence should take

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192. See Coleman, *Storming the Castle*, *supra* note 3, at notes 7–10 and 308–17 and accompanying text.

primacy over personal opinions, whatever their basis. And such evidence should otherwise be treated consistently with evidence law generally, as being both admissible and useful to the evaluation of individual cases. Our proposal for policy reform is thus based on the framework of parental autonomy and calls for scientific evidence to be introduced within this framework.

Consistent with this intentional reconciliation of evidence and norms, we propose that the line between reasonable corporal punishment and abuse be drawn at the point—which we acknowledge will be blurry at times—where valid evidence, based in the scientific literature or current case circumstances, indicates that parental conduct has caused or risks causing functional impairment.<sup>193</sup> With this criterion, we reject concern for parental behavior that would prevent an average-functioning child from achieving a higher level; we concern ourselves only with parental behavior that causes or risks disability or impairment. This standard—as opposed to a weaker or stronger one—is appropriate because it best balances the society’s respect for parental autonomy and science’s findings about when children are actually harmed by corporal punishment. Specifically, it is consistent with long-standing parental autonomy and corporal-punishment law, which draw the line of impermissibility at assaults that are either not in the child’s best interests or that will accomplish the opposite of the goal of the corporal-punishment exception—securing the child’s future as a law-abiding and otherwise successful child and citizen.<sup>194</sup> Notably, the rationales underlying the traditional corporal-punishment exception focus on the child’s intellectual and emotional development, not on the child’s physical well-being. Indeed, these rationales assume that physical punishment can positively affect intellectual and emotional development. In evaluating the reasonableness of corporal punishment, many decisionmakers prefer to focus exclusively on the immediate physical impacts of corporal punishment and to ignore or minimize emotional and developmental ones. Doing so, however, is antithetical to the purposes of the exception. The functional-impairment standard is also consistent with CPS’s role in the line-drawing process, which—the views of some professionals to the contrary—is to balance the harm that parents are or may be causing their children against the harm risked by

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193. Functional impairment refers to short- or long-term or permanent impairment of emotional or physical functioning in tasks of daily living. *See supra* III.B.

194. For example, corporal punishment that causes a child to fail academically, to have disciplinary problems in school, to be fearful of personal relationships, or to become a violent adult, achieves precisely the opposite of the result intended by the corporal punishment exception—that is, a law-abiding and otherwise successful adult. The standard that defines unlawful corporal punishment must provide the relevant legal actors with the basis to classify such punishment as abuse. It should not, however, permit classification as abuse of incidents and injuries that do not cause such impairments. There are no perfect parents, and everyone can imagine themselves to be damaged even by exceptional ones. Routine childhood injuries, whether these are physical or emotional, are not what maltreatment law was or ought to be designed to address.

intervention, and to penetrate the boundaries of family privacy only when there is good reason to believe that the former is more weighty than the latter.<sup>195</sup>

## B. Suggestions for Policy Reform

Consistent with this argument, policy reforms that can ameliorate the three negative effects targeted by this article—the failure of existing law to satisfy its expressive function, inconsistent outcomes, and a risk of false-positive and false-negative findings of maltreatment—include changes to the structure of some child-abuse statutes and clarification of their included terms. Some of the following recommendations reflect existing best practices in statutory language and court or CPS practice. Others reflect a rejection of existing practices or the development of alternatives that better conform to the premises underlying the corporal-punishment exception and the scientific evidence that supports the resolution of individual cases. The model corporal-punishment provision concluding this section demonstrates how the recommendations can work together to provide the relevant legal actors with a systematic approach to drawing the line between reasonable corporal punishment and abuse that reconciles parental-autonomy norms and scientific evidence.

### 1. Structure

Corporal-punishment exceptions to child-abuse provisions should be made to track the common-law privilege; that is, the exception should be available for discipline only, and then only for force that is reasonable.<sup>196</sup> The two-pronged standard makes better policy sense than approaches that focus or appear to focus only on the reasonableness of the force used because it is the most accurate and thus most helpful statement of the applicable law, and because it emphasizes (or brings into the equation) the oft-forgotten threshold condition for the privilege: that it is ultimately in the child's interest that the force be used.<sup>197</sup> Conversely, this standard makes clear that the privilege does not apply in circumstances that are not in the child's interests, for example, when a parent

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195. Many CPS professionals are not aware of or else reject this balancing test. *See, e.g.*, interview by Kenneth A. Dodge and Doriane Lambelet Coleman with a county CPS frontline investigator, Durham County, N.C. (Feb. 16, 2009) (on file with L & CP) (explaining that CPS's job is to protect children, not to safeguard parents' rights). They may believe that respect for family privacy and parental autonomy only hurt children, or at least those children they are assigned to investigate. *See* Coleman, *Storming the Castle*, *supra* note 3, at 415–16. In fact, however, the overriding presumption in American law is that parents act in the best interests of their children until proven otherwise. *Parham v. J.R.*, 442 U.S. 584, 602 (1979). This means that CPS interventions conducted in advance of such proof disrupt parents' efforts to do right by their children. CPS interventions thus are risking harm even as they are designed to protect against it. To the extent that this legal presumption and its logical ramifications reflect how society in general views the relationship between CPS and families, CPS professionals who ignore the balancing test are (at least) operating against that grain. Coleman, *Storming the Castle*, *supra* note 3, at 531–38.

196. *See supra* notes 129–135 and accompanying text.

197. *See supra* notes 129–135 and accompanying text.

lashes out maliciously or without motive or reason.<sup>198</sup> In other words, when the discipline condition is not met, the parent has committed abuse and, in the civil or criminal context, an unprivileged assault or battery. Notably, the merits of this traditional doctrine are reinforced by scientific findings that children are more likely to suffer functional impairments from moderate corporal punishment when they do not perceive a legitimate disciplinary motive.<sup>199</sup>

## 2. Burden of Proof

The state should have the burden of alleging and proving that a parent has abused a child. Parents suspected of child abuse who believe that their conduct is appropriately protected by the corporal-punishment exception are responsible for raising this claim and for producing some supporting evidence, including specific evidence tending to show that discipline was appropriate and that the force used was reasonable in the circumstances. When a parent does so, the state has the specific burden of disproving the parent's claim.

Placing the ultimate burden on the state is appropriate for three reasons. First, regardless of whether the common-law right to use reasonable corporal punishment as a means of discipline is also a constitutional one, it is undoubtedly true that society places a premium on parental autonomy and family privacy, and that the strong expectation of the citizenry is these rights will not be violated by the state without a very good reason. Additionally, and again regardless of the constitutional status of the right to use corporal punishment, most child-maltreatment investigations implicate constitutional limits on state searches and seizures, including the requirement that the state establish a likelihood of maltreatment before it intervenes.<sup>200</sup> Second, most CPS investigations result in a finding of no maltreatment. At the same time, the investigations cause or risk causing at least some emotional harm to the child and family.<sup>201</sup> Incentivizing the state's consideration of these concerns before it intervenes in the family should help to reduce the harm caused or risked by

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198. Older statutory language often made this caveat express, and similar language has found its way into some judicial decisions. *See, e.g.*, *Anderson v. State*, 487 A.2d 294, 298 (Md. Ct. Spec. App. 1985) (“So taken for granted that it tends to be neglected by the case law and legal literature, is that the force truly be used in the exercise of domestic authority by way of punishing or disciplining the child—for the betterment of the child or promotion of the child’s welfare—and not be a gratuitous attack.”); *see also, e.g.*, *Bowers v. State*, 389 A.2d 341, 348 (Md. App. Ct. 1978) (“On the other hand, where corporal punishment was inflicted with ‘a malicious desire to cause pain’ or where it amounted to ‘cruel and outrageous’ treatment of the child, the chastisement was deemed unreasonable, thus defeating the parental privilege and subjecting the parent to penal sanctions in those circumstances where criminal liability would have existed absent the parent-child relationship.”).

199. Kirby Deater-Deckard, Kenneth Dodge & Emma Sorbring, *Cultural Differences in the Effects of Physical Punishment*, in *ETHNICITY AND CAUSAL MECHANISMS* 204, 211 (Michael Rutter & Marta Tienda eds., 2005).

200. *See Coleman, Storming the Castle*, *supra* note 3, at 471–76 (discussing the courts’ insistence that CPS investigations are subject to the Fourth Amendment, their disagreement about the standard that applies in that context, the reasonable suspicion administrative search standard or the probable cause standard, and the apparent preference for the probable cause standard).

201. *See id.* at 417–19, 511–22.

unnecessary interventions. Third, as a practical matter, most parents do not have the knowledge or resources necessary to prove the standard proposed below, particularly the second prong: that the corporal punishment at issue does not cause functional impairment. The state, on the other hand, could more easily marshal this evidence given its expertise; furthermore, the evidence would mostly be reusable in its other and future cases.

Formalizing the requirement that parents raise the corporal-punishment exception and provide some supporting evidence as to both prongs of the standard is appropriate within this context because parents would be reminded that the right to use corporal punishment is a special privilege, an exception to the usual rule that assault and battery are impermissible. This requirement, in turn, is good for children and families because it forces parents to consider *ex ante* their decision and whether it conforms with the norms of the community or legal rules otherwise. Such *ex ante* examination—coupled with the choice to conform to community norms and legal rules—can reduce the number of cases brought to CPS's attention, thus obviating potentially damaging intervention in the family. It can also reduce the incidence of functional impairment to children, since impairment is unlikely when punishment is normative and consciously considered by parents for the express purpose of teaching the child in a context of a warm parent-child relationship.<sup>202</sup> It is particularly important for parents and other legal actors to know, in advance of their actions, that the scope of the privilege to use corporal punishment is not self-defined; rather, precisely because it is a privilege based in common-law doctrine that itself refers to community norms, those norms will influence when others choose to report, when CPS chooses to intervene, and, if the courts do get involved, how they resolve the case.<sup>203</sup>

Finally, it is important to acknowledge the inevitable tension between laws that are based in community norms and the nonconforming practices of minority members of the community. In the context of this article, the law currently permits “reasonable” corporal punishment, reasonableness traditionally being defined according to community norms.<sup>204</sup> This law is and has always been problematic for those in the community whose norms diverge, for example, because of differing religious or cultural beliefs. The difficulty will likely be exacerbated in the future, as community norms about the reasonableness of corporal punishment evolve increasingly to restrict its permutations and use.<sup>205</sup> Our proposal to make functional impairment the basis for line-drawing between reasonable corporal punishment and abuse should ameliorate this problem. That is, although the normativeness of corporal punishment would continue to play a significant role in the analysis, the weight

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202. *See supra* notes 180–184 and 190–191 and accompanying text.

203. Even if the right were based in the Federal Constitution, however, community norms would likely continue to govern its scope. *See supra* notes 129–135 and 142–149 and accompanying text.

204. *See infra* note 207 (describing how reasonableness as a standard is developed in law).

205. *See supra* notes 142–149 and accompanying text (describing this evolution).



associated with this factor would be systematically checked by evidence of actual harm to the child. Thus, for example, the state would be unable to prove abuse if it could not prove functional impairment. The state's assumptions about the unusual being bad would, in such a case, be proven incorrect. Of course, regardless of the normativeness of the practice, abuse would be found on evidence of functional impairment.<sup>206</sup>

### 3. Explanation of the Discipline Requirement

The first prong of our proposed two-pronged corporal-punishment rule requires an evaluation of the propriety of discipline in the circumstances. The propriety of discipline should be judged objectively; that is, the decision that the circumstances preceding the use of force required discipline must have been a reasonable one. We contemplate that reasonableness in these circumstances is, as it always is in the law, either a factual finding about the acceptability of the decision according to community norms, or, in the alternative, a legal ruling about what the community's norms ought to be.<sup>207</sup> In doing so, we reject a different approach that would defer to parents on this question, because such deference is ultimately a statement that a disciplinary purpose is not really a condition of the exception.

In the vast majority of cases, the parent's decision that discipline (or some form of parental intervention) is warranted will be acceptable to the court, so the discipline prong will not often be contested. The court will likely accept the parent's decision because most parents who use corporal punishment are not malicious, uncaring, or acting in complicated developmental circumstances, and because most cases that come to the attention of the authorities involve a child who has transgressed in some way that the community would agree warrants discipline. The only question in these cases, then, is whether the force used was reasonable.

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206. *See supra* notes 182–184 and accompanying text (discussing the scientific evidence concerning the link between normativeness and functional impairment) and *infra* notes 215–223 and accompanying text (describing the role that normativeness plays in our proposals for reform).

207. Reasonableness in law is thus either consistent with existing community norms or else aspirational. In the former, more typical case, the determination whether something is reasonable is made by the trier of fact, usually the jury. When a norm has been established by the jury over a series of cases, judges may decline in future similar cases to submit the question to another jury on the ground that the matter has been amply settled. In the latter, more-atypical case, the determination whether something is reasonable is taken away from the jury by the judge on the ground that community norms are ultimately unacceptable. *See, e.g., Brzoska v. Olson*, 668 A.2d 1355 (Del. 1995) (deciding the question whether AIDS phobia was reasonable “as a matter of law,” thus removing it from the jury’s consideration, on the basis that the state should not be in the business of sanctioning such phobia no matter how normative). In suggesting that judges ought to continue to be permitted to decide what a community’s norms ought to be—as prevailing reasonableness analysis does—we do not propose that they be given the leeway to codify their personal opinions; indeed, we specifically reject this as unreasonable. Rather, we propose that they be authorized to prohibit even normative forms of corporal punishment when these are scientifically proven to cause functional impairment. The example we have already used of such a case is SBS, which is still normative in some situations but which, based on scientific evidence, ought to be prohibited always. *See supra* notes 158–166 and 209–210 and accompanying text (discussing SBS in this context).

Formally establishing the requirement that discipline be warranted remains essential, however, to addressing those infrequent instances when parents do act out of malice or a lack of caring, as well as those circumstances in which a child or category of children cannot benefit from and may even be significantly harmed by the disciplinary effort. Examples of the latter include infants and some special-needs children who, because of their level of brain development or pathology, simply cannot make the connection between their conduct and the physical force that follows. This inability to understand cause and effect is significant because children may become functionally impaired as a result of even moderate levels of corporal punishment that they cannot understand as being for their own good.<sup>208</sup> Perhaps the most well-known example of the use of science in this context is SBS.<sup>209</sup> Without a formal construct in which to argue that discipline is appropriate (reasonable or unreasonable) in the circumstances, the relevance of such evidence may not be apparent to the maltreatment inquiry.

Several states have chosen to codify the common-law standard as we suggest, as a two-pronged test requiring that accused parents establish both a disciplinary motive and the reasonableness of the force used.<sup>210</sup> As to the first, disciplinary prong, some states require a finding that discipline be reasonable in the circumstances, whereas others require a finding of necessity.<sup>211</sup> The necessity standard places a much higher burden on parents: it is literally the difference between having to establish that the community would or should find a particular discipline acceptable and that the community would or should find such discipline necessary.

For the following reasons, we strongly suggest adoption of the reasonableness standard. First, the need for discipline in many instances is a judgment call whose merits cannot be established with precision, perhaps particularly by outsiders to the family. Unlike the necessity standard, the reasonableness standard permits the fact-finder to defer to parents' judgment so long as it is within the range of acceptable decisions. Second, society continues to support parents' right to use corporal punishment, ensuring that normative discipline—discipline that meets the reasonableness standard—generally will not cause functional impairment. Third, the necessity standard risks unnecessary and potentially harmful interventions in the family, an effect that designers of maltreatment law ought to avoid whenever possible.

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208. See *supra* notes 102, 115–120 and accompanying text.

209. For a description of SBS and its effects, see *supra* notes 158–166 and accompanying text.

210. See *supra* notes 43–46 and accompanying text.

211. Compare ARK. CODE ANN. § 12-12-503(2)(C)(1) (“‘Abuse’ shall not include physical discipline of a child when it is reasonable and moderate and is inflicted by a parent or guardian for purposes of restraining or correcting the child.”), with *In re T.A.*, 663 N.W.2d 225, 230 (S.D. 2003) (considering whether a parent’s discipline of his child was “rendered necessary” by the child’s actions).

#### 4. Explanation of the Requirement that the Force Used Be Reasonable

The second prong of our proposed two-pronged corporal punishment requires an evaluation of the reasonableness of the force used. If the state can prove that the use of force in the circumstances was unreasonable, it has established that child abuse occurred. The basis for evaluating this second prong ought to be whether what the parent has done has caused or risks causing functional impairment.

Again, functional impairment refers to short-term, long-term, or permanent impairment of emotional or physical functioning.<sup>212</sup> Scientific evidence about which parenting behaviors lead to functional impairment supports the formal incorporation of several factors into this aspect of the reasonableness inquiry: the *severity* of the physical injury that results from parental conduct; whether the parent's conduct is *normative*; the *proportionality* of the conduct in relation to the child's transgression; the *manner* in which the punishment is administered, which includes consideration of the location of the child's injuries and whether any objects were used; *chronicity*, meaning the frequency of the corporal punishment; and *transparency and consistency*, or whether the child knows the rules that will result in punishment and whether the parent administers those rules non-arbitrarily.<sup>213</sup> Aside from the severity criterion, all of the factors force examination of the context in which the corporal punishment occurs and of the child's reaction to that context.<sup>214</sup> Depending upon the circumstances, any one of these factors alone or two or more factors in combination might suffice to characterize parental conduct as unreasonable. For example, a one-time incident in which a parent strikes a child so hard that a bone breaks will be severe enough on its own to cause or risk causing functional impairment, so there would be no need to establish the existence or weight of the remaining factors. Conversely, moderate (more than mild, less than severe) corporal punishment will generally be insufficient on its own to cause functional impairment; only if it is coupled with other factors—for example, a lack of proportionality, transparency and consistency, or chronicity—can moderate corporal punishment be predicted to cause functional impairment.

Although all of these factors play a potentially significant role in the analysis of individual cases, the question whether the manner and degree of punishment is normative is relevant in all cases. Nonnormative corporal punishment is more likely than normative corporal punishment to result in functional impairment.<sup>215</sup> Thus, if an incident of corporal punishment is normative, it is and ought to be less likely to result in a finding of abuse, and vice versa. Of course, some nonnormative behavior will neither cause nor risk functional impairment and some normative behavior will cause or risk causing functional impairment. Some religiously motivated corporal punishments may fall into the former

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212. See *supra* notes 26, 28, 43–46, 61, 102, 115–119, 131–35 and accompanying text.

213. See *supra* III.B.

214. See *supra* notes 167–191 and accompanying text.

215. See *supra* notes 182–184 and accompanying text.

category, and SBS is (again) a good example of a practice that falls into the latter. In such cases, normativeness should not be determinative.

Normativeness is already central to how reporters, CPS, and judges decide reasonableness; such actors are more likely to view what is unusual to or different for them (based on community culture or personal orientation) as abuse—indeed, in some jurisdictions, it may be the predominant criterion.<sup>216</sup> Abnormality is also an empirical criterion, in that norms are defined by the rate of use in a particular culture or society.<sup>217</sup> Using empirical data as a check on personal views or current practices can reduce the incidence of ad hoc “know it when you see it” fact-finding, and thus standardize what is and is not considered normative, at least within individual communities or jurisdictions.<sup>218</sup> Entirely apart from its usefulness to reduce ad hoc fact-finding, this particular use of scientific evidence is important because what is normative in terms of corporal punishment is rapidly shifting, and as a result, practitioners may not be as aware of actual current normative practice as they believe they are. Empirical knowledge about changes in social norms and parenting practices is becoming more readily available and should be communicated to practitioners, lawyers, and judges regularly.

A problem in the implementation of the normativeness criterion is that the frequency and tolerance of corporal-punishment practices varies across jurisdictions, cultural groups, and time. Parents employ different corporal-punishment practices across the world. Spanking with a bare hand across the buttocks is relatively common in the United States, whereas in other cultures, different practices are relatively common, such as beating with a stick, “coining” a child by rolling a hot coin across the back, and forcing a child to swallow hot peppers.<sup>219</sup> Practices vary across jurisdictions even within the United States. Corporal punishment itself is more common in the South than the North, among African American families than European American families, and among lower socioeconomic-status families than middle- and higher-status families.<sup>220</sup> Also, religious cultural groups may encourage or discourage specific practices, creating the possibility that a parent will find the use of a corporal-punishment practice to be normative within a narrow religious culture even though it is unusual in the broader society. Further, cultural norms have changed across generations. Parents sometimes defend their corporal-punishment practices based on the family norm they experienced growing up,

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216. See *supra* notes 1, 3, 8, and 80–88 and accompanying text.

217. See *supra* notes 1 and 182–184 and accompanying text.

218. See *supra* note 3 and accompanying text (discussing the problem of ad hoc factfinding).

219. For a discussion of these and other “nonnormative” disciplines, see Renteln, *supra* note 4, at § IV.

220. Kirby Deater-Deckard & Kenneth A. Dodge, *Externalizing Behavior Problems and Discipline Revisited: Nonlinear Effects and Variation by Culture, Context, and Gender*, 8 PSYCHOL. INQUIRY 161, 163 (1997) (noting the cultural and socio-economic differences). Kirby Deater-Deckard et al., *supra* note 176, at 1071 (concluding about the differences between regions within the United States).

even in the face of a contemporary societal prohibition.<sup>221</sup> Defining a parental practice as “reasonable” based on cultural normativeness is complicated by these varying norms. Without specific statutory guidance, CPS and the courts must decide which cultural norm to apply (from that of the society at large, the individual’s actual familial or cultural frame of reference, or the norm to which the judge aspires for the society) when determining the reasonableness of a particular disciplinary incident.

Resolving how a legislature ought to define the reference community for the purposes of establishing the normativeness of a particular manner or degree of corporal punishment is beyond the scope of this article. But we encourage serious consideration of the question, and in particular, a focus on the different implications of a decision to base normativeness on the views of the broader community in which the family lives or on those of the family’s particular community—the immediate or extended family, including its affiliations, religious and otherwise. Specifically, a decision to base normativeness on the views of the broader community would assure that all children and families are treated similarly under the law, an outcome consistent with equal-protection doctrine and the antidiscrimination norms at its foundation.<sup>222</sup> It would also mean, however, that at least in some cases—particularly those involving younger children who are still members only of their parents’ world—the maltreatment finding would be based on a larger group norm that is in fact nonnormative for the child. In other words, the law would create the fiction that the parent’s conduct was nonnormative when, for that child, it would be precisely the contrary. Because it is the child’s perspective on normativeness that matters for purposes of functional impairment, application of this rule to children in this category would be inconsistent with their welfare. In contrast, basing the normativeness finding on the parents’ particular community would assure that the finding is consistent with the child’s point of view—and thus a better predictor of functional impairment—but only so long as the child is too young to be or does not choose to be a member of the broader community and a beneficiary of its different norms. Ultimately, we believe that defining normativeness must depend on the political culture and practical resources of the state or locality responsible for defining the standards by which abuse will be judged.<sup>223</sup>

Finally, although lists of illustrative violations in statutory definitions and CPS protocols may help to reduce parents’ and reporters’ concerns about the

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221. See, e.g., *supra* note 88.

222. See generally Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberal’s Dilemma*, 96 COLUM. L. REV. 1093 (1996).

223. For example, some jurisdictions with both extensive non-conforming immigrant communities and the political will and resources to work to reconcile those practices with broader community norms and applicable law have incorporated sensitivity to cultural difference in their CPS protocols and have trained their professionals accordingly. On the other hand, jurisdictions that are unaccustomed to non-conforming immigrants or are unwilling to work to understand their different practices have not engaged such efforts.

breadth and vagueness of typical child-abuse definitions, the listed behaviors do not necessarily correspond with harm or functional impairment. For example, a parent's choice to hit a child on the face or to put pepper in a child's mouth might trigger scrutiny and even substantiation according to an illustrative list in a particular state or county,<sup>224</sup> but may not result in harm if other criteria such as severity or chronicity are absent. Illustrative lists may thus cause a mixed bag of outcomes that are good—increasing predictability and consistency—and bad—intervention in the family that is unnecessary to protect a child from harm. Because they do some important good, however, and because their contents often reflect nonnormative parenting, either in fact or aspirationally, we do not suggest that they be eliminated. Rather, we encourage their treatment as potentially contributing to rather than as automatically dispositive of the line between reasonable corporal punishment and abuse.

### 5. Evidence

Standard evidence law applicable to judicial proceedings provides that “all relevant evidence is admissible”; “relevant evidence” means “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”<sup>225</sup> This law further provides that

if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.<sup>226</sup>

Although the line between reasonable corporal punishment and abuse is drawn initially by CPS and only sometimes and subsequently in a judicial proceeding, the practice required by and principles underlying these rules ought to apply throughout the process. Both CPS and the courts ought to consider all

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224. See Stephen D. Whitney et al., *Defining Child Abuse: Exploring Variations in Ratings of Discipline Severity Among Child Welfare Practitioners*, 23 CHILD & ADOLESCENT SOC. WORK J. 316, 323 (2006) (including these practices or behaviors as among those most likely to trigger CPS scrutiny); interview by Kenneth A. Dodge and Doriane Lambelet Coleman with a county CPS supervisor, Durham County, N.C. (Feb. 16, 2009) (on file with L & CP) (noting that its agency's protocol requires a finding of abuse when a parent seeks to corporally punish a child anywhere on the head).

225. See FED. R. EVID. 401, 402. The states' own rules mirror the Federal Rules in these respects. See, e.g., ALA. R. EVID. 401 (“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”); ALA. R. EVID. 402 (“All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or that of the State of Alabama, by statute, by these rules, or by other rules applicable in the courts of this State. Evidence which is not relevant is not admissible.”). None of the standard exceptions to this rule apply to exclude consideration of the scientific and other evidence described in this article.

226. FED. R. EVID. 702. The states' rules on expert testimony are similar. See, e.g., ALA. R. EVID. 702 (“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”).

relevant evidence as they make findings in individual cases, including but not limited to reliable scientific evidence.

The line between reasonable corporal punishment and abuse is not fixed or easily identified, particularly in cases at the margins. No scientific or case evidence can identify with absolute accuracy the precise point at which corporal punishment becomes abuse. Nevertheless, more consistent and accurate results can be achieved if CPS and the courts have access to, understand, and use as much relevant and reliable evidence as possible. This evidence includes empirical findings about community norms and practices from both lay witnesses and survey experts, as well as scientific evidence that describes the contexts that cause children to suffer functional impairments.<sup>227</sup> This evidence should be used to evaluate both the reasonableness of discipline and the reasonableness of the force used—in other words, to evaluate the merits of both prongs of the corporal-punishment standard. Thus, in order to fulfill their professional obligations, case workers, prosecutors, and judges should be regularly educated about the status of scientific evidence in child abuse and be trained to interpret that evidence.

CPS appears in general to be much more comfortable than the courts with a variety of evidence, including with scientific evidence. What is not clear, though, is whether those agencies and professionals that incorporate emotional and developmental consequences into their assessments are using only valid scientific evidence about those consequences. At least some case workers appear to be using a combination of valid evidence, intuition, or presumed knowledge about the nonphysical sequelae of physical injuries. In addition, in their eagerness to help children exposed to what they perceive to be suboptimal conditions, at least some workers appear willing to classify as abuse incidents and injuries that have not or are unlikely to cause functional impairment. Considering emotional and developmental consequences is essential to the

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227. Part III.B elaborates on the contexts that cause children to suffer functional impairments. Evidence of the presence of these contexts is thus relevant to establishing child abuse. Discerning functional impairment is easiest in circumstances where children are old enough to express their concerns, or else to exhibit failures or inabilities in the exercise of their daily activities. It is more difficult in circumstances where children are either chronologically or developmentally younger, because how well they are functioning in their daily lives is much less susceptible to lay observation. It is thus essential that valid expertise be brought to bear on both the actual and probabilistic effects of parental behavior in infants and toddlers. Thus, for example, immediate functional impairment could be assessed by a medical or psychological examination of the child's current status. Future functional impairment is (in all contexts) an estimate that has a probability attached to it, for example: highly likely, somewhat likely, unlikely to be impaired in a domain such as academic, mental health, or daily living. This probability is based on matching the parent's behavior and child's current status with a scientific literature that says "if the parent's behavior is  $x$  and the child's current status is  $y$ , then the likelihood is  $z$  that the child will be impaired in the future." Although probabilistic evaluations are, by definition, less certain and thus more likely than current status to result in errors, they are necessary unless society is willing to forgo interventions in the family to protect children who are (merely) at risk of maltreatment. Assuming that society is not willing to forego such interventions, it is better—errors will be reduced—if this evaluation is based or substantially relies on valid scientific evidence. Currently, there is no such requirement.

analysis, but it is also essential that these consequences be legitimate and serious. CPS ought to be required to use only that evidence from laypersons and experts that meets rigorous validity standards.

Courts appear less likely than CPS to be comfortable with scientific evidence that is not related to the medical facts surrounding a particular physical injury. In particular, courts and the lawyers practicing before them sometimes appear uninterested in or uncomfortable with scientific evidence about nonphysical sequelae. To some extent this discomfort is due to the exclusive focus of statutory abuse definitions—either in plain text or as interpreted by other courts in the jurisdiction—on the child’s physical injuries. Separately, however, it appears that judges and lawyers do not know what to make of CPS’s claims about emotional and developmental evidence. This uncertainty may be based on their sense that this evidence lacks the indicia of validity necessary in judicial proceedings, or because the law traditionally struggles with claims about emotional damage, both inside and outside of the maltreatment context.<sup>228</sup> Whatever the case, requiring relevance and validity consistent with the rules of evidence, and making clear the doctrinal contexts in which the evidence is to be presented, is essential to its acceptability and utility for these legal actors.

The requirement that practitioners, lawyers, and courts use valid scientific evidence to decide whether cases involve reasonable corporal punishment or abuse necessarily implicates the need for experts to be part of the process. This, in turn, raises the question whether our approach is realistic given the system’s already-limited human and financial resources. We acknowledge that scientific expertise is not free and thus that our proposal will introduce new costs into the system. At the same time, we suggest that these costs are worth bearing if they can fix the problems inherent in the current process, specifically its tendency to produce inconsistent and erroneous outcomes. Like other evidence, once certain scientific facts are accepted and established, they will be admissible or judicially noticed without the involvement of costly experts, thus ensuring that whatever costs are added are reduced over time. Moreover, adoption of this proposal should result in some cost savings—for example, by forcing CPS to concentrate its resources more narrowly on the cases involving functional impairment—that will offset some if not all of the cost increases. In other words, we believe that our approach is both necessary and realistic, the latter particularly if policymakers are willing to view the additional costs in their broader context.

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228. Although the law today generally recognizes claims for emotional harm, its traditional concerns about frivolous and fraudulent claims and about how to limit liability in such a way that the outcome is fair also to the defendant continue to affect their viability and usefulness. *See, e.g.*, N.C. GEN. STAT. § 7B-101(1)(e) (2007) (providing that an “[a]bused juvenile” includes a child “whose parent, guardian, custodian, or caretaker . . . [c]reates or allows to be created *serious* emotional damage to the juvenile” which “is evidenced by a juvenile’s *severe* anxiety, depression, withdrawal, or aggressive behavior toward himself or others”) (emphasis added); *Dziokonski v. Babineau*, 380 N.E.2d 1295 (Mass. 1978) (making these points about the need to limit the scope of civil claims for emotional-distress damages).



## 6. Model Corporal-Punishment Provision

The following model corporal-punishment provision is based on the structure and principles articulated above. It is designed to be used in the civil child-maltreatment context. However, with some modification, its terms may also be applicable to criminal maltreatment investigations and proceedings. Because it substantially mirrors the common-law tort standard and is otherwise consistent with standard evidence law, it also can be applied in that setting. Although these three areas of law have some different objectives and concerns, there is merit to a jurisdiction's considering adoption of a single unified rule, as doing so would send a consistent message to the relevant legal actors—including parents, CPS, and judges—about the state's position on corporal punishment. This single rule, in turn, would potentially reduce the number of incidents in which children were injured in the disciplinary setting and, correspondingly, the number of interventions by the state in the family.

### *Model Corporal-Punishment Provision*

1. A nonaccidental physical assault on a child is child abuse unless it is privileged or excused.

#### 2. Privileges and Excuses

A. The Privilege of Reasonable Corporal Punishment. A parent is privileged to use physical force to discipline his or her child so long as

(i) he or she is reasonable in determining that the child's behavior warranted discipline, *and*

(ii) the force used is reasonable in nature and moderate in degree. Force is reasonable in nature and moderate in degree if it does not cause or risk causing functional impairment. Functional impairment means short- or long-term or permanent impairment of physical or emotional functioning in tasks of daily living.

B. The "De Minimis" Exception. A parent who does not have a reasonable disciplinary motive for his or her conduct but who does not cause his or her child more than minimal harm will not be charged with child abuse.

3. Burden of Proof. A parent charged with assaulting his or her child bears the burden of asserting and producing some evidence to support the assertion that the assault was privileged or excused. When a parent meets this burden, the state is required to prove that the assault was not privileged or excused.

#### 4. Evidence

A. Any evidence is admissible and should be considered in the evaluation of individual cases that is relevant to establishing that

(i) an assault occurred or did not occur;

(ii) discipline was or was not appropriate in the circumstances;

(iii) the force used was or was not reasonable in the circumstances; *and/or*

(iv) any harm caused to the child was or was not within the de minimis exception.

B. Relevant evidence includes, among other things, evidence of traditional parenting practices and scientific evidence (both medical and social-science evidence) that is proffered to provide assistance to the court in understanding the effects of discipline and force in the circumstances.

#### IV

#### CONCLUSION

Notwithstanding efforts in some states to narrow their scope, legal definitions of abuse and neglect continue in general to be broad and vague. Among other things, this means that the line between reasonable corporal punishment and abuse itself tends to be ill-defined. This ambiguity has been rationalized primarily on the ground that the state needs flexible definitions to ensure that it can act to protect children from maltreatment in whatever form it may appear.

Although flexibility is certainly a valid concern, an important ancillary effect is that this ill-defined standard abdicates to the relevant legal actors—parents, reporters, CPS professionals, and the courts—the job of defining maltreatment, and thus also the boundaries of reasonable corporal punishment. Not surprisingly, each of these definers is constrained differently, if not by formal rules, then by cultural, political, religious, and professional training. Parents and lay reporters typically operate on a “know it when you see it” basis, whereas CPS professionals and courts are somewhat, but not ever entirely, constrained in this exercise by the norms of their respective disciplines, social work, and law. Thus, current law fails to give useful guidance to its intended audience, and it provides for inconsistent case outcomes and an unacceptable risk of both false-positive and false-negative errors.

The line between reasonable corporal punishment and abuse will never be exact. But the states can do a much better job of constraining decisionmakers to ensure both that they are only targeting parental behaviors and outcomes for the child that justify intrusions on family privacy, and that these circumstances are consistent and publicly accessible. To these ends, this article contributes to the literature on the subject of broad and vague abuse definitions in law and the social sciences by proposing a legislative solution to the problem of where and how to draw the line between reasonable corporal punishment and maltreatment that is grounded in long-standing parental-autonomy norms and informed by the science that teaches when and how children suffer harm.

Specifically, it proposes the adoption of a standard for reasonable corporal punishment that requires both a reasonable disciplinary motive and reasonable force, and it defines reasonableness according to both normative understandings and scientific evidence of capacity and functional impairment. As a theoretical matter, this standard reflects appropriate recognition of the societal significance of parental rights and responsibilities and permits intervention in the family only when there is evidence of important physical, emotional, or developmental harm to the child. And as a practical matter, it continues to provide the state with the flexibility necessary to target even

unusual forms of maltreatment, while simultaneously clarifying the circumstances that will and should trigger state action. This, in turn, should result in more consistent case outcomes as well as fewer false-positive and false-negative findings of maltreatment.