Crime or Punishment: The Parental Corporal Punishment Defense - Reasonable and Necessary, or Excused Abuse

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CRIME OR PUNISHMENT: THE PARENTAL CORPORAL PUNISHMENT DEFENSE—REASONABLE AND NECESSARY, OR EXCUSED ABUSE?

Kandice K. Johnson*

The parental right to use physical force to discipline and restrain children is a privilege firmly rooted in the American system of jurisprudence. This privilege is often asserted as a defense when parents are charged with a crime of aggression against their child. While the privilege to use disciplinary force is universally recognized as a defense in criminal actions, it is equally acknowledged that child abuse is a pervasive reality of American life. This article postulates that current laws, addressing assertion of the parental privilege defense in criminal actions, fail either to provide adequate guidance to parents or to sufficiently protect children from abuse.

Professor Johnson proposes a justification statute that would place parental conduct that results in physical injury to the child outside of the parental defense umbrella. The goal of the statute is to preserve the parental privilege to use disciplinary force while simultaneously providing a clear statement that the physical integrity of children is sacrosanct.

I. INTRODUCTION

Raising children has never been easy. Indeed, it can be argued that no matter the time or place, humanity’s most fundamental challenge comes not in the global arena, but rather in the day-to-day pro-

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cess of protecting and shaping our young. It is unlikely that Mary Conner would have disputed this premise.\(^1\)

In mid-nineteenth century England, Mary Conner, a widow, worked to support her children as a street vendor selling fruit.\(^2\) When she returned from what must have been a long and exhausting work day, she expected her eldest to pay heed to her instructions and begin the family meal before her arrival.\(^3\) On the evening in question, Mary was obviously angry with her fourteen-year-old son’s failure to follow this directive and with his impertinent response to her request—factors that explain why Mary picked up and threw a fire poker and why the boy ran from the room.\(^4\)

The escalation of what began as an all-too-familiar parent/child scenario tragically took an unexpected turn when Mary's five-year-old child was fatally struck by the poker that had been aimed at her eldest child.\(^5\) In the course of upholding Mary's manslaughter conviction,\(^6\) the court alluded to the fact that her conduct constituted an unlawful form of correction.\(^7\) Nevertheless, because the court found strong mitigating circumstances, Mary was fined one shilling for her crime.\(^8\)

Over seventy years later the testimony of Harlow Green, on trial for the assault and battery of his twelve-year-old daughter, indicates that he too was faced with the quandary of how to punish a disobedient child.\(^9\) Mabel took a fifty-cent piece from her father without permission and then compounded the problem by denying that she had stolen the money.\(^10\) As punishment, Green ordered her to disrobe and then beat her with a riding whip.\(^11\) Covered in bruises and open cuts, the child was locked in a room with her hands tied behind her back, where she remained for three days with only bread and water for sustenance.\(^12\)

At trial the defendant maintained that the jury should consider whether his actions were protected because he was disciplining his child for misconduct. He urged the court to adopt the rule of law that precludes the prosecution of parents for the use of disciplinary force

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2. See id. at 194.
3. See id.
4. See id.
5. See id.
6. See id. at 195. The central focus of the opinion dealt with the fact that the fatal blow had not been intended for the five-year-old victim. The court held that an unlawful blow, arising from sudden passion constitutes the crime of manslaughter even if death results to an unintended victim. See id.
7. See id. The court did not analyze the difference between lawful and unlawful punishment. It merely concluded that the throwing of a poker is an “improper mode of correction” and that the defendant intended to correct the older child “in a way that was unlawful.” Id.
8. See id.
10. See id. at 1087.
11. See id.
12. See id.
unless it results in permanent injury to the child.\textsuperscript{13} In support of his position Mr. Harlow testified:

What I was trying to get her to say from Friday afternoon to Sunday morning was that she was going to try and do better and to refrain from habits of dishonesty. . . As I have had a chance to look over the past two years and a half, I am satisfied that some other method might have been used with the child to better advantage. \textit{It is hard for a man to decide those questions on the spot.}\textsuperscript{14}

In refusing to reverse the defendant's conviction, the court held that a parent's use of disciplinary force need only be excessive or unreasonable to fall outside the scope of lawful discipline.\textsuperscript{15}

In 1993, James Edward Thompson expressed yet another reason for disciplining a child.\textsuperscript{16} Although the exact nature of his child's infraction is unclear, the reported decision, reviewing the defendant's conviction for felony assault, establishes that Thompson believed his religious principles directed the use of force against his ten-year-old daughter.\textsuperscript{17} At an omnibus hearing, the defendant explained his position:

Christianity in the New Testament of the Bible refers specifically to the use of force on and in the rearing of children. It is direct in its quotation, \textquote{To spare the rod and spoil the child.}'

\ldots

This openly means that if a person, any person, in an attempt to live a life in his personal religious manner may not be made to submit to the atrocities of invasion of privacy, \ldots or to be brought before a charge which he may believe is a Godly action. \textit{Remembering that in Christianity, child sacrifice was also accepted, any form of action less would be a merciful action.}\textsuperscript{18}

Spanning a century and a half, these cases point toward some of the many issues posed when a parent uses disciplinary force; the most obvious of which is that parents, throughout time, have used physical force in response to the perceived transgressions of children. Parents utilize physical punishment because they do not know what else to do, they are angry, it is their desire to instill moral and social values, or they believe that religious beliefs dictate a physical response. At a minimum, the latter two of these reasons center around the belief that the use of force will ultimately benefit the child.

\begin{itemize}
\item \textsuperscript{13} See \textit{id.} at 1088.
\item \textsuperscript{14} Id. (emphasis added).
\item \textsuperscript{15} See \textit{id.} at 1090.
\item \textsuperscript{16} See \textit{State v. Thompson}, 865 P.2d 1125 (Mont. 1993).
\item \textsuperscript{17} See \textit{id.} at 1129. The child had been repeatedly kicked, and there was extensive and severe bruising on her arm, torso, back, and legs. See \textit{id.} at 1128.
\item \textsuperscript{18} Id. at 1129 (emphasis added).
\end{itemize}
No matter what the motivation is for the use of such force, these decisions also point to the fact that the criminal justice system is frequently called upon to intervene when a disciplinary measure appears to have entered the realm of criminal conduct. This occurs because criminal laws are designed to protect humans from aggression that could or does result in injury. When the issues of discipline and criminally inflicted harm intersect, the courts must then grapple with the question of how much punishment is too much.

In the course of resolving this question, issues of law and fact intertwined with the most basic of human emotions must be confronted. Does a parent's right to direct the upbringing of a child preclude state involvement in disciplinary matters in all but the worst cases of abuse, or should state intervention be triggered by something less? Should the circumstances surrounding imposition of the punishment be evaluated by the fact finder, or are the reasons best left to those most responsible for the child's welfare? Even if a child suffers no physical injury, do certain disciplinary practices so offend notions of decency that they warrant criminal penalties? Do societal perspectives on the difference between crime and punishment change, or is a child's life today worth more than a shilling?

To address these questions and others, society, courts, and legislative bodies have sought for centuries to define the often thin line between acceptable and unlawful punishment. The refinement process continues today, as evidenced by the fact that every state, as well as the U.S. Supreme Court, has addressed the use of disciplinary force against children in one legal context or another. Although the civil courts frequently have occasion to assess the legal ramifications of parental disciplinary force, the interplay between parental corporal punishment and abuse is, perhaps, most dramatically confronted in the criminal justice system, when a parent interposes a "justification" as a defense.


20. See infra Appendix.


22. The parental privilege to use disciplinary force has legal relevance in several situations. The first is civil tort liability for physical harm inflicted upon a child by a parent. In the civil context, a parent's right to use corporal punishment serves to insulate the parent from a damage claim for injury to the child. See Restatement (Second) of Torts § 147 (1965). Additionally, the parental right to use corporal punishment could arise in a civil juvenile proceeding. For example, taking a child into the custody and control of the juvenile court is often precipitated by allegations of child abuse. When abuse is alleged, the parent could assert the parental right to utilize corporal punishment to refute the allegations of abuse. See, e.g., People v. In re M.A.L., 592 P.2d 415, 417 (Colo. Ct. App. 1976); In re Ethan H., 609 A.2d 1222, 1225 (N.H. 1992) (reversing holding of Superior Court that found child had been abused); In re Rodney C., 398 N.Y.S.2d 511 (Fam. Ct. 1977). The third area where the privilege may be asserted is in a criminal proceeding. In this situation a criminal defendant may assert the defense of "justification" if the use of intentional physical force against the child fits within the lawful parameters of the parental privilege. See discussion infra Part III.B.
defense. Thus, parents charged with a crime resulting from the use of force against their children may assert the justification defense of parental privilege when the force is used for a disciplinary purpose. This defense excuses a parent from criminal liability for aggressive or assaultive conduct. Consequently, criminal laws excuse conduct that, but for the parental privilege defense, would result in a conviction for child abuse or assault.

Based upon historical, societal, and legal underpinnings, courts have interpreted statutes and common-law doctrines addressing the defense by balancing two principles. The first is that parents should be free to raise their children without undue governmental influence. Second, courts assume that the use of force is lawful because, and so long as, it is employed to promote the well-being of the child.

To accommodate the tension created by these two concerns, the courts have articulated flexible legal standards that essentially require that the use of force be reasonable, moderate, or not excessive. In some states the concept of reasonable punishment is not defined. In others, it is defined by listing conduct that is deemed to be unreasonable. The definition of unreasonable punishment frequently includes conduct that creates a substantial risk of, or results in, death, disfiguration, or serious physical or emotional injury. Using either approach, courts reason that when the force used is reasonable or moderate, there is no need to interfere in family matters; if the force exceeds this standard then the state may intervene because it is not being used to promote the welfare of the child.

As implemented, these standards provide a viable defense to parents who use inconsequential force. For example, the offense of misdemeanor assault may criminalize conduct that results in an offensive contact to another. Many common parental disciplinary measures could be classified as the use of force that is offensive to the child. The parental privilege to use corporal punishment uniformly insulates parents from criminal liability for such conduct. At the other end of the range of parental disciplinary measures, the parental privilege does not alleviate criminal responsibility when parents murder their

23. For ease of discussion throughout this article, the term "parent" is used when addressing the situation when an adult is using force to discipline a child. As will be discussed in Part III.E, the term "parent" has a broad application in this context and generally includes an adult who has assumed responsibility for the welfare of the child.

24. See discussion infra Part III.E.

25. See discussion infra Part II.B.2.

26. See discussion infra Part II.B.2 and III.E.

27. See discussion infra Part III.F; see also infra Appendix.

28. See discussion infra Part III.F; see also infra Appendix.


30. See MO. ANN. STAT. § 565.070 (West 1994), which provides: "A person commits the crime of assault in the third degree if: ... He knowingly causes physical contact with another person knowing the person will regard the contact as offensive or provocative."
Likewise, the privilege is not designed to shield parents charged with serious felony abuse or assault charges when their disciplinary practices include conduct that is designed to, or does, result in debilitating injury. Thus, although the adopted standards may be adequate when addressing conduct at either end of the range of parental conduct, they are less satisfactory when dealing with parental discipline that falls between an offensive contact and death or debilitating injury. It is this type of parental conduct, generally encompassed by the crimes of misdemeanor assault or child abuse, that presents the most obvious of the inadequacies of the parental corporal punishment privilege.

Within this context, assertion of the privilege as a defense in a criminal action implicates one of two concerns: either it fails to give adequate guidance to parents as to when appropriate discipline stops and abuse begins, or it falls short in addressing conduct that many would find to be abusive. These factors alone necessitate an examination of the parental corporal punishment privilege. However, the greatest problem emanating from the parental privilege to use disciplinary force is that in an attempt to accommodate traditional disciplinary practices, current standards hedge on the issue of whether parents can physically injure their child. The net effect of this accommodation is the existence of legal standards that exacerbate the pervasiveness of child abuse in this country.

To address these failures, a clear legal standard should be adopted that precludes the use of force that results in physical injury to the child. Implementation of this standard would not result in undue governmental intrusion into the family unit, would provide clear guidance to parents, and would protect children from abuse. Most important, a parental corporal punishment defense that clearly does not extend to conduct that results in physical injury to the child is a sensible, cost-effective measure that will lead to a society less tolerant of child abuse.

There are many reasons why the criminal laws have been designed to accommodate the use of force by parents. At the threshold of the analysis, however, it must be recognized that the mere existence of the privilege is an acknowledgment that, as a society, we condone the harm of children for the purpose of teaching them acceptable behavior. That is to say, if the conduct of the parent would

31. As one of the requirements of the privilege to use disciplinary force is that it be used to promote the welfare of the child, it is self-evident that force resulting in death is not protected. The privilege to use disciplinary force does not encompass force that results in death. However, some states have enacted excusable homicide statutes that address the accidental death of a child resulting from lawful discipline. See 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES CRIMINAL PRACTICE SERIES § 144(a), at 162 n.1 (1984). The accidental death of children resulting from the use of disciplinary force is a topic beyond the scope of the article.

32. See, e.g., MODEL PENAL CODE § 3.08; see also State v. Coombs, 381 A.2d 288, 289 (Me. 1978); Carpenter v. Commonwealth, 44 S.E.2d 419, 423-24 (Va. 1947).
be criminal in the absence of the privilege, and criminal laws are
designed to punish harmful aggression, then we must accept what
would otherwise be condemned as criminal behavior is acceptable
because the victim is a child in need of discipline. The purpose of this
article is to explore the legal and societal consequences flowing from
this premise as implemented by the parental corporal punishment
privilege.

II. THE UNDERLYING CONCERNS

A. Child Abuse and Corporal Punishment: Is There a Connection?

That child abuse is a serious problem and a widespread American
phenomenon cannot be challenged. In 1995, an estimated 1215 chil-
dren died as the result of abuse or neglect in the United States.\(^3\) Approximately forty-three percent of these children had contact with
a social service agency prior to their death, forty-nine percent died
from abuse, and another eleven percent died from a combination of
abuse and neglect.\(^4\) During the same year, it has been estimated that
996,000, or fifteen children per 1000, were substantiated as victims of
abuse and neglect.\(^5\) Twenty-five percent of these children were vic-
tims of physical abuse, and three percent were victims of emotional
abuse.\(^6\) Thus, twenty-eight percent of the children substantiated as
victims of abuse suffered the type of abuse at issue when parents use
disciplinary force.

A multitude of problems have been cited as contributing factors
to the abuse epidemic.\(^7\) In 1995, however, social service agencies
listed substance abuse, poverty and economic stress, and the lack of
parenting skills as the top three contributors to the problem of child
abuse.\(^8\) Although substance abuse and poverty are factors with a
complex relationship to how we discipline children, parenting skills, or
the lack thereof, have a direct and obvious connection to the way chil-
dren are corrected for inappropriate behavior.

Although the magnitude of the child abuse problem cannot be
disputed, less data exists to correlate the interplay between discipline

\(^3\) See Ching-Tung Lung & Deborah Daro, Current Trends in Child Abuse Re-
porting and Fatalities: The Results of the 1995 Annual Fifty State Survey 12 (Na-
Annual Fifty State Survey].

\(^4\) See id. at 15 tbl.3.

\(^5\) See id. at 6. This figure represents only substantiated instances of abuse. Substantiated
abuse follows a determination by an agency of the state that abuse or neglect has in fact oc-
curred. See id. at 3.

\(^6\) See id. at 7. The remaining cases of substantiated abuse in 1995 included the categories
of neglect (54%), sexual abuse (11%), and other (6%). See id.

\(^7\) See Susan Janko, Vulnerable Children, Vulnerable Families: The Social
Construction of Child Abuse 1-7 (1994).

\(^8\) See 1995 Annual Fifty State Survey, supra note 33, at 10-11.
and abuse. However, certain factors suggest that the potential for interrelationship is present. First, it is clear that most children who suffer from abuse do so at the hands of their parents or other caregiver. Statistics indicate that approximately twelve percent of abuse cases result from acts by individuals who are not related to the child. Thus, most abuse can be attributed to adults who are responsible for the well-being of the child. Second, there is widespread acceptance of the use of corporal punishment in our society. Societal acceptance of corporal punishment is reflected by the legal recognition of the parental force privilege and by studies conducted from the 1950s through the 1990s that consistently indicate that greater than ninety percent of American parents use physical force to punish their children. If the use of physical force on children is condoned by most parents and if most children are abused by their caregivers, it is reasonable to speculate that there may be some relationship between abuse and discipline. Several studies discussed below confirm this hypothesis.

In a 1967-68 study, David Gil attempted to extrapolate data arising from reported instances of child abuse. The findings reported from this study isolate a number of factors considered to be contributors to the child abuse phenomenon. However, the leading factor cited by Gil was the use of disciplinary force. Specifically, the study indicated that sixty-three percent of the children studied had been subjected to abuse as the result of a parental response to the child's behavior. Gil's study was one of several that confirmed the hypothesis that there is a relationship between abuse and discipline. Several studies discussed below provide additional support for this hypothesis.

39. See Murray A. Straus, Beating the Devil out of Them: Corporal Punishment in American Families and Its Effect on Children 12 (1994). Straus, in his discussion of the connection between abuse and parental discipline, refers to what he calls a "conspiracy of silence" concerning the issue of corporal punishment. See id. at 10. It is his premise that experts writing on both child development and child abuse commonly make no mention of, or only brief reference to, the fact that corporal punishment is an integral part of child rearing in American families. See id. He speculates that the reluctance to broach this issue stems from a deeply ingrained cultural commitment to the practice and a fear by authors that rejection of the practice will result in a loss of rapport with parents. See id. at 12.

40. See Janko, supra note 37, at 25 (citing Bronfenbrenner (1974), American Humane Association (1986)); see also James Garbarino, The Incidence and Prevalence of Child Maltreatment, in 11 Family Violence 219, 228 tbl.4 (1989) (indicating that in approximately 83% of cases of major physical abuse of children, a parent is the perpetrator); Edward Zigler & Nancy W. Hall, Physical Child Abuse in America: Past, Present and Future, in Child Maltreatment: Theory and Research on the Causes and Consequences of Child Abuse and Neglect 38, 51-52 (Dante Cicchetti & Vicki Carlson eds., 1989) (indicating that "[m]others (or 'mother substitutes') were found to be responsible for 47.6% of the abuse cases researched, while 39.2% of the incidents involved father or father substitutes," and "[n]inety percent of abusive incidents take place in the child's own home").

41. See Janko, supra note 37, at 25 (citing American Humane Association (1986), Bronfenbrenner (1974), and Garbarino (1976)).


perceived misconduct. In a 1974-75 study of child abuse, Kadushin and Martin attempted to study the physical abuse of Wisconsin children. In the course of this study, 830 reports of physical abuse of children by parents were examined, and interviews were conducted with sixty-six parents who acknowledged that they had injured their child. Based upon data from this study, Kadushin and Martin conclude that abuse consistently begins as a parental response to a child’s behavior that causes the parent to initiate a disciplinary action. The initial parental response was generally a “low-level non-corporal response” followed by an abusive act precipitated by the child’s response to the initial parental action. Moreover, they conclude that even after intervention by a protective service agency, parents “tended to perceive their behavior as having an essentially disciplinary intent rather than being abusive.”

Finally, in a study conducted by Professor Murray Straus, it was determined that parents who support the use of corporal punishment “not only hit more often, but they more often go beyond ordinary physical punishment and assault the child in ways which carry a greater risk of injury to the child.” These studies indicate that there is a substantial likelihood that child abuse commonly begins as corporal punishment administered for disciplinary purposes.

None of these social scientists suggest that all parents who use corporal punishment abuse their children. Moreover, it cannot be disputed that child abuse is a multidimensional problem. In addition to the factors of poverty, substance abuse, and lack of parenting skills mentioned above, historical acceptance of maltreatment of children, intergenerational transmission of abuse, and stress caused by health

45. See id. at 126-30.
47. See id. at 97-99, 253.
48. See id. at 253.
49. Id. at 250.
50. See id.
51. Id.
52. Straus, supra note 40, at 141-42.
54. See RUTH S. KEMPE & C. HENRY KEMPE, CHILD ABUSE 3-6 (1978).
55. See Joan Kaufman & Edward Zigler, The Intergenerational Transmission of Child Abuse, in CHILD MALTRTREATMENT: THEORY AND RESEARCH ON THE CAUSES AND CONSEQUENCES OF CHILD ABUSE AND NEGLECT, supra note 40, at 129, 135. This article takes the position that the relationship between being abused as a child and subsequently abusing offspring has been overstated by other researchers. The authors, however, estimate that an accurate projection of the intergenerational theory may be a 25% to 35% transmission rate, a rate of occurrence characterized as “scarcely inconsequential.” See id. at 135.
problems, unemployment, or marital/personal relationships\textsuperscript{56} have also been identified as factors contributing to the prevalence of child abuse. Recognizing the complexity of the problem does not diminish the significance of studies indicating that abuse frequently finds its origins in the disciplinary use of physical force.\textsuperscript{57}

With the acknowledgement that abuse is a serious problem frequently finding its origins in the use of disciplinary force, it becomes important to consider whether current approaches to the parental privilege to use disciplinary force accomplishes the dual tasks of protecting children from abuse and defining for parents the line between criminal conduct and lawful punishment. This assessment begins with an analysis of the policy reasons that shape and give context to the parental privilege to use disciplinary force.

\textsuperscript{56} See \textsc{Kadushin \& Martin}, \textit{supra} note 46, at 226.

\textsuperscript{57} Although there is little dispute that abuse is a problem of tremendous significance and complexity, and sound research to suggest that abuse commonly begins as a parental disciplinary response, there is surprisingly little consensus about what the term "abuse" means. See \textsc{Jeanne Giovannoni}, \textit{Definitional Issues in Child Maltreatment}, in \textit{Child Maltreatment: Theory and Research on the Causes and Consequences of Child Abuse and Neglect}, \textit{supra} note 40, at 3, 8-16; \textsc{Susan J. Zuravin}, \textit{Research Definitions of Child Physical Abuse and Neglect: Current Problems}, in \textit{The Effects of Child Abuse and Neglect: Issues and Research} 100-24 (Raymond Starr Jr. \& David Wolfe eds., 1991). Social scientists, medical professionals, and civil and criminal laws each give a slightly different slant to the meaning attached to the term "abuse." Criminal laws that address the crime of child abuse also vary in terms of the specificity used to outline the meaning of the term abuse. Some states use very broad language to define the crime of "abuse." For example, abuse is broadly defined in California as "willfully" causing a child to "suffer... unjustifiable physical pain or mental suffering." \textsc{Cal. Penal Code} § 273(a) (West 1988). Indiana defines abuse as conduct that "knowingly" may "endanger" the "life or health" of the child. \textsc{Ind. Code Ann.} § 35-46-1-4 (West 1994). Other states may provide greater specificity in defining abuse. For example, Arizona defines "abuse" as "the infliction or allowing of physical injury, impairment of bodily function or disfigurement or the infliction of or allowing another person to cause serious emotional damage as evidenced by severe anxiety, depression, withdrawal or untoward aggressive behavior." \textsc{Ariz. Rev. Stat. Ann.} § 8-546 (West 1989). And finally, in some states great specificity is provided by including specific types of injury that are not permitted. Virginia is one such state. "For purposes of this subsection, 'serious injury' shall include but not be limited to (i) disfigurement, (ii) fracture, (iii) a severe burn or laceration, (iv) mutilation, (v) maiming, (vi) forced ingestion of dangerous substances, or (vii) life-threatening internal injuries." \textsc{Va. Code Ann.} § 18.2-371.1 (Michie 1996). The lack of consensus in defining the term "abuse" may have important ramifications for assessing the societal impact of abuse, but in the legal context broadly drawn definitions of abuse are a response to the need to capture the infinite number of ways that adults can cause criminal harm to a child.

Moreover, it can be argued that it is primarily within the context of the parental corporal punishment defense that the issue of whether a child has been assaulted or abused becomes difficult. That is to say, what the law condemns as the abuse or assault of a child is relatively clear-cut in a practical context, unless the parental defense is at issue. For example, if a stranger hurts or causes a child pain, whatever the motivation for the infliction of the force, the crimes of child abuse or assault are meant to address the conduct. If a parent engages in similar conduct that is gratuitous in nature and not in response to the conduct of the child, the crimes of assault or child abuse have been designed to punish the conduct. Stated otherwise, criminal laws generally have no trouble defining or responding to child abuse unless the issue of parental discipline is injected. Thus, although it might be assumed that the lack of consensus as to what is or is not abuse contributes to the difficulties in articulating the parental defense, it is just as likely that the existence of the defense serves as an obstacle in reaching a societal consensus about what is or is not abuse. Whether the latter conclusion is correct or a classic chicken-and-egg dilemma posed is difficult to assess.
B. Policy Issues and Public Opinion

From the earliest applications of the privilege, courts have relied on two assumptions when excusing parents from criminal liability resulting from the use of disciplinary force. First is the supposition that the force is being used to promote the best interests of the child. The logic underlying this assumption is that any physical harm that results to the child is outweighed by the benefits derived from the punishment imposed and that the use of physical force is a practice that promotes the best interests of the child. Second, the courts have reasoned that it is inappropriate for the state to unnecessarily interfere in parental determinations of the appropriate measures to be taken in teaching children the limits of acceptable conduct. These two factors have served as the primary force behind the continuing viability and scope of the parental corporal punishment defense. Consequently, whether the use of corporal punishment promotes the welfare of the child, as well as the rationale behind protecting a parent’s right to use disciplinary force, should be examined.

1. The Welfare of the Child

Whether corporal punishment can be considered to be a benefit to the child is an issue that can be evaluated from an individual and societal perspective. The above-mentioned studies indicating that abuse frequently has its origins in discipline weaken the argument that corporal punishment is a benefit to children from a societal perspective. The analysis from the individual perspective addresses the direct and/or long-term impact on a child who has been subjected to corporal punishment.

Although the direct impact of corporal punishment on children has not received a great deal of attention from social scientists or child-welfare professionals, Professor Murray A. Straus has devoted a significant portion of his career to the study of corporal punishment and its effects on children. Work spanning several decades has lead Straus to the conclusion that “corporal punishment plays a crucial role in training people to accept violence in human relationships.”

59. See, e.g., People v. Sambo, 554 N.E.2d 1080, 1088 (Ill. App. Ct. 1990); State v. Black, 227 S.W.2d 1006, 1009 (Mo. 1950); State v. Sinica, 372 N.W.2d 445, 447 (Neb. 1985); see also discussion infra Parts II.B.2, III.C.
60. Professor Straus is the Codirector of the Family Research Laboratory and professor of sociology at the University of New Hampshire. See Straus & Yodanis, supra note 53, at 35.
62. Straus & Yodanis, supra note 53, at 37.
Straus argues that because corporal punishment is often used on very small children, who have not yet learned to speak, it conveys to the child perspectives on violence that become an integral part of his or her personality. What becomes embedded in the fiber of the child is the acceptance of a relationship between love and violence. That is to say, because children are generally hit by their parents, a child reasons that she is most apt to be struck by individuals with whom she is intimately involved. Moreover, because corporal punishment is commonly associated with a parent's concern for the child, a child learns that it is morally acceptable to strike a loved one. With these assumptions as the starting point of his analysis, Straus undertook a study to determine if adults who were subjected to corporal punishment as children were more likely to abuse their partners.

A 1985 study involving over 4000 families determined that there was a correlation between being hit as a child and assaulting a spouse as an adult. The analysis conducted by Straus in this study provided support for three reasons linking corporal punishment and spousal abuse. First, in what Straus calls "modeling of implicit cultural norms," he reasons that because children who are struck learn that it is morally acceptable to strike someone who misbehaves, it becomes appropriate to strike a partner who fails to meet expectations of reasonable conduct. Second, Straus contends that children who grow up in homes where the use of corporal punishment is prevalent fail to develop problem-solving skills based upon nonviolent conflict resolution. Finally, his study indicates that the use of corporal punishment is associated with an increased risk of depression and that depressed individuals are more likely to engage in aggressive conduct. Importantly, these same variables also impact the probability that a parent who has experienced corporal punishment as a child will also abuse his or her own child.

The work conducted by Straus strongly suggests that corporal punishment may do little to promote the well-being of the child. When considered in conjunction with the above-mentioned studies linking abuse and discipline, it must be questioned whether disciplinary force promotes the welfare of the child from either an individual or societal perspective.

63. See id. at 37-38.
64. See id. at 38.
65. See id.
66. See id. at 36-37.
67. See id. at 40, 44.
68. Id. at 44.
69. See id. at 45-46.
70. See id. at 46.
71. See id. at 61.
2. Parental Autonomy

Even if we accept as true the assertion that corporal punishment does not promote the well-being of the child from either an individual or societal perspective, it is important to remember that the well-being of the child is only half of the legal equation. The other countervailing concern at the heart of the parental privilege to use disciplinary force is that the state should, when possible, refrain from interfering in matters of family autonomy.

At the core of every society are values that the culture recognizes as fundamental to its existence. Few would deny that the translation of these values into meaningful standards of behavior takes place within the family unit. This means that parents assume the role of passing cultural values to their children. Parents pass values from their generation to the next by modeling acceptable behavior, providing an environment that meets the physical and emotional needs of the child, and by establishing parameters for acceptable behavior. Each of these functions is related to the way that children are disciplined.

Because the family unit is the primary vehicle for transmitting cultural values, the law has recognized throughout history that the sanctity of the family unit must be preserved and allowed to operate with the least governmental intrusion possible. Governmental intrusion into the parent-child relationship is deemed undesirable because it stands at the core of family life. That our society reveres the family unit, and in particular the parent-child relationship, is reflected by Supreme Court decisions addressing the constitutional status of domestic authority.\(^72\)

a. Constitutional Status of Domestic Authority

Although the Supreme Court decisions that examine the legal dimensions of the parent-child relationship have never squarely addressed the constitutionality of the parental corporal punishment privilege, they do provide insight into this issue. In the broadest sense, three points can be gleaned from these decisions. First, the parent-child relationship creates a Fourteenth Amendment parental "liberty interest" designed to allow parents to direct the upbringing of their children.\(^73\) Second, this parental right is not unfettered and may become secondary to interests of the state.\(^74\) Third, the use of physical force is an acceptable means of controlling a child.\(^75\)


\(^73\) See infra notes 76-79 and accompanying text.

\(^74\) See infra notes 81-86 and accompanying text.

\(^75\) See infra notes 87-91 and accompanying text.
The case trilogy of Meyer v. Nebraska,76 Pierce v. Society of Sisters,77 and Prince v. Massachusetts78 are often included among the first cases establishing that the Fourteenth Amendment creates a liberty interest that includes a parent's right to direct the upbringing of their children.79 The first two of these decisions, Meyer and Pierce recognized a fundamental parental liberty interest that superseded the interest of the state.80 Prince v. Massachusetts held that the parental interest was not the only issue of importance when children were involved.81

Prince was convicted after she and her young niece were discovered illegally distributing religious materials on the streets of Brockton.82 The Court upheld the Massachusetts child labor law despite Prince's claim that it violated her Fourteenth Amendment due process parental rights, as well as her First Amendment right to freedom of religion.83

In rejecting her claim, the Court first recognized that "[t]he parent's conflict with the state over control of the child and his training is serious enough when only secular matters are concerned. It becomes the more so when an element of religious conviction enters."84 Despite these two constitutional concerns, the Court held that when the welfare of the child is at issue, the state has considerable power to intervene:

Against these sacred private interests, basic in a democracy, stand the interests of society to protect the welfare of children, and the state's assertion of authority to that end . . . . It is [in] the interest of youth itself and of the whole community, that children be both

76. 262 U.S. 390 (1923). In Meyer the parental right to raise children without undue governmental interference was interpreted to mean that a statute requiring English to be the sole language taught in elementary school was an unconstitutional interference in the parental right to direct the education of children. See id. at 400-01. The defendant was a schoolteacher who was convicted of a misdemeanor for violating this statute. See id. at 396-97. The Court ultimately concluded "[h]is right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment." Id. at 400.

77. 268 U.S. 510 (1925). In Pierce, an Oregon statute required children between eight and sixteen to attend public school. See id. at 530. The Court held that the law "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." Id. at 534-35. The Court also indicated that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." Id. at 535.

78. 321 U.S. 158 (1944).


80. Meyer, 262 U.S. at 401; Pierce, 268 U.S. at 535.

81. Prince, 321 U.S. at 165.

82. See id. at 159-61. Prince involved the appeal from a violation of a Massachusetts child labor law by Prince, who was the aunt of nine-year-old Betty Simmons; the law prohibited minors from selling publications in public locations. See id.

83. See id. at 170.

84. Id. at 165.
safeguarded from abuses and given opportunities for growth into free and independent well-developed . . . citizens.85

The Court concluded its discussion by saying the "state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare."86

These decisions do not specifically indicate how the parental use of physical force fits into the balance between the interest of the state in protecting children and the interest of parents in raising their children. Although the only Supreme Court case dealing with corporal punishment arose outside the parent-child context, it should not be ignored in assessing the constitutional parameters of the privilege.

*Ingraham v. Wright*87 dealt with a Florida statute that authorized teachers to use reasonable corporal punishment as a means of maintaining discipline.88 The case arose following the administration of "licks with a paddle" to James Ingraham and Roosevelt Andrews.89 The twenty "licks" administered to Ingraham resulted in a hematoma requiring medical attention and absence from school for several days, and the punishment to Andrews included striking him in a manner that precluded him from using his arm for one week.90 The plaintiffs alleged that the punishment violated the Cruel and Unusual Punishment Clause of the Eighth Amendment. The Court rejected this contention and upheld the right of the state to authorize the use of corporal punishment by school administrators.91

Because the case discusses corporal punishment outside the family context and focuses upon Eighth Amendment questions, it cannot be used as a definitive answer to the constitutional dimensions of the parental privilege to use disciplinary force. It does, however, provide some guidance with respect to potential issues of concern. First, in discussing the right to use corporal punishment, the Court recognized the common-law principles that both allow and restrict the use of force. Second, while noting that the use of corporal punishment was subject to controversy, the Court indicated that there was no discern-
able trend toward the elimination of the practice, and nothing about the Court's opinion provides a basis to speculate that the Court finds the practice to be unacceptable. The Prince, Pierce, and Meyer decisions point toward the conclusion that parents have a fundamental interest in raising children as they see fit. Ingraham implicitly includes the use of corporal punishment as one of the tools available to parents in accomplishing this function. Equally clear from these decisions is the conclusion that the right to use corporal punishment can be restricted by the state. That restriction will withstand constitutional challenge if it is designed to protect the welfare of the child. Although a complete abolition of the privilege could be determined to be invasive of a parent's Fourteenth Amendment rights, it would appear that the states may define and delineate the scope of the privilege without risk of constitutional challenge.

b. Public Support for Domestic Authority

Whether laws are shaped by society or society is shaped by laws is a difficult question to answer. However, the Supreme Court's tacit approval of corporal punishment as an integral aspect of family autonomy seems to be strongly supported by the public. Moreover, studies discussed below also demonstrate that disciplinary force is frequently utilized by parents not only during infancy, but also throughout a child's tenure in the home.

As mentioned above, based upon data from the National Family Violence Survey conducted in 1975, Straus indicated that ninety percent of the surveyed parents expressed approval of physical punishment. In a 1992 study comparing the prevalence of corporal punishment in the United States and India, researchers indicated that ninety-three percent of American males and ninety-two percent of American females experienced corporal punishment as children. These figures are remarkably consistent with studies conducted in 1957 indicating that ninety-nine percent of the mothers surveyed used physical punishment in raising their children, and a 1982 study of

93. See id. at 661-62. Although the Court's opinion notes that there is no discernable trend toward the elimination of corporal punishment in schools, such a conclusion is no longer correct. At the time the opinion was published, the Court indicated that only two states had enacted legislation prohibiting the use of corporal punishment in schools. See id. at 663. Recent studies indicate that 25 states have now outlawed the use of corporal punishment in schools. See Straus, supra note 39, at 172.


95. See Anthony M. Graziano et al., Physical Punishment in Childhood and Current Attitudes: An Exploratory Comparison of College Students in the United States and India, 7 J. INTERPERSONAL VIOLENCE 147, 149 (1992).

96. See Robert R. Sears et al., PATTERNS OF CHILD REARING 328 (1957).
college students indicating that ninety-five percent had experienced corporal punishment during their lifetime.97

Although it is true that there is a greater reliance on corporal punishment in the early years of a child's life, studies also indicate that the practice frequently continues well into the child's adolescence.98 One study concluded that more than ninety percent of American parents use corporal punishment on toddlers and more than half continue the use of force into adolescence.99 Studies conducted in the 1970s indicated that approximately one-fourth of the surveyed high school seniors had been struck.100 A recent study, based upon data collected from a large sample of adult men and women, concluded that approximately half of American adolescents are hit by their parents and that the median rate of occurrence is four times during a twelve-month period.101

Each of these studies supports the premise that as a society we endorse and utilize corporal punishment to discipline children. This strong public support would not exist in the absence of a cultural belief in its validity and necessity. Stated otherwise, America must believe that corporal punishment promotes the well-being of the child. As such, excessive governmental intrusion into the practice of using corporal punishment is unlikely to be supported by the public. This means that, as applied to the use of corporal punishment, the second philosophical pillar, which stresses the parental right to raise children without undue governmental interference, is not only supported by the courts but is also embraced by the public.

Thus, on one hand, we have social science research indicating that the use of any corporal punishment may not be in the best interests of the child, and on the other, legal and popular support that it is. The tug-of-war between the welfare of the child and autonomy principles provides at least a partial explanation of why it is difficult to develop standards defining the parental corporal punishment defense. Moreover, it calls into play an examination of how the policy concerns driving the defense factor into the premise that current standards are inadequate.

The first policy concern, which addresses the welfare of the child, wraps around the privilege in two ways. First, there is the assumption that parental autonomy, however it is exercised, is not an absolute

98. A detailed discussion of corporal punishment of adolescents can be found in Murray A. Straus & Denise Donnelly, Corporal Punishment of Adolescents by American Parents, 24 YOUTH & SOC'Y 419, 419-39 (1993).
99. See STRAUS, supra note 54, at 57.
101. See id. at 437.
right, but rather is tempered by the interest of the state in regulating matters related to the well-being of the child. 102 Second, this particular defense rests upon the assumption that the force used will benefit the child. 103 Emanating from common-law concepts of justice, this assumption was placed at the crux of the privilege at a time when child abuse was not a recognized phenomenon and social science research was nonexistent. 104

Taken together, these two factors indicate that modern perspectives on the use and consequences of corporal punishment should have a spillover effect on the manner in which the second prong, parental autonomy, is construed. That is to say, although the importance of parental autonomy should not be minimized, the state’s ability to regulate the authority that arises therefrom should be enhanced if the use of corporal punishment is of minimal benefit to the child.

To accommodate these competing concerns, the policy reasons behind the defense should be interpreted in a balanced fashion that reflects modern concepts of abuse. If either concern predominates, compelling interests founded upon sound legal and factual realities will be minimized. Stated otherwise, when one concern supersedes the other, either children will be at greater risk for abuse, or parents will be unfairly subjected to criminal prosecution. On the other hand, if, in an attempt to accommodate both concerns, nebulous standards are implemented then instead of negative implications arising for one of the constituencies, arguably both are at risk. Parental autonomy is then weakened, risks of prosecution are enhanced, and children are at greater risk for abuse when no one knows where discipline stops and abuse begins. Although current standards have most certainly been designed to reflect a balancing of these policy concerns, the standards, as implemented in many jurisdictions, fail to accomplish this goal.

III. THE SCOPE OF PRIVILEGE

A. The Underlying Offense

In the criminal context, the parental privilege to use disciplinary force arises when a parent is charged with a crime of aggression. The use of inappropriate force against person or property is an omnipresent theme of criminal jurisprudence. When parents use force against their children, however, they are commonly charged with the crime of assault, child abuse or endangerment, or domestic abuse. Because the

103. See, e.g., id.; State v. Koonse, 101 S.W. 139, 141 (Mo. Ct. App. 1907) ("The welfare of the child is the principal ground on which the parental right to chastise him is founded."); see also infra Part III.C; supra note 59 and accompanying text.
104. Although the abuse of children is a phenomena as old as mankind, modern recognition of the problem is often credited to a 1962 study describing the “battered child syndrome.” See C. Henry Kempe et al., The Battered Child Syndrome, 181 JAMA 17 (1962).
defense must be evaluated within the context of the crimes to which it applies, it is important to review the laws that encompass aggressive conduct against children.

One hallmark of the criminal justice system is the principle that the wrong resulting from criminal conduct harms not only the victim, but society as well. Indeed, the harm caused by physically aggressive conduct is so detrimental that state-sanctioned punishment is deemed to be appropriate. Due to the unlimited number of ways human aggression can be displayed and ever-evolving standards of human interaction, laws defining this type of crime are richly varied. However, the most universal and enduring legal mechanism for punishing human aggression is encompassed by the crime of assault. Moreover, the statutory framework created to define, prohibit, and punish a defendant for the crime of assault incorporates concepts common to many crimes designed to protect individuals, including children, from aggressive conduct.

105. In the most general sense, criminal laws designed to address human aggression are intended to respond to human conduct at its worst. These laws define physical conduct that goes beyond the boundaries of acceptable human interaction. They are not designed to promote conflict resolution, make model citizens, or for that matter model parents. Rather, the focus is on conduct that is so detrimental that it is harmful not only to the physical well-being of the victim, but also to the fabric of society. Consequently, laws designed to protect children from harm are important because as a society we have determined that hurting children is detrimental to the interests of our culture.

106. Because of the far-reaching consequences of conduct deemed to be criminal, the imposition of state sanctioned punishment becomes appropriate. Indeed, punishment is one of the primary characteristics that serves to delineate criminal conduct from that which is merely harmful or damaging and thus actionable in the civil courts. See Jerome Hall et al., Criminal Law and Procedure 167 (3d ed. 1976). Traditionally, punishment is said to be for the purposes of retribution, rehabilitation, and deterrence. See Wayne R. LaFave, Modern Criminal Law 24 (2d ed. 1988); James J. Gobert, The Fortuity of Consequence, 4 Crim. L.F. 1 (1993). The consequences of punishment include deprivation of property interests, deprivation of liberty interests, and, at the extreme, deprivation of life itself. The point of interest within the context of this discussion is that as a society we embrace the concept of punishment as a response to inappropriate behavior by adults. We assume that state-imposed punishment is a morally appropriate response (retribution), that will dissuade others from similar conduct (deterrence), and that will teach adults to refrain from such conduct in the future (rehabilitation). To accomplish these goals, fines or incarceration is imposed. The range of punishment does not include corporal punishment. Moreover, once incarcerated, inmates may not be corporally punished. See Ingraham v. Wright, 430 U.S. 651, 660 (1977); Jackson v. Bishop, 404 F.2d 571, 580 (8th Cir. 1968). Implicit in this development is the recognition that as a society we do not tolerate the use of physical punishment to accomplish the goals of retribution, rehabilitation, or deterrence, at least as far as adults are concerned. That is of course true but for one exception, the death penalty (the ultimate corporal punishment), an anomaly beyond the scope of this article.

107. At common law, assaultive conduct was commonly divided into several categories. Mayhem was classically a felony reserved for assaults resulting in serious physical injury, permanent bodily damage, or disfigurement. See Model Penal Code § 211.1 cmt. 1 (1980) (discussing historical treatment of the crime of assault). Conduct less deserving of serious punishment included the misdemeanor offenses of battery and assault. See id. Battery was defined as the unlawful application of force to another, and assault was treated as an attempt to cause a battery. See id. Today, the classification of aggressive conduct into mayhem, battery, and assault has largely been abandoned and replaced by graduated assault statutes that encompass each of the distinct common-law crimes. See id.
Any discussion of the crime of assault should begin with the acknowledgment that there are a great many statutory adaptations and nuances that impact the definition and scope of the crime of assault. With this caveat in mind, statutory approaches to the crime of assault generally are divided into categories or grades. For example, the Model Penal Code first classifies aggravated assault as either an attempt to cause, or the actual infliction of, serious bodily injury. This category of assault is routinely treated as a serious felony, and the range of punishment is substantial. A second category is reserved for conduct that poses less risk to the physical well-being of others and is generally applicable when the conduct either results in physical injury or attempts to cause such injury. Simple assault is classified as a misdemeanor. Under the Model Penal Code approach, a third type of conduct is included as simple assault. The third situation contemplates conduct that has no physical consequence. Instead it addresses conduct designed to place another in fear of serious injury. Although the Model Penal Code is characteristic in many aspects, jurisdictions may also classify physical contact that does not result in injury, but that is instead merely offensive, as a misdemeanor offense. Because the harm or potential for harm resulting from the conduct is one of the major dividing lines for distinguishing one grade of assault from another, the statutory definition of the degree of harm (i.e., whether physical/bodily injury or serious physical/bodily injury has occurred) is significant.

108. See id. § 211.1.
109. See id. § 211.1(2). Although the degree of injury resulting from the conduct is an important basis for distinguishing one grade of assault from another, it is important to note that it is not only the degree of injury inflicted, but also the potential for causing harm that is evaluated. In contrast to the common-law approach to assault, modern classification schemes, such as the Model Penal Code, look at the potential for harm caused by the conduct in addition to the result. See id. § 211.1 cmt. 2. As a mechanism for evaluating the risk of harm, some statutory frameworks do not treat conduct amounting to an attempt and conduct resulting in the actual infliction of injury as two separate crimes. See id. The basis for the elimination of this distinction is the principle that the punishment of the conduct should not focus solely on the consequence. Rather, the conduct should be evaluated for its likely potential for harm. See id. For example, consider the situation where a parent tries to drown a child by holding him underwater. In one instance, the child might suffer serious brain damage; in another, the child might fully recover, with no ensuing physical consequence. In both situations the conduct of the parent was the same. If the only matter of importance was the degree of harm inflicted, the parent in the second situation would not be held criminally responsible for his conduct. As such, it is reasoned that an attempt to cause injury should be punished in the same fashion as one in which injury results.

110. See id. § 211.1(2); see also id. § 5.05.
111. See id. § 211.1(1).
112. See id. § 211.1(1)(c). Under the Model Penal Code, simple assault occurs when the defendant "attempts by physical menace to put another in fear of imminent serious bodily injury." Id.
113. See, e.g., Mo. ANN. STAT. § 565.070 (West 1979) ("A person commits the crime of assault in the third degree if . . . [h]e knowingly causes physical contact with another person knowing the person will regard the contact as offensive or provocative.").
114. Because one basis for distinguishing grades of assault is the degree of harm, the definitions of the terms "serious physical injury" versus "physical injury" are of great importance. See
The crimes of child abuse and child endangerment, like the crime of assault, are designed to protect the physical integrity of children. Characteristically, these crimes overlap with the crime of assault, including the same types of injury contemplated by the assault statutes.\textsuperscript{115} They may also classify grades of the offense based upon the degree of harm inflicted. This type of crime, however, may also address the issue of neglect, preclude conduct that affects the emotional well-being of the child, or prohibit conduct that is degrading or unconscionable even though it has no discernable physical consequence.\textsuperscript{116} Finally, the crime of domestic abuse often encompasses acts of aggression against children taking place within the home.\textsuperscript{117} In leaving this topic, it is important to note again that many statutes make it a crime to cause another person physical or bodily injury. In some instances these crimes specifically address physical injury to a child.\textsuperscript{118} Thus, in one aspect the message is sent that children should not be abused and that abuse includes physical injury. The waters become muddied, however, when the issue of disciplinary force is injected. In this one circumstance, what constitutes abuse becomes less clear.

\textbf{B. The Defense}

No matter what form criminally aggressive conduct against children takes, or how the state chooses to charge the offense, defenses

\textit{intra} note 337 and accompanying text. The states define these terms many different ways. The Model Penal Code defines bodily injury as “physical pain, illness or any impairment of physical condition.” \textit{Model Penal Code} \S 210.0(2). Some states do not include pain as a component of physical injury. \textit{See, e.g., Utah Code Ann.} \S 76-5-109 (Supp. 1997). What one state may classify as serious physical injury may mirror another state’s definition of the term “physical injury.” \textit{Compare Mass. Ann. Laws} ch. 265, \S 13J (Law. Co-op. Supp. 1997) (defining “bodily injury” as “substantial impairment of the physical condition including any burn, fracture of any bone, subdural hematoma, injury to any internal organ”), \textit{with Utah Code Ann.} \S 76-5-109 (Supp. 1997) (defining “serious physical injury” to include “fracture of any bone; ... intracranial bleeding, swelling or contusion of the brain; ... any burn; ... any damage to internal organs of the body”). These definitions become important within the context of a parent using force to discipline a child because, if broadly defined, the terms encompass conduct that many consider to fall within the range of reasonable parental discipline. For example, if it is a crime to intentionally cause physical injury to another and the term “physical injury” is defined to include pain, then a parent who swats the hand of a child reaching for a knife would be guilty of assault. It is this type of parental action that logically necessitates the existence of the parental corporal punishment defense. The crime of assault is intended to encompass many different types of aggression. As such it makes sense that the statutory definitions of the degree of harm required for conviction are broadly drawn. However, because these broad definitions take into their sweep normal parental conduct, it is important that the scope of the parental privilege be clearly articulated in a general application statute that applies to all criminal offenses.


that shield a defendant from liability may be asserted. One of several defenses that may be asserted by a defendant charged with a crime of aggression is the defense of justification. Justification provisions remove liability for otherwise criminal conduct because the aggressive behavior of the defendant is deemed to be appropriate under the circumstances. When the defense of justification is asserted, the criminal defendant agrees that he acted in an aggressive manner towards the victim. He also asserts, however, that his actions were in response to conduct of the victim. For example, the justification defense of "self-defense" excuses the defendant who can establish that his actions were necessary to defend himself from the aggression of the victim. Or, the justification defense of "defense of another" comes into play when the defendant asserts that he was protecting a third party from an act of aggression by the victim. "Justified" conduct in these two situations serves as a defense to criminal liability because the aggressive conduct is deemed necessary to protect the life or well-being of the defendant or another.

One situation exists, however, where justification statutes do not require that the victim be the initial aggressor. This is in the area of justified use of corporal punishment by parents. When a parent strikes a child, the child need not be the initial aggressor, and the parent need not fear for his safety. In this instance the aggressive conduct of the defendant parent is deemed to be acceptable if the victim child is acting in an inappropriate manner.

C. Common-Law Influence

As might be expected, the number of ways in which the states choose to define and implement the parental defense is subject to variation and nuance, but without question the privilege is an extension of early common-law doctrines. Indeed, it is reasonable to say that the dominating legal force behind the contemporary privilege is the common law.

One of the most succinct statements of the early common-law defense is contained in Blackstone's Commentaries. Highlighting the concept of moderation it is noted that, "battery is, in some cases, justifiable or lawful; as where one who hath authority, a parent or a master, gives moderate correction to his child, his scholar, or his ap-

120. See Model Penal Code § 3.05; Dix & Sharlot, supra note 119, at 786.
121. See Model Penal Code § 3.04 explanatory note; see id. § 3.05 explanatory note.
122. See, e.g., Ala. Code § 13A-3-24 (1993) (stating that parental force is appropriate to "maintain discipline" or to "promote the welfare" of the child); S.D. Codified Laws § 22-18-5 (Michie 1994) (stating that a parent may use force to "restrain or correct his child" if such conduct is necessary because of the "misconduct of such child" or the child's failure to "obey the lawful command" of the parent).
prentice." Later, in the mid-nineteenth century, James Kent in his work, *Commentaries on American Law*, addressed the scope of the privilege by explaining:

The rights of parents result from their duties. As they are bound to maintain and educate their children, the law has given them a right to such authority; and in the support of that authority, a right to the exercise of such discipline as may be requisite for the discharge of their sacred trust. 

This explanation of the parental privilege places emphasis upon parental authority and the responsibilities attached thereto.

From these seminal principles, courts treat the defense as developing along two divergent paths. The first approach focuses upon whether the parental conduct was motivated by malice. Malice in these decisions is commonly defined in one of two ways: the first being parental aggression undertaken without a parental purpose; the second being parental conduct that resulted in death, or serious or permanent injury to the child. These cases hold that in the absence of malice, parents had almost unfettered discretion to physically dominate their children.

The second approach articulates a standard based upon a determination of whether the force utilized was reasonable or moderate. There are two hallmarks of this approach. First, commonly the terms “reasonable” and “moderate” are undefined and are evaluated by the fact finder within the context of the circumstances presented. 

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123. *William Blackstone, Blackstone's Commentaries on the Laws of England* 120 (1768); see also *William Blackstone, Commentaries on the Laws of England* 440 (Oxford Reprint 1966) (stating that a parent “may lawfully correct his child, being under age, in a reasonable manner. For this is for the benefit of his education.”).


125. See, e.g., *Holmes v. State*, 39 So. 569, 570 (Ala. 1905) (noting that one with parental authority may exercise that authority to the same extent as a parent so long as it is without “malice or wicked motives”); *State v. Jones*, 95 N.C. 588, 592 (1886) (noting that the state will not interfere with family government except “in cases where permanent or malicious injury is inflicted or threatened”); *State v. Lutz*, 113 N.E.2d 757 (Ohio C.F. 1953) (noting that a teacher’s paddling of a pupil does not constitute a crime unless the state can show it was administered with malice).

126. See *State v. Straight*, 347 P.2d 482, 490 (Mont. 1959) (rejecting the malice approach, the court stated, “[s]ome cases in other jurisdictions go as far as to say that one standing *in loco parentis* acts in a quasi-judicial capacity and has almost unlimited discretion regarding the punishment of the child entrusted to his care”).

127. See *People v. Stewart*, 10 Cal. Rptr. 217, 219 (Ct. App. 1961) (finding that a parent may use reasonable punishment, but when he “does so willfully he commits a battery”); *People v. Curtiss*, 300 P. 801, 804 (Cal. App. Dept. Super. Ct. 1931) (finding that the statute condemned the infliction of pain that could not be justified as reasonable); *State v. Straight*, 347 P.2d 482, 489 (Mont. 1959) (stating that any force used must be in a reasonable manner and moderate degree); *State v. Spiegel*, 270 P. 1064, 1065 (Wyo. 1928) (stating that punishment within parental duty must not exceed the bounds of moderation).

ond, the force utilized need not rise to the level of serious injury to fall outside the scope of the defense. The logic of dividing the development of the defense on the basis of whether malice is required or not is well founded upon the language of the early opinions, as well as the modern adaptations of these common-law approaches. Yet, in a certain sense, this analysis seems to be incomplete.

Often what seems to be at play is the tension created by the search for standards that balance the two guiding forces behind the privilege: family autonomy and the well-being of the child. In jurisdictions using the malice standard or variations thereof, great deference is given to the authority of parents to raise children as they see fit. Parental authority dominates the concern for the physical well-being of the child. As such, in all but the worst cases of abuse, when the child is subjected to conduct that could or does result in death, serious injury, or disfigurement, a parent’s right to discipline is given priority over the consequences to the child.

In contrast, jurisdictions not using the malice standard appear to value the well-being of the child over the authority of parents. That is to say, because the imposed standard uses reasonableness as the guidepost, rather than a specific outside boundary, the fact finder is allowed to evaluate conduct that would not be evaluated by the fact finder under the malice standard. In jurisdictions that reject the malice standard, the range of conduct that falls outside the parameter of the defense is enlarged, parental authority is reined in, and concerns for the well-being of the child are enhanced.

Regardless of how the dichotomy between these two lines of cases is cast, it is clear that the common law continues to serve as the focal point for modern application of the privilege. That the common law is a pervasive influence is evidenced by the fact that while approximately half the states have statutes establishing a parental defense, the remaining states rely on case-law precedent to define the scope of the privilege. Commonly, in states that can be classified as utilizing the common-law approach, no specific statutory reference, in the criminal context, is made. In some instances the reliance on common

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129. See, e.g., Straight, 347 P.2d at 490 (finding that the jury should determine whether the punishment was reasonable and moderate in light of several factors, including whether the punishment inflicted permanent or temporary injuries and the extent of the injuries).

130. See, e.g., State v. Jones, 95 N.C. 588, 592 (1886) (finding that family government is “recognized by our law as being as complete in itself as the State government is in itself[,] and . . . we will not interfere with . . . it . . . unless in cases where permanent or malicious injury is inflicted or threatened, or the condition of the party is intolerable”).


132. See infra Appendix.

law is addressed in a general justification statute, asserting that conduct authorized pursuant to the common law continues to serve as a valid defense to criminal conduct.\textsuperscript{134}

\textbf{D. Statutory Enactments}

The second category of states have codified the common-law parental privilege via statutory enactment.\textsuperscript{135} The statutory approach takes two forms. The first and most common approach includes the parental privilege as one of several defenses to all crimes where the use of force is at issue.\textsuperscript{136} In states where the parental defense is included in justification statutes of general application, the defense may be asserted whenever a parent is charged with a crime involving the use of force against his or her child.\textsuperscript{137}

In some states the defense is not included in justification statutes of general application. Rather, the parental privilege is codified only in respect to a particular violation of law, for example, child or domestic abuse.\textsuperscript{138} When the privilege is set out within the framework of a particular crime, the defense is in effect, not a defense, but rather an

\textsuperscript{134} See infra Appendix. A number of examples of this approach can be found. For example, in Wyoming a statute abolishing common-law crimes specifically indicates that common-law defenses are retained. See Wyo. Stat. Ann. § 6-1-102 (Michie 1997). Thus, once the court recognizes the common-law defense of parental authority this general statute encompasses the defense. See Keser v. State, 706 P.2d 263, 269-70 (Wyo. 1985). In Indiana the general justification statute indicates that "[a] person is justified in engaging in conduct otherwise prohibited if he has legal authority to do so." Ind. Code Ann. § 35-41-3-1 (West 1976).

\textsuperscript{135} Even in states that have adopted statutory standards for application of the defense, the statutes do not repeal the common law. See, e.g., Wyo. Stat. Ann. § 6-1-102 (retaining common-law defenses). In the absence of a stated intent to repeal the common-law defense as it existed within the state at the time of enactment, such statutes should be read as codifying existing doctrines. See People v. Jennings, 641 P.2d 276, 279 (Colo. 1982) (en banc) (noting that Colorado has codified the common-law parental corporal punishment privilege); People v. Franklin, 433 N.Y.S.2d 482, 485 (App. Div. 1980) (Mangano, J., dissenting) (noting that New York has codified the common-law parental right to discipline with corporal punishment that is reasonable and moderate). This means that the statutes are interpreted in light of common-law principles and to the greatest extent possible harmonized with case precedent. See Anderson v. State, 487 A.2d 294, 300-01 (Md. Ct. Spec. App. 1985) (discussing overlap between child abuse statute and common-law parental defense). Because no state has specifically abrogated the common-law right of a parent to use disciplinary physical force the common law continues to provide guidance to the courts even in those states that have codified the defense.

\textsuperscript{136} See infra Appendix.

\textsuperscript{137} See infra Appendix.

\textsuperscript{138} For example, in Rhode Island a child abuse statute makes it a crime to inflict either serious physical injury or serious bodily injury. See R.I. Gen. Laws § 11-9-5.3 (1995). Serious bodily injury is defined as conduct creating a risk of death or permanent injury. See id. § 11-9-5.3(2). Serious physical injury is defined as any injury other than serious bodily injury "which arises other than from the imposition of nonexcessive corporal punishment." Id. In Michigan, the child abuse statute contains a specific provision which indicates that "[t]his section shall not be construed to prohibit a parent or guardian, or other person permitted by law or authorized by the parent or guardian, from taking steps to reasonably discipline a child, including the use of reasonable force." Mich. Comp. Laws Ann. § 750.136b(6) (West 1991). In Illinois, it is a crime to cause, without legal justification, great bodily harm or permanent disability to a child under 13. See 720 Ill. Comp. Stat. Ann. 5/12-4.3 (West Supp. 1997).
element of the crime.\textsuperscript{139} In such a situation, the state has the burden of proving, beyond a reasonable doubt, that the conduct was not lawful discipline. If, however, the parent is not charged with a crime that incorporates the defense, the common-law defense may be asserted.\textsuperscript{140}

\section*{E. Elements of the Defense}

Whether a state implements the parental privilege to use disciplinary force through the common law or statutory enactment, certain commonalities exist. The commonalities may be procedural\textsuperscript{141} or substantive in nature. The first substantive principle of universal application is that the person inflicting the punishment must be a parent or someone standing "in loco parentis."\textsuperscript{142} Both statutory language and court interpretation of this requirement vary from state to state. Frequently, statutes have expansive definitions of the parental requirement that include any "person responsible for the child's welfare,"\textsuperscript{143} "person entrusted with the care of the child,"\textsuperscript{144} or "anyone who has

\begin{itemize}
\item \textsuperscript{139} See, e.g., 720 Ill. Comp. Stat. Ann. 5/12-4.3; Mich. Comp. Laws Ann. \textsection 750.136b(6).
\item \textsuperscript{140} See, e.g., People v. Green, 119 N.W. 1087, 1090 (Mich. 1909) (affirming conviction, but allowing parents to administer reasonable punishment).
\item \textsuperscript{141} One procedural matter common to most jurisdictions is that establishment of the defense is generally treated as a matter of fact. See People v. Whitehurst, 12 Cal. Rptr. 2d 33, 33-35 (Ct. App. 1992) (reversing conviction because court improperly failed sua sponte to instruct the jury on the parental defense and indicating that defense must be evaluated by jury under circumstances presented); LaPann v. State, 382 S.E.2d 200, 201 (Ga. Ct. App. 1989) (affirming conviction for aggravated assault to a child, the court indicated question of whether reasonable force was used is "particularly within the province of the trier of fact"); State v. Black, 227 S.W.2d 1006, 1010 (Mo. 1950) (reviewing the issue of whether the punishment imposed was excessive, the court indicated that the question of whether punishment is excessive "is not a conclusion of law but a question of fact for the determination of the jury"). As such, the fact finder, be it judge or jury, must decide, based upon the facts and circumstances presented, whether the conduct of the defendant falls within the scope of the privilege. A second procedural issue is that the defense is commonly treated as an affirmative defense. If it is treated as an affirmative defense, the burden of raising the privilege is placed upon the defendant. Once the defense has been asserted, however, the state assumes the burden of persuasion and must establish beyond a reasonable doubt that the defendant's conduct was not justified. See, e.g., State v. Davis, 714 P.2d 884, 886-87 (Ariz. Ct. App. 1986) (reversing defendant's conviction for child abuse because the trial court failed to properly instruct jury on parental defense). The court indicated that as an affirmative defense a defendant need only raise reasonable doubt as to existence of the parental defense, then the state must disprove beyond a reasonable doubt that defendant's conduct was justified. See id. at 886.
\item \textsuperscript{142} In a general sense the term "in loco parentis" is meant to apply to those who have assumed the duties and responsibilities characteristically assumed by parents toward their children. See Fuller v. Fuller, 418 F.2d 1189, 1190 (D.C. Cir. 1969); Niewiadomski v. United States, 159 F.2d 683, 686 (6th Cir. 1947); Martin v. United States, 452 A.2d 360, 362 (D.C. 1982); see also Rollin M. Perkins, Criminal Law 987 (2d ed. 1969) (indicating that the parental defense extends to adoptive parents or to adults who have taken children into their family without formal adoption).
\item \textsuperscript{143} For example, Wisconsin permits reasonable discipline by "a person responsible for the child's welfare." Wis. Stat. Ann. \textsection 939.45(5) (West 1996). This phrase is defined as including "the child's parent or guardian, ... or any other person legally responsible for the child's welfare in a residential setting." Id.
\item \textsuperscript{144} Ariz. Rev. Stat. Ann. \textsection 13-403(1) (West 1989); see also Ark. Code Ann. \textsection 5-2-605(1) (Michie 1987) ("A parent, teacher, or guardian or other person entrusted with the care and supervision of a minor . . . .")
\end{itemize}
express or implied consent of the parent."\textsuperscript{145} Whether in a common-law or statutory jurisdiction, the term is given broad application because the requirement centers around the assumption of responsibility for the well-being of the child rather than biological affinity.\textsuperscript{146} In the absence of a relationship creating such responsibility, an inference that the use of force is for the purpose of promoting the best interests of the child is at best attenuated.

A second substantive principle excludes application of the defense to situations involving parents and their adult offspring. Statutory language commonly extends the privilege to acts of aggression toward the "child"\textsuperscript{147} or the "minor."\textsuperscript{148} Some states limit the doctrine to victims under a certain age.\textsuperscript{149} This limitation again corresponds with the assumption that the individual utilizing force has assumed responsibility for controlling the conduct of another. This premise has no place in relationships between parents and their adult offspring.\textsuperscript{150}

In what could be called the parental purpose requirement, the third universal principle is that the force must be used for the benefit of the child.\textsuperscript{151} That is to say, the act of force must fulfill a parental

\textsuperscript{145} Tex. Penal Code Ann. § 9.61(1)(b) (West 1994). This statute allows the use of force by the child's parent, stepparent, or someone acting in loco parentis. The term "in loco parentis" is defined as a "grandparent and guardian, any person acting by, through, or under the direction of a court . . . and anyone who has express or implied consent of the parent or parents." \textit{Id.}

\textsuperscript{146} Discussion of this issue commonly occurs in cases involving live-in relationships, step-parents, or boyfriends. When disciplinary force has been used by someone falling into this category, the court may use the lack of a parental relationship to exclude the defendant from the protection provided by the defense. \textit{See} United States v. Ward, 39 M.J. 1085, 1088 (A.C.M.R. 1994) (finding that a live-in boyfriend was not able to rely on the defense because he had not assumed responsibility for the care and supervision of child); Dayton v. State, 501 N.E.2d 482, 484 (Ind. Ct. App. 1986) (holding that while a stepfather was a custodian, not all custodians have the right to use corporal punishment); Wood v. Texas, No. A14-87-00940-CR, 1988 WL 126935, at *2 (Tex. App.—Houston (14 Dist.) Dec. 1, 1988) (court rule states that this case may not be cited as authority) (finding that live-in boyfriend was not acting in loco parentis because he exceeded the disciplinary measures outlined by the mother). \textit{But see} Keser v. State, 706 P.2d 263, 265 (Wyo. 1985) (indicating that a stepfather was entitled to assert defense).

\textsuperscript{147} \textit{E.g.}, Mont. Code Ann. § 45-3-107 (1997) (allowing parent to use force to correct a "child"); Wis. Stat. Ann. § 939.45 (West 1996) (authorizing reasonable discipline of a "child" as defined in § 948.01(1)).


\textsuperscript{149} \textit{See} Alaska Stat. § 11.81.430 (Michie 1996) (authorizing use of force on a child under 18); N.Y. Penal Law § 35.10 (McKinney 1998) (authorizing use of force on person under the age of 21).

\textsuperscript{150} Allowing the use of force on a person who is under the age of 21 as outlined by the New York statute cited above seems to be stretching, to a questionable maximum, the limits of the age range where parental disciplinary force is appropriate.

\textsuperscript{151} \textit{See} Anderson v. State, 487 A.2d 294, 298 (Md. Ct. Spec. App. 1985) (noting that reported decisions routinely fail to discuss the parental purpose requirement and instead focus on the amount of force used by the parents). This is an accurate statement in that courts appear to assume without discussion that the force was used for a disciplinary purpose even when presented with circumstances that might suggest otherwise. \textit{See} Commonwealth v. Ogin, 540 A.2d 549 (Pa. Super. Ct. 1988) (upholding conviction based on three incidents in which the child did not appear to be misbehaving at the time of the abuse); \textit{cf.} United States v. Arnold, 40 M.J.
obligation attendant to the upbringing of the child. The language used to denote the purpose requirement is often reflected by the phraseology that the force must be used for the purpose of discipline or to promote the welfare of the child. As will be recalled, the absence of parental purpose was one of the two ways in which malice could be established under the malice approach. However, whether or not a malice standard is being utilized, the parental purpose requirement is universally mandated. This restriction means that random or gratuitous acts of violence toward children are not encompassed by the defense.

F. The Variables

The final two characteristics of the defense center around an evaluation of the necessity for using force and a restriction on the amount of force that may be used. As with the purpose requirement, every jurisdiction places some type of limit on the amount of force that is permissible. Some jurisdictions require only that the amount of force be reasonable; others exclude force that is designed to cause or known to create a substantial risk of death, serious physical injury, disfigurement, extreme pain or emotional distress, or gross degradation. A limited number of statutory states exclude only deadly force. At the opposite end of the spectrum, the justification statute in one state excludes conduct that results in physical injury to the

744, 745 (A.F.C.M.R. 1994). In Arnold the defendant asserted that his plea of guilty should be set aside. The basis of his claim was that in the course of disciplining his one-month-old baby, he accidentally caused the baby to suffer a subdural hematoma. See Arnold, 40 M.J. at 745. The defense of accident required establishment of three elements, one of which was that the defendant was engaged in an act not prohibited by law. See id. In analyzing this issue the court noted that the defendant appeared to meet this criterion. See id. at 746. In doing so, the court stated:

[I]t is axiomatic that a parent is authorized, and in fact expected, to discipline his children, although one must question whether the cognitive ability of a 1-month-old infant is sufficiently developed to derive any benefit whatsoever from such "discipline." However, giving the appellant the benefit of the doubt, we will assume, without deciding, that his actions did not violate any law . . . .

Id.

152. E.g., People v. Green, 119 N.W. 1087, 1090 (Mich. 1909) (indicating that a parent "who acts in good faith, honestly thinking what he does is for the benefit of the child" will not be subjected to legal intervention); Commonwealth v. Krammer, 371 A.2d 1008, 1011 (Pa. Super. Ct. 1977) (indicating that disciplinary force must be used "with an attitude of proper parental responsibility for teaching the child right from wrong").

153. E.g., COLO. REV. STAT. § 18-1-703 (1990) (allowing a parent to use force to the extent necessary to "maintain discipline or promote the welfare of the minor"); PA. CONS. STAT. ANN. § 509(1)(i) (West 1983) ("the force is used for the purpose of safeguarding or promoting the welfare of the minor, including the preventing or punishment of his misconduct").

154. See infra Appendix.

155. See id. This approach is drawn from the Model Penal Code. See MODEL PENAL CODE § 3.08 (1985).

156. See ALASKA STAT. § 11.81.430 (Michie 1996) (allowing parents to "use reasonable and appropriate nondeadly force"); N.J. REV. STAT. 2C:3-8(c) (1995) (excluding deadly force unless it is "otherwise justifiable under the provisions of this chapter"); N.Y. PENAL LAW § 35.10 (Consol. 1998) (allowing "force, but not deadly force"); TEX. PENAL CODE ANN. § 9.61 (West 1994) ("The use of force, but not deadly force, . . . against a child is justified . . . "); infra Appendix.
child,\textsuperscript{157} and another limits the defense to that which does not “cause bodily harm greater than transient pain or minor temporary marks.”\textsuperscript{158}

The necessity factor is based upon an evaluation of the proportionality of the disciplinary force used to the conduct of the child. As such, it requires a comparison of the punishment imposed and the conduct that warranted the punishment. In making this assessment, the court evaluates circumstances surrounding the imposed punishment including such factors as the size, age, sex, physical condition, sensitivity, character, and conduct of the child.\textsuperscript{159} The interjection of necessity as a factor of consideration requires subjective analysis of the parent-child relationship. It mandates an assessment of whether the parent could or should have used other means of correction, and whether the child was or was not deserving of the response. The states treat the necessity requirement in three ways: they do not evaluate necessity; or they evaluate necessity from either an objective or subjective perspective.\textsuperscript{160}

It is within the confines of these two issues, force and necessity, that the greatest variations exist. Whether in a common-law or statutory jurisdiction, it is the interplay and interpretation of these variables that results in differing standards for application of the privilege. As the statutory states typically mirror common-law standards, legislative attempts to balance the factors of force and necessity serve as a good guide to the approaches utilized throughout the United States. Several statutory approaches are found.

\begin{itemize}
\item \textsuperscript{157} See \textsc{Del. Code Ann.} tit. 11, § 468 (1995) (“The force shall not be justified if it includes, but is not limited to, any of the following: Throwing the child, kicking, burning, cutting, striking with a closed fist, interfering with breathing, use of or threatened use of a deadly weapon, prolonged deprivation of sustenance or medication, or doing any other act that is likely to cause or does cause physical injury, disfigurement, mental distress, unnecessary degradation or substantial risk of serious physical injury or death . . . .” (emphasis added)).
\item \textsuperscript{158} \textsc{Wash. Rev. Code Ann.} § 9A.16.100 (West Supp. 1994) (“The following actions are presumed unreasonable when used to correct or restrain a child: (1) Throwing, kicking, burning, or cutting a child; (2) striking a child with a closed fist; (3) shaking a child under age three; (4) interfering with a child’s breathing; (5) threatening a child with a deadly weapon; or (6) doing any other act that is likely to cause and which does cause bodily harm greater than transient pain or minor temporary marks.” (emphasis added)).
\item \textsuperscript{159} E.g., State v. Hunt, 406 P.2d 208, 222 (Ariz. Ct. App. 1965) (reasoning that the degree of punishment should relate to the specific child’s characteristics); State v. Thorpe, 429 A.2d 785, 788 (R.I. 1981) (finding that the degree of acceptable corporal punishment must be evaluated in terms of the “sensitivity and character of the child, the child’s age, sex, physical condition”); Carpenter v. Commonwealth, 44 S.E.2d 419, 424-25 (Va. 1947) (finding that corporal punishment must be evaluated by examining the specific characteristics of the child, the child’s misconduct, and the nature and type of injury inflicted on the child).
\item \textsuperscript{160} See infra Appendix. When states evaluate necessity from a subjective perspective, the issue of importance is whether the fact finder determines that the defendant believed the punishment was necessary. Evidence of this nature, supporting a contention that the punishment was necessary, is most apt to come from the defendant. Because it is unlikely that a defendant asserting the defense would maintain that the punishment was not necessary, in terms of practical application, states that only require a subjective determination of necessity are indistinguishable from states that do not evaluate necessity.
\end{itemize}
Several states require that both the amount of force used and the necessity of using the force be judged by an objective standard of reasonableness. The parental privilege as enacted by the Colorado legislature contains characteristic statutory language for a state following this approach. The Colorado statute reads:

The use of physical force upon another person which would otherwise constitute an offense is justifiable and not criminal under any of the following circumstances:

(a) A parent, guardian, or other person entrusted with the care and supervision of a minor may use reasonable and appropriate physical force upon the minor when and to the extent it is reasonably necessary and appropriate to maintain discipline or promote the welfare of the minor.

As indicated by this language, the statute requires both that the force be reasonable and that it be reasonably necessary. In statutory states and common-law jurisdictions, the parameters of reasonable force and reasonable necessity are factual questions to be evaluated in light of common-law standards.

The second type of statutory enactment is based upon the Model Penal Code. Section 3.08 of the Model Penal Code states:

The use of force upon or toward the person of another is justifiable if:

(1) the actor is the parent or guardian or other person similarly responsible for the general care and supervision of a minor or a person acting at the request of such parent, guardian or other responsible person and:

(a) the force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his misconduct; and

(b) the force used is not designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation.

Under the Model Penal Code approach, the statutory language does not address the issue of necessity, nor does it include a specific mandate that the amount of force used be reasonable. Comments to

161. See infra Appendix.
162. See COLO. REV. STAT. ANN. § 18-1-703 (West 1990).
163. Id.
164. See infra Appendix. A variation on this approach is utilized in several states. These states require that the amount of force utilized be reasonable. With respect to necessity, however, the statutory language requires that the actor reasonably believe that the use of force was necessary. Thus, the fact finder must find that the actor believed that the force was necessary and that this belief was reasonable. Because the actor’s belief must meet an objective determination of reasonableness, this variation, from a practical perspective, is indistinguishable from the Colorado approach. Examples are found in Alabama, Connecticut, Maine, and Oregon. See infra Appendix.
165. MODEL PENAL CODE § 3.08 (1985); see infra Appendix.
this section indicate that "so long as a parent uses moderate force for permissible purposes, the criminal law should not provide for review of the reasonableness of the parents judgment." In contrast to the states requiring reasonable force, the language of the Model Penal Code clearly defines the amount of force that is not permitted. This limitation restricts parents from using force that is designed to cause or known to create a substantial risk of causing death, serious physical injury, disfigurement, extreme pain, mental distress, or gross degradation. In effect, this limitation provides that conduct resulting in one of the listed factors is never moderate. Conversely, because neither necessity nor reasonableness is specifically evaluated, any force, utilized for a disciplinary purpose, that falls short of the enumerated consequences is protected.

The third statutory approach utilized can be classified as a combined approach. Jurisdictions using the combined approach can be divided into subgroups. In what might be considered a true combined approach, the first variation mandates that the force be reasonable and reasonably necessary, and it includes Model Penal Code language that places an outer limit on the amount of lawful force. A second subgroup using the combined approach is similar to the first in that these states require that the force used must be reasonable and moderate and, as in the Model Penal Code, an outer limit on appropriate force is established. In these jurisdictions, however, specific acts are excluded from the protection offered by the defense. Most importantly, and in contrast to the Model Penal Code, the boundary used to distinguish lawful from unlawful force is neither death nor

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166. MODEL PENAL CODE § 3.08 cmt.2.
167. The Model Penal Code approach is similar to a strict malice approach in that it provides explicit language indicating parental conduct that is not lawful discipline. It also uses similar factors such as death, serious injury, and disfigurement to define prohibited conduct. See id. § 3.08(1)(b). It is, however, distinguishable from a strict malice approach. The strict malice approach evaluates the result of the conduct. See, e.g., State v. Jones, 95 N.C. 588, 588 (1886). If the child was killed, seriously injured, or disfigured, the conduct was not protected. The Model Penal Code language necessitates an evaluation of the parental conduct and whether it was known to cause an injury, or created a substantial risk that such an injury could occur. See MODEL PENAL CODE § 3.08(1)(b). If such a risk is created, the conduct is arguably not protected even if serious injury does not result. Thus, the malice approach focuses upon the consequence to the child, while the Model Penal Code approach evaluates the parental conduct and its potential for harm. It should be noted, however, that even under the malice approach, conduct that did not have a physical consequence could be determined to be unprotected if the discipline was administered without a parental purpose. See Moakley v. State, 547 So. 2d 1246 (Fla. Dist. Ct. App. 1989).

168. See infra Appendix.
169. The result of combining the two approaches is a standard that has three prongs: (1) the punishment must be reasonable; (2) it must be reasonably necessary; and (3) it must not be known to cause or create a substantial risk of the enumerated consequences. See ME. REV. STAT. ANN. tit. 17-A, § 106 (West 1983); WIS. STAT. § 939.45 (1996). The language of these statutes would indicate that if the parental conduct fails to meet even one of the prongs, then the conduct of the defendant would not be encompassed by the defense.
serious physical injury. In two jurisdictions, Washington and Delaware, the justification defense specifically excludes conduct resulting in physical injury or in bodily harm greater than transient pain or minor temporary marks. The effect of the language utilized in these two jurisdictions is to articulate a standard that preserves the parental authority to use corporal punishment, while at the same time setting forth a standard that clearly eliminates from the defense parental aggression that results in physical injury. This approach is significantly different from the approach utilized in states that set the outside parameter of parental aggression at death or serious physical injury. In Washington and Delaware, the common-law concept of moderation is defined so as to restrict parental aggression.

In the other states using the combined approach, the concept of reasonableness is arguably expanded by the use of the malice or Model Penal Code parameters to give context to the meaning of reasonable or moderate punishment.

No matter which approach is utilized, the ultimate goal is to provide a standard by which parents can physically punish children with-

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172. The Washington statute provides:

> It is the policy of this state to protect children from assault and abuse and to encourage parents, teachers, and their authorized agents to use methods of correction and restraint of children that are not dangerous to the children. However, the physical discipline of a child is not unlawful when it is reasonable and moderate and is inflicted by a parent, teacher, or guardian for the purposes of restraining or correcting the child. Any use of force on a child by any other person is unlawful unless it is reasonable and moderate and is authorized in advance by the child's parent or guardian for purposes of restraining or correcting the child.

The following actions are presumed unreasonable when used to correct or restrain a child: (1) Throwing, kicking, burning or cutting a child; (2) striking a child with a closed fist; (3) shaking a child under age three; (4) interfering with a child’s breathing; (5) threatening a child with a deadly weapon; or (6) doing any other act that is likely to cause and which does cause bodily harm greater than transient pain or minor temporary marks. The age, size, and condition of the child and the location of the injury shall be considered when determining whether the bodily harm is reasonable or moderate. This list is illustrative of unreasonable actions and is not intended to be exclusive.

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

173. The Delaware statute provides:

> The use of force upon or toward the person of another is justifiable if it is reasonable and moderate and: (1) The defendant is the parent, guardian, foster parent, legal custodian or other person similarly responsible for the general care and supervision of a child, or a person acting at the request of a parent; . . . and, (a) The force is used for the purpose of safeguarding or promoting the welfare of the child, including the prevention or punishment of misconduct; and (b) The force used is intended to benefit the child . . . . The size, age, condition of the child, location of the force and the strength and duration of the force shall be factors considered in determining whether the force used is reasonable and moderate; but (c) The force shall not be justified if it includes, but is not limited to any of the following: Throwing the child, kicking, burning, cutting, striking with a closed fist, interfering with breathing, use of or threatened use of a deadly weapon, prolonged deprivation of sustenance or medication, or doing any other act that is likely to cause or does cause physical injury, disfigurement, mental distress, unnecessary degradation or substantial risk of serious physical injury or death . . . .


174. See id.; WASH. REV. CODE ANN. § 9A.16.100 (authorizing force only when used “for purposes of restraining or correcting the child”).

out criminal sanction, while at the same time protecting children from punishment that is excessive in nature. It can be speculated that current standards work well at accomplishing this goal when the parental conduct in question falls at the outer edges of disciplinary force.

A review of the cases evaluating the defense, as well as the statutes that define it, indicates that current standards protect children from truly egregious discipline. If a child suffers a permanent injury, disfigurement, or death, parents are not protected by the defense. Their conduct is excluded from the defense umbrella because it is either specifically precluded, as in the Model Penal Code, or it falls so far outside the realm of reasonable punishment that reliance on the defense is doomed to failure.

At the other end of the spectrum, it can be speculated that the privilege is working well to protect parents from criminal sanction for physically inconsequential acts of force. As the Model Penal Code shields conduct resulting in physical injury, then certainly acts not resulting in physical injury will normally be protected. Under the reasonable, moderate, and necessary jurisdictions, acts of inconsequential force are arguably subject to review by the fact finder. Two factors, however, would indicate that this standard is adequate to protect parents from nonphysically invasive discipline. First, excepting high-risk circumstances, it seems unlikely under most circumstances that discipline having no physical consequence would be deemed to be unreasonable. Second, the almost total absence of reported decisions dealing solely with instances of discipline with a nonphysical consequence provides at least anecdotal evidence that parents are not being prosecuted for using force that is inconsequential.

Before leaving this point, one observation should be made concerning the use of reported decisions to assess the viability of the parental privilege. This point revolves around the fact that appellate review in the criminal context generally follows the conviction of the defendant. The state has no right to appeal a judgment of acquittal. Therefore, the reported decisions generally deal with instances when

177. Note, however, that under the Model Penal Code, acts that have no physical consequence but pose a substantial risk of the listed factors are excluded from the defense. See id.
178. See Hinkle v. State, 26 N.E. 777 (Ind. 1891). This appears to be one of the few reported cases dealing with the imposition of corporal punishment that did not result in some type of physical injury. In Hinkle the father chained his daughter to a sewing machine and left her there for an extended period of time. See id. at 778. Other cases frequently include a description of parental conduct that has both a physical and a nonphysical consequence, but it is rare to see the latter unaccompanied by the former. See also Mullen v. United States, 263 F.2d 275 (D.C. Cir. 1958) (involving a charge where the child was chained and did not suffer any physical injury, however, the case did not involve application of the parental defense).
179. As will be noted in the discussion of the void-for-vagueness cases in the next section, the state does have the opportunity to seek appellate review when the lower court dismisses an indictment or information based upon the premise that the criminal statute at issue is unconstitutional. See infra Part IV.A.
the fact finder did not believe that the disciplinary force used was lawful. There is no empirical research or statistical database analyzing cases where the defendant has been acquitted because he successfully asserted the parental defense. Thus, if the case analysis is skewed, the suspected imbalance would tip towards the assumption that the defense is doing a better job of protecting parental autonomy, and a less effective job of protecting children, than the reported cases would imply. Although the picture presented is thus in some aspects incomplete, it is not unreasonable to assume that fact finders grapple with the issues presented in much the same manner as do the courts.

With this caveat in mind, it is in the realm of parent-child physical contact falling between egregious and mild punishment that is problematic. An examination of the cases that address the assertion of the parental corporal punishment privilege points toward the difficulties posed by current standards when parental punishment falls between these two extremes.

IV. CASE-LAW DISCUSSION

When the parental corporal punishment defense has been asserted at trial, claims of insufficiency of evidence, and vagueness or overbreadth challenges are two of the most frequently asserted grounds on appeal.¹⁸⁰ Both of these areas highlight the need to examine the privilege and its impact on parents and children.

A. Challenges Based on Vagueness and Overbreadth

In the criminal context, due process protections afforded by the Fifth and Fourteenth Amendments stand at the heart of a vagueness challenge. The Due Process Clauses have been interpreted to require fair notice; thus, "no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed of what the state commands or forbids."¹⁸¹

¹⁸⁰. Claims based on instructional challenge are also frequently asserted. Although these cases raise interesting issues, the idiosyncratic nature of the instructing process make a comparative analysis of the manner in which states treat the corporal punishment privilege difficult. Compare State v. Nevels, 609 S.W.2d 725, 728 (Mo. Ct. App. 1980) (reversing because the lower court failed to instruct on parental defense), with People v. Whitehurst, 12 Cal. Rptr. 2d 33, 35 (Ct. App. 1992) (reversing conviction because court failed sua sponte to instruct on parental defense), and People v. Hoehl, 568 P.2d 484, 487 (Colo. 1977) (reversing and remanding for failure to instruct on the meaning of the phrase "without justifiable excuse" as defined by parental justification statute), and State v. Torrice, 564 A.2d 330, 335 (Conn. App. Ct. 1989) (finding that the court does not have sua sponte duty to instruct on parental defense). As such, the most fertile grounds for analysis center around appeals based upon claims of vagueness and insufficiency of evidence.

¹⁸¹. Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939); see also Dunn v. United States, 442 U.S. 100, 112 (1979) (holding that the defendant's interview did not meet the requisite formality required by the statute); Smith v. Goguen, 415 U.S. 566, 573 (1974) (stating that in the First Amendment context, the degree of specificity is greater).
When a criminal statute is challenged as being unconstitutionally vague, the focus of the court centers around the concept of notice. Fair notice has two components, both of which emanate from the proposition that criminal statutes must be drafted so that "men of common intelligence need not guess at its meaning and differ as to its application." In the first instance, this means that the statute must inform those charged with an offense that their conduct is criminal. In the second, the statute must provide intelligible standards for enforcement. Those who enforce the law—police officers, judges, and juries—must receive sufficient direction from the statutory language in order to assess whether the conduct of the defendant falls within the scope of the offense. In the absence of clear direction, those who enforce the law will be called upon to determine important matters of policy that appropriately belong to the legislative branch.

A second constitutional concern, similar to, but distinct from, challenges based on the void-for-vagueness doctrine, revolves around the issue of substantial overbreadth. When a criminal statute is alleged to be overbroad, the courts focus on whether the statutory language encompasses not only conduct that is legitimately criminalized, but also conduct that is entitled to constitutional protection. If the statute is so sweeping that it inhibits protected conduct, it is said to have a chilling effect on rights guaranteed by the Fifth and Fourteenth Amendments and thus is fatally overbroad.

With these principles in mind, several initial points should be made in conjunction with a review of the cases dealing with the parental defense. First, challenges based on vagueness or overbreadth frequently occur when the parental privilege to use disciplinary force is included as an element of the underlying offense. Further, whether a parent’s right to use such force is incorporated into the elements of the underlying crime or framed as a separate defense, appeals are gen-

182. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926); see also Schad v. Arizona, 501 U.S. 624, 632 (1991) (stating that the practical consequence of the doctrine of vagueness is that the defendant understands the legal basis of the charge with specificity); City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982) (stating that a statute is void for vagueness if its prohibitions are not clearly defined).


185. See Grayned, 408 U.S. at 108-09.


erally limited to states that define the defense as the reasonable and moderate use of force.190

Challenges to vagueness or overbreadth are uncommon in jurisdictions that utilize the Model Penal Code approach or variations thereof. Thus, when the statute clearly articulates parental conduct that is not entitled to protection, due process challenges are rare. This phenomenon is likely attributable to the fact that challenges based upon vagueness or overbreadth are less tenable when the statutory language defining the defense provides greater specificity.

Appeals based on vagueness or overbreadth in states using the "reasonable and moderate" formulation of the defense take two forms. In the first, the defendant does not typically limit his argument to the vague nature of the privilege. Rather, the argument is centered on unclear language contained in the underlying statutory offense that calls into play the issue of a parent's right to use disciplinary force. For example, states commonly enact child abuse statutes that make it a crime to punish children in a manner that is "cruel,"191 "unnecessarily severe,"192 or "unlawful."193 Thus, the statutory language makes it a crime to punish a child, but only if the punishment exceeds that which is lawful. Because the language of these statutes necessitates an evaluation of the scope of lawful punishment, the vagueness or overbreadth challenges to the underlying statute are intertwined with the meaning attached to the privilege.

The second form in which such challenges arise concerns the interplay between the defense and the definition of the degree of harm specified in the underlying offense. For example, statutes designed to protect children from abuse may make it an offense to cause "physical harm"194 or "unjustifiable physical pain"195 to a child. When these terms are either undefined or defined in a manner that arguably crosses into the realm of lawful discipline, challenges based on vagueness or overbreadth are asserted.

190. But see State v. Artis, 545 N.E.2d 925, 926-27 (Ohio Ct. App. 1989) (reviewing an appeal based on vagueness issues that involved interpretation of a statute that defined excessive punishment as that which creates "a substantial risk of serious physical harm"). However, the issue on appeal was whether the phrase "[t]orture or cruelly abuse" rendered the statute unconstitutionally vague.

191. See Bowers, 389 A.2d at 347 (interpreting the statutory phrase "cruel or inhumane treatment"); State v. Sinica, 372 N.W.2d 445, 448 (Neb. 1985) (interpreting the phrase "cruelly punish").


Bowers v. State\(^\text{196}\) falls into the first category mentioned. This case involved a claim of vagueness when the underlying offense precluded the infliction of "cruel or inhumane treatment."\(^\text{197}\) Bowers was the stepfather of fifteen-year-old Patricia. Because Patricia had "played hookey" from school, the defendant struck her with a belt fifteen to twenty times on her back, neck, arms, and legs.\(^\text{198}\) He was subsequently charged with child abuse. On appeal, the defendant asserted that defining abuse as "cruel or inhumane treatment" represented an "unwarranted intrusion of the constitutionally protected right of privacy in family relationships."\(^\text{199}\) The court rejected this argument.\(^\text{200}\)

An issue of significance in Bowers was whether a parent's use of disciplinary force was entitled to the status of a constitutionally protected fundamental right.\(^\text{201}\) According to the court in Bowers, a vagueness challenge not touching on a fundamental right is generally limited to the facts before the court.\(^\text{202}\) In other words, the inquiry is into whether or not this particular defendant had fair notice that his conduct was criminal.

In contrast, if the statute in question intrudes upon the exercise of a fundamental right, then it is incumbent on the court to review the statute upon its face.\(^\text{203}\) A facial review asks whether under any reasonably foreseeable circumstance, the statutory language could be determined to have provided inadequate notice of the prohibited conduct. It is "essentially a rule of standing" that allows a defendant to complain that the language at issue is unconstitutional with regard to others not before the court, even though it is constitutional as applied to the conduct of the defendant.\(^\text{204}\) This grant of third-party standing is mandated because of the assumption that statutory language that suffers from "imprecise draftsmanship" will have a chilling impact on protected conduct.\(^\text{205}\) Once arriving at the conclusion that a facial review is mandated, however, Bowers maintains that the scope of review is the same as in the nonfundamental right situation.\(^\text{206}\) As such, the focus of the court should be upon whether the language provides fair notice and adequate guidelines.\(^\text{207}\)

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\(^\text{196}\) 389 A.2d 341.
\(^\text{197}\) See id. at 344.
\(^\text{198}\) See id. at 343.
\(^\text{199}\) Id. at 346.
\(^\text{200}\) See id. at 349-50.
\(^\text{201}\) See id. at 345-46.
\(^\text{202}\) See id. at 346.
\(^\text{203}\) See id.
\(^\text{204}\) Id.
\(^\text{205}\) See id.
\(^\text{206}\) See id.
\(^\text{207}\) See id.
Bowers noted that it was, as yet, undetermined whether a parent's right to use corporal punishment is a fundamental right. However, because the court believed that the Maryland statute could withstand a facial review, it indicated that it was not necessary to determine if the right of parents to use disciplinary force involved the exercise of a fundamental right.

In determining that the statute in question was not vague, the court relied first on the fact that the terms "cruel" and "inhumane" had commonly accepted definitions. It then stressed the long-standing legal recognition of a parent's right to use reasonable and moderate punishment. Because the parameters of reasonable and moderate punishment had been subject to refinement through the centuries, it reasoned that the converse of reasonable and moderate—"cruel and inhumane"—had also "acquired a relatively widely accepted connotation in the law." With this premise as the bedrock of analysis, Bowers returned to the issue of notice. The court held that the statutory language provided fair notice to parents that the use of force was permissible when used for correction but was not appropriate when physical injury was caused cruelly. Moreover, it held that the language provided clear direction to those who enforce the law and precluded them from "reacting to nothing more than their own subjective ideas of child discipline."

The court buttressed its decision by indicating that although many child abuse statutes had been challenged for vagueness, none had been struck down. It further noted that assessing statutory vagueness does not require "mathematical precision" but rather a "rough idea of fairness." Finally, the court said that "[i]t is true that the terms 'cruel or inhumane' and 'cruel mistreatment' are by nature somewhat loose-fitting descriptions of human behavior," yet it held that the statute represented an acceptable compromise between the need for specific language and the need to address "a social evil of truly inestimable proportions."

208. See id. at 347. The court noted that traditionally the status of a right as a "fundamental right" has been limited to First Amendment freedoms. See id. at 346. The court further noted a trend by state and lower federal courts to accord "fundamental right" status to "any of the fundamental freedoms protected under the Bill of Rights." Id. at 346-47. As will be noted in the discussion that follows, several state courts have determined that the parental right to use lawful punishment is entitled to "fundamental right" status.

209. See id. at 347.
211. See id. at 348.
212. Id.
213. See id. at 349.
214. Id.
215. See id.
216. See id.
217. Id. (citing Colten v. Kentucky, 407 U.S. 104, 110 (1972)).
218. Id. at 349-50.
Bowers is atypical in two aspects. First, it includes a detailed analysis of a void-for-vagueness review when the issue of a parent’s right to use disciplinary force is at issue.219 Most decisions recognizing the parental right to use such force quickly come to the conclusion that the statutory language provides adequate notice to defendants that their conduct is criminal.220

Second, unlike Bowers, some courts do not review the statute for facial vagueness. This results because the courts fail to address the issue of whether the assertion of the defense involves a fundamental right221 or, alternatively, either explicitly222 or implicitly223 hold that the use of disciplinary force by a parent does not involve the exercise of a fundamental right.

In one sense, this distinction should be unimportant because Bowers tells us that even under the stricter scrutiny of a facial review, the language “cruel mistreatment” meets the requirements of due process.224 Yet, it is not unfair to characterize this assessment as a close call. However, mimicking the same type of analysis used in Bowers, other courts have determined that language such as, “unnecessarily severe corporal punishment”225 or “unjustifiable pain and suffering,”226 also meet the requirements of due process. When courts employ a cursory analysis or fail to treat the parental use of force as a fundamental right, the due process goals of fair notice may not have really been met.

Conversely, Bowers, in many aspects, is a very typical decision. First, as mentioned above, no matter the language at issue, courts typically find that the statute in question provides due process notice to parents and fact finders.227 Second, the cases commonly involve a factual basis entailing significant injury to the child.228 Finally, the courts seem to recognize the difficulty in resolving cases of this nature, but reason that the need for specificity must be balanced against a very serious social problem calling for flexible statutes that provide broad

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219. See id. at 347-50.
228. See, e.g., Gregg, 520 N.W.2d at 691 (involving blood blisters, bruises, and a welt).
protection for children.\textsuperscript{229} Similar concerns reappear in the second type of vagueness or overbreadth claim commonly asserted.

As mentioned at the outset of this discussion, the second common basis for appeal in this context arises because of the lack of clear definitions with respect to the scope of harm encompassed by the underlying offense. In these cases, the accused parent asserts that the prohibited conduct is not sufficiently defined and, as such, crosses into the realm of protected parental conduct. For example, in \textit{Keser v. State},\textsuperscript{230} the defendant was charged with the crime of child abuse. The evidence at trial established that the defendant struck his fourteen-year-old stepson in the face with an ice scraper, slapped him in the mouth, and beat him with a belt on the face and body because the teenager had refused to return to the family home.\textsuperscript{231} One point asserted on appeal was that the statute in question was vague because it defined abuse as causing “physical injury” or “mental trauma.”\textsuperscript{232} The defendant reasoned that the lack of definitions of these terms resulted in the inability to distinguish between child abuse and the permitted use of corporal punishment.\textsuperscript{233}

This contention was rejected. In doing so, the court noted that similar language had been upheld and that the terms “physical injury” and “mental trauma” were readily capable of definition.\textsuperscript{234} As such, the court reasoned that due process notice requirements had been met.\textsuperscript{235} It concluded by indicating that “[t]he statute is violated upon the occurrence of physical injury and mental trauma—what society would consider child abuse.”\textsuperscript{236} Two points of interest from this decision exist. First, \textit{Keser} holds that physical injury, resulting from discipline, is child abuse.\textsuperscript{237} Second, the court does not address whether the prohibition against causing physical injury would have a chilling effect on the parent’s right to discipline.

In \textit{People v. Hicks},\textsuperscript{238} the court reviewed a consolidated appeal of a husband and wife charged with cruelty to children. At issue was a Michigan statute that made it a crime to habitually cause or permit the health of a child to be injured.\textsuperscript{239} \textit{Hicks} held that a criminal statute was unconstitutional where it interfered with the right of parents to

\begin{itemize}
\item \textsuperscript{229}See, e.g., \textit{People v. Jennings}, 641 P.2d 276, 280 (Colo. 1982) (finding that standards governing the parent-child relationship must be flexible while also protecting the child against abuse).
\item \textsuperscript{230}706 P.2d 263 (Wyo. 1985).
\item \textsuperscript{231}See id. at 264-65.
\item \textsuperscript{232}See id. at 266.
\item \textsuperscript{233}See id. at 268.
\item \textsuperscript{234}See id. at 266-68.
\item \textsuperscript{235}See id. at 268.
\item \textsuperscript{236}Id.
\item \textsuperscript{237}See id. at 268-70.
\item \textsuperscript{238}386 N.W.2d 657 (Mich. Ct. App. 1986).
\item \textsuperscript{239}See id. at 660 (discussing the Michigan statute).
\end{itemize}
use reasonable and timely corporal punishment. Hence, a facial re-
view was conducted, and the analysis focused on whether the phrase
"habitually causes or permits the health of a child to be injured" was
vague to the extent that it had a chilling effect on the parent's right to
discipline. In concluding that the phrase was not overbroad and, as
such, did not impede constitutionally protected conduct, the court de-
termined that the statute provided fair notice to parents and those
required to enforce the law. Crucial, however, to the court's con-
clusion was the determination that inclusion of the word "habitually"
effectively distinguished lawful discipline from that which was not.

If the phrase in question merely proscribed causing or permitting
injury to the health of the child, we would agree with defendant
Mary Hicks that normal discipline might be "chilled" through
fear that such conduct was covered by the statute. However, the
wording of the phrase in question provides that only habitually
causings or permitting the child's health to be injured is pro-
scribed. The word "habitually" protects the welfare of the child
without prohibiting reasonable and timely discipline by the
parent.

Comparing the holdings in Keser and Hicks, it is apparent that
neither court believed that the due process requirements of notice
were vitiated by the statute in question. Hicks, however, implies that
the statutory language at issue in Keser could be subject to an over-
breadth challenge. Stated otherwise, the implication in Hicks is that a
statute that does no more than preclude the infliction of physical in-
jury fails to provide adequate notice to parents. Whereas, the notice
deficiency would be corrected if the statutory language, with greater
specificity, signified the difference between abuse and reasonable
discipline.

A final case of interest is State v. Suchomski. In Suchomski,
the defendant challenged a domestic abuse statute that precluded the
causing of physical harm to a child. The trial court dismissed the
indictment on defendant's motion that alleged the statute prevented
him from disciplining his child. The state appealed the dismissal,
but the dismissal was upheld on appeal. The appellate court af-
firmed primarily because of its expansive interpretation of the defini-
tion of "physical harm" under Ohio law. As defined by the appellate
court, physical harm not only included trauma but also pain. As
such, the court maintained that the statute improperly impeded the rights of parents to discipline their children.\textsuperscript{249}

When the state appealed once again, the Supreme Court of Ohio reversed the decision of the appellate court and reinstated the indictment.\textsuperscript{250} The Ohio Supreme Court’s decision did not appear to take issue with the intermediate court’s definition of the term “physical harm.” It indicated, however, that when parental discipline is at issue, the definition of physical harm is qualified by the parental privilege.\textsuperscript{251} It did so by indicating the statute defined the term “physical harm” to mean “any injury.”\textsuperscript{252} The court then defined the term “injury” to mean “the invasion of any legally protected interest.”\textsuperscript{253} The court concluded, “[a] child does not have any legally protected interest which is invaded by proper and reasonable parental discipline.”\textsuperscript{254}

\textit{Keser, Hicks,} and \textit{Suchomski} point toward the difficulty of determining the scope of a parent’s right to use disciplinary force when the extent of that authority is defined as the “reasonable and moderate use of force.”\textsuperscript{255} In \textit{Keser} the court indicated that the jury was free to conclude that the infliction of physical injury is not included within the parameters of reasonable and moderate punishment.\textsuperscript{256} \textit{Hicks} and \textit{Suchomski} appear to indicate that lawful punishment does encompass the right to cause physical injury.

A case that seems to combine the problems presented by the “cruel or unjustifiable punishment” appeals, typified by the \textit{Bowers}\textsuperscript{257} decision, and the “degree of harm” appeals exemplified by \textit{Keser, Hicks,} and \textit{Suchomski}, is \textit{State v. Meinert}.\textsuperscript{258} \textit{Meinert} involved a babysitter who spanked a three-year-old child for urinating on the floor.\textsuperscript{259} Four hours after the spanking, red marks were still visible on the child’s buttocks.\textsuperscript{260} The defendant was charged with a statute that made it an offense to cause a child to suffer “unjustifiable physical pain.”\textsuperscript{261} The trial court dismissed the complaint concluding that the

\begin{footnotes}
\item 249. \textit{See id.}
\item 250. \textit{See id.}
\item 251. \textit{See id.}
\item 252. \textit{Id.}
\item 253. \textit{Id.} (citing \textit{BLACK’S LAW DICTIONARY} 785 (6th ed. 1990))
\item 254. \textit{Id.}
\item 256. \textit{See Keser,} 706 P.2d at 270-71.
\item 258. 594 P.2d 232 (Kan. 1979).
\item 259. \textit{See id.} at 232. The court did not specifically address whether the scope of the parental privilege extends to baby-sitters in Kansas. The decision of the court would indicate that it does.
\item 260. \textit{See id.} at 232-33.
\item 261. \textit{See id.}
\end{footnotes}
words “unjustifiable physical pain” were vague. The decision of the trial court was upheld by the Supreme Court of Kansas.

Like Bowers, Meinert emphasized the two prongs of fair notice: fairly apprising the defendant of the prohibited conduct and providing guidelines to those who must enforce the law. Additionally, it used the same analysis to determine if these requirements had been met. However, Meinert then posed logical questions that other courts touch upon only tangentially, if at all:

Where is the line to be drawn in determining if discipline or other treatment of a child is justified or unjustified? How does one decide whether or not a spanking is due a child and, if so, should it be administered with the hands, a fly swatter, or a belt? Is one slap, two slaps, or five slaps too many? Are two hard slaps a violation of the statute but five very light slaps not? Do red marks lasting only one hour relieve one from prosecution? Some persons do not believe in any form of corporal punishment and to them any such treatment would be unjustified. On the other hand others may believe any correction, however severe, which produces temporary pain only, and no lasting injury or disfigurement, is justified. The statute could conceivably cover anything from a minor spanking or slapping to severe beating depending upon the personal beliefs of the individual.

Meinert recognized that the parameters of the defense are commingled with the interpretation of underlying statutes utilized to prosecute parents who abuse their children. Moreover, the questions posed by the court are relevant whenever the scope of the privilege is delineated as being “reasonable and moderate” and the language of the statute prohibits punishment that is cruel, unjustifiable, or unlawful.

As indicated by the discussion above, appeals based on claims of vagueness are routinely rejected by the courts. Moreover, the decisions are difficult to compare because of differences in the statutory language of either the underlying offense, the defense, or both. However, these decisions do point toward several problems posed by the “reasonable and moderate” use of force defense.

First, there is no uniformity among the decisions indicating whether the scope of the defense includes the right to inflict physical injury. Second, although one of the requirements of due process is

262. See id. at 233. Meinert revolves around a statute that incorporates the privilege to use force into the elements of the offense. See id. Stated otherwise, the interpretation of a general justification statute was not at issue. Rather, the statute incorporated the privilege by precluding the infliction of “unjustifiable physical pain.” See id.

263. See id. at 235.

264. See id. at 234-35.

265. Id. at 234.

that the statute must provide adequate guidelines for enforcement, it is interesting to note that with some frequency appeals in these cases result because the lower court has determined that the statute was vague.\textsuperscript{267} Thus, the language of the statute was determined not to be capable of common understanding by the trial courts who must enforce it. Third, the courts are not in agreement as to whether the use of corporal punishment is a fundamental right. If the courts do not view the right of parents to use corporal punishment as a fundamental right, the issue of vagueness is assessed only with regard to the particular defendant before the court and whether that defendant should have known that his conduct was prohibited. When the conduct evaluated is severe, the vagueness doctrine is not rigorously tested.\textsuperscript{268}

_Bowers_ and others following its approach seem to indicate that "cruel mistreatment" and other such phrases can withstand the stricter scrutiny of a facial review. But these decisions, commonly relying on dicta, assume that the long-standing recognition of reasonable and moderate punishment supplies the clarity required for due process. This is a reasoned posture when severe discipline has been imposed and the statute precludes cruel treatment.

It can be argued, however, that the closer both of these factors move toward the middle ground, the less notice is provided. Stated otherwise, the closer the statutory language comes to precluding normative discipline (for example, the "infliction of pain"), or the more nebulous it becomes in terms of defining the crime (for example, "unnecessarily severe or unlawful corporal punishment"), the greater is the risk that normal parental discipline will be chilled. _Meinert_ is an apt representation of this phenomenon because the statute at issue in

\textsuperscript{267} See People v. Jennings, 641 P.2d 276, 276 (Colo. 1982) (reversing district court finding that the phrase "cruelly punish["] was unconstitutionally vague); State v. Sinica, 372 N.W.2d 445, 449 (Neb. 1985) (reversing district court motion to quash information on basis that phrase "cruelly punish" was unconstitutionally vague); Suchomski, 567 N.E.2d at 1305 (reversing district court and appellate court determination that statute prohibiting infliction of "physical harm" to family member was unconstitutionally vague and overbroad); cf. State v. Lucero, 531 P.2d 1215, 1216 (N.M. Ct. App. 1975) (overturning district court indictment dismissal on basis that abuse statute that precluded negligently "causing . . . child to be tortured, . . . or cruelly punished" violated Equal Protection Clause of Constitution). The major emphasis of the court's discussion was that the statute did not inappropriately distinguish between those who batter children and those who batter adults. However, the dissenting opinion of Judge Sutin indicates that the statute is vague and indefinite. See Lucero, 531 P.2d at 1218.

\textsuperscript{268} It should not be inferred from this statement that the author would support the classification of a parent's right to use corporal punishment as fundamental. Indeed, Professor Mary Kate Kearney, in her article _Substantive Due Process and Parental Corporal Punishment: Democracy and the Excluded Child_, 32 San Diego L. Rev. 1 (1995), presents a compelling argument that the defense is not entitled to such a status. Rather, the point to be made is that in the context of this defense, a vagueness analysis based upon a nonfacial review seldom requires careful analysis because the injuries to the child are typically severe. See, e.g., Hunter v. State, 360 N.E.2d 588, 594-95 (Ind. Ct. App. 1977) ("Men of ordinary intelligence and experience are capable of judging if hitting a child with a frying pan is "unnecessarily severe corporal punishment.""). In the face of this reality, the issues of notice and chilling are subject to less judicial scrutiny.
the case precluded unjustifiable pain, and the injuries to the child were red marks from a spanking.\footnote{ See Meinert, 594 P.2d at 233.}

Finally, it should be noted that appellate courts commonly treat the issue of how much punishment is excessive in a piecemeal fashion. That is to say, the defendant claims that the words "cruel punishment" are vague, or that the prohibition against causing "physical harm" invades the right to use lawful punishment, or that the privilege itself is ambiguous. In a sense the problem is not that the independent pieces of the statutory framework are vague, but rather that the entire statutory scheme suffers from imprecision.

Viewed from a practical context, when each of the components is defined in an obscure manner, the risk that protected conduct will be chilled or that the defendant and law enforcement are without adequate guidance is compelling even if the courts typically find that each of the statutory components pass constitutional muster. Although the need for flexibility within the criminal justice system is important, pervasive ambiguity raises issues of fundamental fairness. In the context of protecting children from abuse, it is especially important for the underlying offense to be broadly drawn. But in response to that need, it becomes equally important for the defense to be articulated in a straightforward manner.

From the perspective of parents raising children, it must be asked if a legal restriction against cruel or unlawful punishment that is reasonable, and moderate, and may or may not include the right to inflict physical injury, really provides fair notice. The courts, recognizing the difficulties posed,\footnote{ See People v. Jennings, 641 P.2d 276, 278 (Colo. 1982) ("The vagueness standard, while frequently enunciated, is nevertheless difficult to apply."); Keser, 706 P.2d at 271 ("The statutory prohibition of child abuse encompasses a very difficult and nebulous area; it is not an easy task to clearly distinguish child abuse from parental punishment."); cf. Moakley v. State, 547 So. 2d 1246, 1247 (Fla. Dist. Ct. App. 1989) (noting, in the context of sufficiency of evidence review, "[t]he term excessive, as used by the Kama court, is rather vague and like other such terms is often definable as 'in the eyes of the beholder'") (quoting Kama v. State, 507 So. 2d 154, 156 (Fla. Dist. Ct. App. 1987)); Bowers v. State, 389 A.2d 341, 349 (Md. 1978) ("It is true that terms such as 'cruel or inhumane' and 'cruel mistreatment' are by nature somewhat loose-fitting descriptions of human behavior.").} generally indicate that it does. Nevertheless, the premise could be characterized as a legal fiction created to protect innocent and vulnerable victims.

B. Sufficiency of Evidence Cases

The second ground frequently appearing as a basis for appeal in cases involving the parental use of disciplinary force centers around claims of insufficiency of the evidence. When a claim of insufficiency of the evidence is asserted the defendant maintains that evidence introduced at trial failed to establish, as a matter of law, that his conduct
fell within the scope of the offense. Commonly, in the context of parents using force against children, the defendant contends that the force used was not unlawful because of its disciplinary nature. In such cases the defendant does not dispute that force was used. Rather, the defendant asserts that the state failed to establish that the force used was not protected by the corporal punishment defense.

The appellate court then reviews the evidence introduced, in the light most favorable to the state, and assesses whether the judgment of the fact finder was clearly erroneous. These components of the standard of review mean that an appellant is confronted with a significant burden in seeking reversal.

While appeals based on claims of vagueness appear primarily in those jurisdictions defining the corporal punishment privilege as the


273. See id.

274. See id.


276. See Carson v. United States, 556 A.2d 1076, (D.C. 1989); State v. Crowell, 487 N.W.2d 273, 277 (Neb. 1992); see, e.g., Commonwealth v. Rochon, 581 A.2d 239, 244 (Pa. Super. Ct. 1990) ("A claim that the evidence presented at trial was contradictory and unable to support the verdict requires the grant of a new trial only when the verdict is so contrary to the evidence as to shock one's sense of justice." (citations omitted)).

277. For example, in Carson v. United States, 556 A.2d 1076 (D.C. 1989), the court reviewed the conviction of a mother who was charged with three counts of cruelty to children. The case arose following the beating of the children with an electrical cord because they lied to the defendant concerning some missing money. See id. at 1077. The evidence in this case established that six-year-old Everett had loop-shaped marks on his body extending from the back of his neck, and down his right arm and leg. See id. at 1081. Seven marks were clustered around his elbow, and a dozen bruises and lacerations were observed on his thigh. See id. Four unhealed sores were observable in the admitted photographs. See id. Marks on his five-year-old and eight-year-old sisters were similar but not as severe. See id. The mother appealed the decision based on a sufficiency of evidence claim, and the court reviewed the conviction based upon a corporal punishment standard excluding discipline that was either inflicted without parental purpose or that was inflicted with a conscious disregard that serious harm would result. See id. at 1077, 1079.

The majority opinion first indicated that it believed the evidence supported the conclusion that appellant acted out of a "legitimate desire to correct the children." Id. at 1080. Additionally, in a footnote it stated, "[w]e echo the trial court's sentiment that appellant had a genuine and deep-felt love and concern for the children." Id. at 1080 n.3. Second, it concluded that the punishment was not so excessive as to necessitate the conclusion that the appellant acted with a conscious disregard that serious harm would result. See id. at 1080. Despite these conclusions, the court indicated that it would not reverse the conviction because it was not "plainly in error" and stated that "[w]e are loath to substitute our judgment for that of the trier-of-fact." Id. at 1080-81. Interestingly, a concurring opinion supports the conclusion of the court, but because of the nature of the injuries inflicted, takes issue with the majority's equivocation on the issue of whether the appellant acted with conscious disregard that her actions could result in serious injury. See id. at 1081.
reasonable and moderate use of force,\textsuperscript{278} appeals based on insufficiency of the evidence are asserted under each approach to the defense. Under the Model Penal Code approach,\textsuperscript{279} the reasonable/moderate approach,\textsuperscript{280} and variations of the reasonable/moderate ap-

\textsuperscript{278} See supra notes 191-95 and accompanying text.

\textsuperscript{279} Under the Model Penal Code approach, because serious physical injury is specifically precluded, claims of insufficiency of the evidence cannot prevail in the face of obvious abuse. \textit{See}, e.g., Commonwealth v. Moore, 395 A.2d 1328 (Pa. Super. Ct. 1978). In \textit{Moore}, a stepfather beat his seven-year-old stepson with a paddle-stick on his back, buttocks, and thigh because he allowed friends to enter the home. \textit{See id.} at 1330. The injuries sustained by the boy resulted in hospitalization for six months. \textit{See id.} The court found the evidence sufficient to sustain the defendant's conviction for aggravated assault, but reversed the conviction for possession of an instrument of crime, finding that the paddle-stick used by the defendant was not an "instrument of crime" as required by the statute. \textit{See id.} at 1332-33; \textit{see also} State v. Beins, 456 N.W.2d 759, 762 (Neb. 1990) (involving a father who struck his daughter in the face, knocked her to the ground, and began choking her until she thought her "eyes were just going to pop out of [her] head") The "discipline" in \textit{Beins} resulted from an argument concerning the purchase of a car. \textit{See id.} at 761; \textit{see also} Commonwealth v. Rochon, 581 A.2d 239 (Pa. Super. Ct. 1990). The defendant/mother in \textit{Rochon} became angry at her seventeen-month-old child for soiling his diaper. \textit{See id.} at 244. To "discipline" her child the defendant struck him with her shoe, and stated, "I'm going to cool this m--r f--r off" and then immersed the boy in water until he became cyanotic while stating to him "swim, bitch, swim." \textit{See id.; see also} United States v. Ziots, 36 M.J. 1007, 1008 (A.C.M.R. 1993) (involving a defendant who disciplined his three-year-old stepson for lying by striking him between the eyes and on the back with a closed fist).

\textsuperscript{280} In jurisdictions defining the defense as the reasonable and moderate use of disciplinary force, the degree of harm that can be inflicted is not specified. Thus, in contrast to jurisdictions that specifically state that serious injury is not encompassed by the defense, the fact finder in states that rely on this standard has leeway to find that something less than serious injury was unreasonable. The subjectivity of this standard has implications at both the trial and appellate stages. At the trial level the subjectivity translates into a commission to evaluate reasonableness at both ends of the punishment continuum. That is to say, the fact finder has the discretion to determine that punishment without a physical consequence is unreasonable or that punishment with a significant physical impact is reasonable. Thus, under this approach the punishment need not rise to the level of serious injury to preclude application of the defense, but conversely, such punishment is not automatically excluded either. Because only the defendant is allowed to appeal on the basis of insufficiency of evidence, the reported cases deal with the situation where the defense has not been successfully asserted. Thus, whether this standard tolerates higher levels of violence at the trial stage than the Model Penal Code approach cannot be determined. It is reasonable to assume that it does not, due to the fact that the concepts of reasonable punishment and serious injury are incongruous. However, once the determination has been made by the fact finder that the punishment was not lawful, rarely will an appellate court hand down a reversal. This results because the appellate court is evaluating a subjective determination of reasonableness, because the sufficiency of evidence is reviewed in the light most favorable to the state, and because reversal is necessitated only if the decision of the fact finder was clearly erroneous. With these factors in mind, the reported cases from jurisdictions using a standard that requires the punishment to be reasonable routinely reject appeals when serious injury has been inflicted. \textit{See} State v. Barnett, 521 So. 2d 663 (La. Ct. App. 1988). In \textit{Barnett}, the defendant/father beat his six-year-old son with a belt for lying and covering the boy's body with bruises. \textit{See id.} at 665. The court, with little discussion, determined that the evidence was sufficient to establish that the punishment went beyond the realm of reasonableness. \textit{See id.} at 666; \textit{see also} State v. Coombs, 381 A.2d 288, 288-89 (Me. 1978) (finding that evidence introduced in aggravated battery of 21-month-old child was sufficient to defeat assertion that the defendant's conduct was privileged without recitation of the underlying facts); State v. Nitka, 542 N.W.2d 238 (Wis. Ct. App. 1995) (unpublished opinion) (involving a father's beating with a belt leaving extensive bruising on five-year-old child's thigh and buttocks that was sufficient to overcome defendant's claim that the discipline was reasonable).
approach,\textsuperscript{281} convictions are not reversed if the child suffered life-threatening or permanent injury. At the opposite end of the spectrum, reported decisions dealing with sufficiency of evidence in a disciplinary context have not been found unless the imposed punishment also resulted in a physical consequence. Again, this would appear to be at least anecdotal evidence that successful prosecutions are not routine under any approach for physical conduct that is merely offensive or threatening or that has a physical consequence not resulting in injury.

Sufficiency of evidence cases would appear to indicate that children are protected from serious physical injury, and parents are protected from prosecution for inconsequential acts of force under each approach. This category of cases, however, also points toward the conclusion that children living in states that utilize a standard that protects parental aggression unless it results in, or creates a substantial risk of, serious physical injury are not being protected from what many would consider to be abuse. A comparison of the approaches that utilize this type of parameter explains this premise.

In \textit{Moakley v. State}\textsuperscript{282} the court reviewed a conviction of a father for striking an eight-year-old child with a belt.\textsuperscript{283} As a result of the beating, the child had bruise marks on her buttocks and hip.\textsuperscript{284} The court reviewed the defendants claim of insufficiency of the evidence with respect to a statute that prohibited the "malicious punishment" of a child.\textsuperscript{285} The court in reviewing the verdict against the defendant held that the use of force was not privileged if it was "motivated by malice."\textsuperscript{286} Malice was defined as the use of force that was not motivated by a parental purpose or which resulted in "great bodily harm, permanent disability, or permanent disfigurement."\textsuperscript{287}

In refusing to uphold the defendant’s conviction, the court indicated that although the defendant had perhaps struck the child too

\textsuperscript{281} See State v. Crouser, 911 P.2d 725, 731 (Haw. 1996) (interpreting a statute that requires that the employed force be used with regard for the age and size of minor, that it be reasonably related to promoting the welfare of the child, and that it not cause or create a substantial risk of serious injury); State v. Waller, 538 P.2d 1274, 1276 (Or. Ct. App. 1975) (interpreting a standard that required utilized force to be reasonable and reasonably necessary, and finding evidence sufficient to sustain mother’s conviction in the face of her assertion that beating of her six-year-old son by striking him in the face and then with a belt on his buttocks and legs was reasonable discipline. Based upon this standard, the court found that the defendant’s conduct (repeated beatings on torso, arms, buttocks, and thighs with plastic bat) in beating 14-year-old daughter of his live-in girlfriend was not protected).

\textsuperscript{282} 547 So. 2d 1246 (Fla. Dist. Ct. App. 1989).

\textsuperscript{283} See id. at 1246-47. The facts in the case indicated that the defendant had called a state agency asking that the child be removed from the home because she was “ungovernable.” See \textit{id}. at 1246. Later, the same agency received a report from the child abuse registry concerning the defendant. See \textit{id}. at 1247. When the agency worker went to the defendant’s home to investigate, the child was found standing next to a wall crying with wet pants. See \textit{id}. It was at this time that the worker discovered the injuries that formed the basis for the charge. See \textit{id}.

\textsuperscript{284} See \textit{id}.

\textsuperscript{285} See \textit{id}. at 1246.

\textsuperscript{286} \textit{Id}. at 1247.

\textsuperscript{287} \textit{Id}.
hard, he had not inflicted permanent disability or disfigurement.\textsuperscript{288} Moreover, it indicated that "the law should be quite careful about intrusion into family relationships and must tread most lightly in borderline cases."\textsuperscript{289} Holding that this was such a borderline case, the jury's verdict was reversed.\textsuperscript{290}

\textit{Moakley} represents the parameters of a strict malice approach. As such, the issue before the court is whether the discipline either lacked parental purpose or resulted in serious injury. When this standard is utilized, children are arguably at the greatest risk for abuse. This results because any conduct undertaken for a disciplinary purpose is protected unless the child is seriously injured.\textsuperscript{291}

In a fashion akin to the malice approach, the Model Penal Code uses similar factors to address the type of injury that is not protected.\textsuperscript{292} The language of the Model Penal Code, however, represents a significant departure from the malice standard because the potential for harm is specifically addressed. That is to say, under the Model Penal Code approach, the fact finder is asked to evaluate the conduct and its potential for harm, not merely the result.\textsuperscript{293} This is accomplished by mandating that the fact finder assess whether the force used was either known to cause or actually created a substantial risk of serious injury.\textsuperscript{294} The practical effect of this standard is best explained by illustration of three scenarios.

First, assume that serious injury is actually inflicted. If such injury results, then the court will logically conclude that the conduct was "known to cause" such injury because it in fact resulted. Second, assume that no injury results to the child. In the absence of any injury, the analysis should focus upon whether the conduct posed a substantial risk of serious injury. The conclusion of the fact finder may be that the conduct did or did not pose such a risk, but the question is nevertheless at issue. Finally, consider the situation where physical injury is inflicted, but it is not a serious injury. Again the issue should be whether a substantial risk of serious injury was posed by the conduct. In making this analysis the fact finder may conclude that despite the lack of serious injury, the conduct nevertheless posed such a risk. On the other hand, the fact finder may assume that the conduct did

\begin{itemize}
  \item \textsuperscript{288} See id.
  \item \textsuperscript{289} Id.
  \item \textsuperscript{290} See id.
  \item \textsuperscript{291} Although \textit{Moakley} employs a malice standard, utilization of this approach is rare. In most jurisdictions the malice approach has either been specifically rejected, modified, or replaced by a more modern standard. See infra Appendix.
  \item \textsuperscript{292} See Model Penal Code § 3.08(1)(b) (1985).
  \item \textsuperscript{293} See id.
  \item \textsuperscript{294} For ease of discussion, the phrase "serious injury" will be used as a substitute for the actual Model Penal Code language that precludes placing the child at a substantial risk for "death, serious bodily injury, disfigurement, extreme or unnecessary pain, mental distress, or humiliation." Model Penal Code § 3.08.
\end{itemize}
not create a risk beyond the actual consequence of the conduct. Stated otherwise, the existence of some injury may affect the evaluation of whether risk was posed for injury beyond that which was endured.

This contingency seems to be at play in several opinions. For example, in *State v. Kaimimoku* the Hawaiian court reviewed a conviction for abuse of a family member where the defendant had asserted the parental corporal punishment defense. The incident giving rise to the charge arose as the result of a fight between the defendant and his seventeen-year-old daughter. The evidence established that the daughter became angry at her father as a result of his conduct toward his wife and her mother. When the daughter began shouting obscenities at the father, he struck her with an open hand several times in the face and then with a closed fist struck her in the shoulder. As a result of the father's conduct, the daughter was bruised, "black and blue" on her side, and had prints of the defendant's hands and thumb on her neck and scratches on her face. In noting that the Hawaiian corporal punishment defense was a verbatim enactment of the Model Penal Code defense, the court indicated that the statute "grants to parents considerable autonomy to discipline their children, and as long as parents use moderate force for permissible purposes in disciplining their children and do not create a substantial risk of the excessive injuries specified . . . they will not be criminally liable." In reversing the defendant's conviction the court indicated that there was no evidence that the defendant struck his daughter for any purpose other than discipline. Moreover, the court then referred to a previous decision involving the assertion of the parental force defense where the Hawaiian Supreme Court found no evidence of serious bodily injury. After discussing the facts in the prior decision, the court inferred that the level of aggression in the case before it was less severe, and thus it could not sustain the defendant's conviction as a matter of law.

296. See id. at 1077. The victim in this case was a 17-year-old child. The court notes without discussion that the daughter was a minor at the time of the offense. See id. at 1080.
297. See id. at 1077.
298. See id.
299. See id. at 1078.
300. Id. at 1080.
301. See id.
302. See id. (citing State v. DeLeon, 813 P.2d 1382 (Haw. 1991)).
303. See DeLeon, 813 P.2d at 1384. The facts in *DeLeon* established that a 14-year-old child had been struck with a 36-inch-long belt six to 10 times, the belt was one and a half inches wide, was folded in half, and left bruises on the child that lasted for approximately one week. See id. at 1383.
304. See Kaimimoku, 841 P.2d at 1080. But see State v. Crouser, 911 P.2d 725, 731 (Haw. 1996). Following the *Kaimimoku* and *DeLeon* decisions, the Hawaiian parental justification statute was amended for the "express purpose of 'reduc[ing] the permitted level of force that a person responsible for the care of a minor . . . may use.'" Id. at 733 (citing the legislative his-
The point of interest from this decision is twofold. First, the court does not explicitly address the issue of whether the conduct posed a substantial risk of causing serious injury. It did not question whether striking the victim in the torso with a closed fist or slapping her in the face could have caused serious injury. Instead, the court appears to take the posture that risk was not posed because the injury inflicted was not serious. In finding that the injuries were not serious, the court overturned the conviction of the defendant. This decision clearly indicates the Model Penal Code defense protects parents who injure their children, so long as the injuries are not serious. It also suggests that although the Model Penal Code approach requires an evaluation of whether the parental conduct posed a substantial risk of serious harm, the court may fail to evaluate this issue when the child suffers some injury that the court deems to be less than serious.

This phenomenon appears again in State v. Brunner, where the court reviewed a child abuse statute that, similar to the Model Penal Code, set the outside limit of appropriate discipline at conduct that creates a substantial risk of serious injury. Specifically, the Ohio child abuse statute made it a crime to inflict serious harm to the child when using excessive corporal punishment that created a substantial risk of serious physical harm to the child. In Brunner, the mother of five-year-old Michael Sallee was found guilty of this offense. The issue on appeal was whether the conviction should stand in light of the mother's position that she struck the five-year-old boy as a disciplinary measure.

The state's evidence established that as a result of inflicted punishment, the defendant's son had numerous bruises and contusions on
the legs, back, and chest, as well as scratches on his arms. The appellant introduced evidence that her child was "difficult" and "unruly," that she had administered "approximately fifteen swats to the boy's rear with her belt," that her past efforts to discipline by other means had failed, and that on the day the injuries were inflicted her son had used vulgar language approximately five minutes after she had instructed him not to do so. Appellant further stated that she had been threatened with eviction if her son used "foul" language in front of other tenants of the building.

The court reversed the defendant's conviction finding that her conduct did not fall within the purview of the statute. In doing so it held that the mother had not struck the boy for other than disciplinary reasons and that she had done so to "correct the boy's almost incorrigible behavior, which exhibited and manifested a direct and open opposition to [the] mother's parental authority." While not specifically stating so, the clear inference was that the court found the punishment imposed by the defendant/mother was not excessive under the circumstances. Additionally, it found that the injuries sustained did not rise to the level of serious physical harm. After eliminating each of the definitional categories of serious harm, the court indicated that "[t]he bruises exhibited by the photos certainly are not permanent in nature, and although temporary, were not of the nature requiring any type of surgical repair or treatment." In concluding that the conviction was "against the manifest weight of the evidence," the court stated: "While appellant's conduct in the case at bar is certainly questionable, we are unwilling to hold that her efforts to discipline her child in the manner she saw fit rises to the level of criminal conduct required by the Revised Code."

Neither the Kaimimoku nor Brunner decisions discuss the substantial risk issue. This failure to evaluate one of the statutory criteria might have been an oversight. Or perhaps, the courts neglected to discuss the issue because they assumed that a substantial risk of serious injury was not posed by the parental conduct. Nevertheless, the absence of any discussion, the language of the opinions, and the facts of the cases suggest that the threshold of aggression tolerated by this standard may influence or minimize the substantial risk issue when the child suffers injury that is not regarded as serious. A variation on this theme can be noted even if a court does discuss the substantial risk issue.

312. See id. at *4.
313. Id.
314. See id.
315. See id. at *6.
316. Id. at *5.
317. See id.
318. Id.
319. Id. at *5-6.
For example, in *State v. Ivey*, the defendant was charged with abuse of his ten-year-old child. Similar concerns to those presented in the *Brunner* case were at issue in that the court was reviewing a conviction that required a finding that the child had been "abused" with resulting "serious physical harm," and the parameters of the parental privilege to use force required a finding that the punishment was excessive and created a substantial risk of serious physical injury.

Evidence introduced at trial established that the defendant punished his child for failing to inform the defendant that he had received a detention at school. The punishment included hitting the child in the chest and eye and whipping his buttocks and legs with a belt. The day after the injuries had been inflicted, they were detected by school personnel, and the boy was then transported to the hospital. The doctor who examined the boy indicated that there were "bruises and swelling on his buttocks and legs," that the sides of his arms were swollen and bruised, that open cuts appeared on the buttocks area, and that the injury to the boy's blackened eye was consistent with being punched by a fist. He was released from the hospital without receiving medication or dressings.

The court reversed the defendant's conviction. In contrast to *Brunner*, the court in *Ivey* indicated that the punishment administered in this instance was excessive. However, the court indicated that, in addition to being excessive, the punishment must also pose a substantial risk of serious harm. The court did not find that the defendant's conduct either resulted in or created a substantial risk of serious physical harm. In reaching this conclusion, the court noted that there was no evidence that the boy "was in great pain" or that the doctor had found it "necessary to hospitalize the boy, order any type of pain killer, (even aspirin), or to schedule another medical exam." The court concluded its discussion by acknowledging the father's defense,

321. *See id.* at 523.
322. *See id.* at 521.
323. *See id.*
324. *See id.*
325. *Id.* at 521-22.
326. *See id.* at 522. The doctor also noted old bruises on the boy's buttocks. The victim indicated these bruises were the result of previous beatings. *See id.* at 521.
327. *See id.* at 526.
328. *See id.* at 524.
329. *See id.* at 523. It is interesting to note that this statute requires that the punishment must create a substantial risk of serious physical harm and it must be excessive. *See id.* (discussing the state's burden of proof). In order for the parental discipline to be unlawful the conduct must meet both criteria: excessiveness and serious injury. *See id.* If it fails to meet either prong then the discipline is lawful. This approach is distinguishable from jurisdictions where excessiveness and the potential for serious injury are both at issue but are posed in a disjunctive fashion. *See Me. Rev. Stat. Ann.* tit. 17-A, § 106 (West 1983); *Wis. Stat.* § 939.45 (1996). In disjunctive jurisdictions if the punishment is either excessive or creates a risk of serious injury the defense fails. *See Ivey*, 648 N.E.2d at 523.
noting that "the injuries sustained . . . were the result of the imposition of corporal punishment by a father who judged his son's school conduct and acts of deception warranted a strong physical disciplinary response."\textsuperscript{331}

Thus, although the \textit{Ivey} decision gives lip service to the substantial risk issue, the decision of the court that no such risk was created appears to be based on the ultimate outcome of the discipline and the lack of what the courts categorize as serious injury. The issue of potential for harm, whether the boy was at risk for serious injury because of extensive beatings and being punched in the eye, is mitigated because the outcome of the conduct is not serious, a criterion this court implies is one that would require hospitalization.

These cases indicate that, whether the court is utilizing the Model Penal Code approach, or a variation thereof, when one of the criteria used for applying the defense is that the force must result in or create a risk of serious physical injury, children will be at risk for what many would call abuse. This occurs for two reasons. First, this approach clearly protects conduct that results in physical injury, unless the substantial risk issue comes into play. Thus, the infliction of injury for the purpose of discipline, that is not permanent or debilitating, is generally protected. Second, when some physical injury is inflicted, certain courts seem to focus on the outcome of the discipline rather than the potential for harm.\textsuperscript{332} Stated otherwise, if serious injury did not result, the child was not at risk—end of discussion.

\textsuperscript{331} \textit{Id.} The dissenting opinion took issue with the majority's opinion that the defendant had not exceeded the bounds of permissible punishment. \textit{See id.} at 526. The dissenting judge noted that the evidence established dark purple bruises, open sores, linear welt marks up and down the boy's arms and legs, and his black eye, and the judge additionally referenced testimony of a social worker indicating that she had taken the child to the hospital because the bruising was so extensive that she felt the child was at risk if he remained in the home. \textit{See id.} at 526-27. Based upon this evidence the dissenting opinion indicated that the verdict was supported by the evidence. \textit{See id.} at 528.

\textsuperscript{332} \textit{See, e.g.,} State v. Kaimimoku, 841 P.2d 1076, 1080 (Haw. Ct. App. 1992) (reversing father's conviction and focusing on the child's injuries); \textit{Ivey}, 648 N.E.2d at 521-22 (focusing on harm child suffered and reversing conviction). This of course, is not always the case. Some courts do analyze and discuss the substantial risk issue. For example, in \textit{Commonwealth v. Ogin}, 540 A.2d 549, 550 (Pa. Super. Ct. 1988), a mother and father appealed a conviction for simple assault and endangering the welfare of the child. The facts in the case revolved around three separate incidents.

With respect to the first incident, a witness testified that the victim's mother was dragging her by the feet, that the child stumbled, and that the mother then "flung her like an old rag doll against the building." \textit{Id.} at 551. The witness further indicated that the entire backside of the child hit the wall and that she then fell forward and hit her head on the concrete steps. \textit{See id.} This punishment occurred because the child had not remained in front of her home as directed. \textit{See id.} The second incident occurred when the child was taken to see Santa Claus. A neighbor held the child, April, during a long wait, and when she put the child down, she went to her mother and stretched out her arms to be picked up. \textit{See id.} The mother slapped April with the back of her hand. \textit{See id.} Ten minutes later, the child once again held out her arms to be picked up, and the mother hit April with the back of her hand, knocking her into a brick wall. \textit{See id.} The third incident occurred when the father placed a plate of hot spaghetti in front of April at the dinner table. \textit{See id.} When the child did not eat the food, the father pushed the hot food

\bibitem{331} \textit{Id.}
\bibitem{332} \textit{See, e.g.,} State v. Kaimimoku, 841 P.2d 1076, 1080 (Haw. Ct. App. 1992) (reversing father's conviction and focusing on the child's injuries); \textit{Ivey}, 648 N.E.2d at 521-22 (focusing on harm child suffered and reversing conviction). This of course, is not always the case. Some courts do analyze and discuss the substantial risk issue. For example, in \textit{Commonwealth v. Ogin}, 540 A.2d 549, 550 (Pa. Super. Ct. 1988), a mother and father appealed a conviction for simple assault and endangering the welfare of the child. The facts in the case revolved around three separate incidents.

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C. Assessing the Status Quo

Both the vagueness and sufficiency of evidence cases indicate that articulating a standard for the middle ground is difficult. Some would argue that it is a necessary evil required to protect intrusion into parental authority. Moreover, under each approach an attempt is made to delineate the line between abuse and reasonable discipline by tempering the amount of force that may be used. A review of current approaches demonstrates how most jurisdictions either fail to draw a clear line between permissible and impermissible acts of force or draw the line at a level that threatens the well-being of children.

In the majority of states, excessive punishment is assessed by determining whether the punishment imposed was reasonable.\textsuperscript{333} Because this term is undefined, the conduct in question need not rise to the level of inflicting or creating the risk of serious injury. This standard has positive implications in that it is flexible enough to capture parental conduct that results in physical injury to the child, what many would call abuse. The standard, however, is not without shortcomings. With "reasonableness" as their only guide, parents have little guidance as to the limits of a lawful physical interaction with their children, and fact finders are left to define the privilege on a case-by-case basis. It is reasonable to speculate that many jurors would find that a single swat to the bottom of a clothed child with an open hand was reasonable and that a beating with a belt that required hospitalization was not. It is just as likely, however, that what may or may not be reasonable might be based on the childhood perspectives of the fact finder, rather than the mandates of the law.\textsuperscript{334} In a minority of

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\textsuperscript{334} It is impossible in cases of this nature to speculate as to what extent the personal childhood perspectives of the fact finder prevail over the dictates of law. *But see Stoker v. Commonwealth*, 828 S.W.2d 619 (Ky. 1992). In this case the judicial musings in the consolidated appeal of a mother and her live-in boyfriend would suggest that fact finders are at times "reacting to nothing more than their own subjective ideas of child discipline," a concern expressed in the *Bowers* decision. *Bowers v. State*, 389 A.2d 341, 349 (M.D. 1978). In *Stoker*, the mother was convicted of first-degree sodomy, first-degree criminal abuse, and first-degree sexual abuse. *Stoker*, 828 S.W.2d at 621. The live-in boyfriend was convicted of first-degree rape, first-degree sodomy, first-degree sexual abuse, first-degree criminal abuse, and terrorist threatening. *See id*. The evidence established an incredible and grotesque assortment of sexual and abusive acts...
jurisdictions, this problem is avoided because statutory language specifically sets out conduct that is unlawful.\textsuperscript{335} In these jurisdictions the fact finder again must determine what is excessive, but the parameters of the defense are commonly defined as conduct that results in or creates a substantial risk of serious injury.\textsuperscript{336} In light of the significant problem of child abuse and modern assessments of the impact of corporal punishment, setting the outer limit at this threshold seems at odds with modern societal values. In jurisdictions using this standard, the limits of permissible violence are clearly drawn at a level that includes infliction of physical injury. Additionally, in terms of providing guidance to parents, the statutory framework creates a clear inference that a high level of force is permissible, so long as it is utilized for a disciplinary purpose.\textsuperscript{337}

Whether excessive punishment is undefined or specifically articulated, the issue of necessity may also be at issue. When necessity is evaluated, the circumstances surrounding imposition of the punish-
ment must be evaluated by the finder of fact. Arguably the addition of necessity as a factor of consideration serves the purpose of providing an additional means of tempering the concept of reasonable punishment. Thus, when necessity is added to the computation, the issue goes beyond the manner and effect of the punishment to include the issue of why the punishment was administered. Although the use of necessity to temper the use of disciplinary force can be viewed as an important tool in assessing appropriate parental force, it also poses conceptual difficulties. Indeed, it can be argued that using necessity to temper the force is both difficult and analytically circuitous. It is difficult because the question of when to use physical punishment and the extent to which it should be imposed is an extremely subjective issue. Swearing by a five-year-old child may be a moral violation to some parents and a childhood folly to others.

It is circuitous because in the course of using necessity to temper the amount of force, an inference is created that justifies increased aggression. Necessity essentially addresses the question of why the child is being punished. To determine if the punishment was necessary, the conduct of the child must be evaluated. If the punishment must fit the misconduct, then the clear inference is that the greater the childhood indiscretion, the greater the level of parental aggression that should be tolerated. Thus, an underlying assumption that accompanies an evaluation of necessity is that the punishment imposed should escalate in proportion to the misconduct. Although proportionality of the punishment to the conduct has appeal with respect to nonaggressive parenting techniques, it is a less palatable means of evaluating conduct that results in injury.

As implied by the Model Penal Code, which does not evaluate necessity, attempts to review the necessity of punishing a child requires an objective review of what many Americans believe to be a truly subjective decision. Evaluating necessity requires the fact finder to enter the realm of family and parental privacy. Thus, the net impact of necessity as a factor to temper force is the creation of an underlying premise that supports an escalation of physical force, while simultaneously being the most invasive criterion in terms of family autonomy.

Conversely, the failure to address the issue of necessity is not without repercussion. In the absence of a necessity evaluation, the risk that the child will be subjected to capricious violence is enhanced. If there is no requirement that the punishment be necessary, then the fact finder is left to review only the purpose of the punishment and the amount of force. Thus, if the parent asserts that the force was used to discipline, the remaining issue in controversy is the amount of force used. This is a serious flaw when the outside parameter of physical force is anything short of conduct designed to result in death, serious injury, or extreme pain.
The problems associated with evaluating necessity, as well as those associated with vagueness (exemplified by the majority reasonable/moderate approach) and the minority Model Penal Code (serious injury) approach, could be ameliorated if a bright line was drawn for acceptable physical interaction between children and parents. The focus of this standard should be a restriction against the use of force that results in physical injury to the child.

V. THE PROPOSED STATUTE

A. Goals to Be Accomplished

The discussion above points to several obvious factors that any statutory enactment addressing a parent's right to use disciplinary force should incorporate. One preliminary observation, however, is in order. It is important to recall that criminal laws are a societal response to conduct that goes beyond the pale of socially acceptable behavior. They are not designed to respond to errors in judgment but are instead adopted to react to that which invades the stability of the culture. Thus, while the parental defense must be flexible enough to address a wide range of parental conduct, it must also refrain from the punishment of poor parenting techniques.

With this thought in mind, the first goal driving the parameters of the privilege is that the defense must strike a socially acceptable and legally defensible balance. An equilibrium between the interest of the state in protecting the well-being of the child and the parental right to direct the upbringing of their offspring must be struck. Second, to avoid the problems associated with vagueness, the law should be drafted in a manner that clearly delineates the scope of permissible discipline. Next, in order to address parental discipline that is abusive, but that does not result in physical repercussions to the child, the defense should be drafted to address conduct that has both a physical and a nonphysical consequence.338

338. This is an important feature for two reasons. First, certain crimes prohibit the use of force that does not and/or was never intended to have a physical consequence. For example, the crime of child abuse often makes it an offense to unnecessarily degrade a child. Parental conduct that is unnecessarily degrading may or may not have a physical consequence. In illustration, assume that, as a punishment for misbehavior, a father shaves his daughter's head in an erratic fashion, with the ensuing result that she is provided with a wig by school personnel to prevent her from being taunted by other children. See Commonwealth v. Krammer, 371 A.2d 1008, 1009 (Pa. Super. Ct. 1977). The parental conduct does not result in a physically harmful consequence to the child, but it may be unnecessarily degrading. As such, the question as to whether the father's conduct is lawful punishment or unlawfully degrading is a subjective one that should be determined by the finder of fact. Thus, the defense should contemplate situations where no physical injury was intended to flow from the parental discipline.

Second, while assault statutes address conduct resulting in injury to the victim, they also encompass attempts to cause injury or conduct that places individuals at a substantial risk of injury. An attempt to commit an assault generally will be characterized by an intent to engage in the conduct that constitutes the crime and a substantial step towards the commission of the crime. Then, for one reason or another the intended act is thwarted. Defining conduct as crimi-
Finally, to address the fact that the defense must be versatile, the statute should be one of general application pertaining to all crimes of violence against children. This means that the defense should be contained in a general justification statute rather than included within the statutory language of specific crimes designed to protect children. A single criminal statute that sets forth the defense will avoid the potential conflicting defense standards that could arise from multiple codifications and/or common-law interpretations. This approach will provide consistency and clarity to the courts interpreting the defense and to parents who assert that their disciplinary actions were lawful.339 With these goals in mind the following statute is proposed.

B. The Proposed Statute

The Use of Disciplinary Force

The use of physical force upon a child, that would otherwise constitute a criminal offense, is justifiable under the following conditions:

Force that does not result in physical injury may be used by a parent for the purpose of discipline, control, or restraint of a child, but only to the extent that such force does not place the child at a substantial risk of either death, serious physical or emotional injury, or gross degradation.

Definitions:
Child: A child is defined as an unemancipated minor.
Parent: A parent is defined as a biological or adoptive parent, stepparent, or court-appointed guardian.

339. Even if a general justification statute is enacted, problems will still be posed by the language of the underlying offense. For example, if the justification defense excludes conduct that "grossly" degrades the child and the underlying offense makes it a crime to "unnecessarily" degrade the child, the inconsistency in terms will not promote clarity.

340. Many statutes and case-law interpretations establishing the right to use disciplinary force extend the defense to school personnel. See, e.g., ARK. CODE ANN. § 5-2-605(1) (Michie 1987); MONT. CODE ANN. § 45-3-107 (1978); N.H. REV. STAT. ANN. § 627:6(II) (1996). It is also common to include mentally incapacitated adults within the definition of the child. Whether school personnel and/or the mentally handicapped should be encompassed by the defense is an issue beyond the scope of this article.

341. Traditionally, the right to use disciplinary force has been broadly extended to include adults who have assumed responsibility for the welfare of the child. As such, this definition is more restrictive than most statutory provisions or court interpretations of the privilege. It has been drafted with the assumption that the right to use physical force to discipline children should be limited to those with a specific legal relationship to the child. The factors supporting this position include the social science research negating the positive benefits derived from corporal punishment and the number of cases of child abuse involving "live-in" adults. See Zigler & Hall, supra note 40, at 52 (indicating that approximately 17% of the cases of child abuse involve a live-
Physical Injury: Physical injury is defined as any damage to or impairment of tissue or organ, but does not include transient red marks or temporary pain.\textsuperscript{342}

Serious Physical Injury: Serious physical injury is defined as protracted, permanent, or life-threatening trauma or damage to tissue or organ.

Serious Emotional Injury: Serious emotional injury is defined as a medically diagnosable mental condition, trauma, or illness.

This statutory proposal adopts the universal features that are and always have been reflected by the defense to the extent that it applies to parents and children, and force used for a disciplinary purpose. In a fashion similar to the Model Penal Code,\textsuperscript{343} it removes from consideration by the fact finder the subjective elements of reasonableness and necessity. Again mimicking the Model Penal Code, the statute contemplates acts of aggression that have a nonphysical consequence in that the defense does not extend to parental conduct that places a child at a substantial risk of death, serious physical or emotional injury, or gross degradation.\textsuperscript{344} Finally, the most significant difference between this approach and the vast majority of statutes defining, or court decisions interpreting, the defense is that the outside parameter of physical punishment is clearly placed at the point of physical injury to a child.

The statute's clear elimination of a parent's right to use disciplinary force resulting in physical injury to the child guides the logic behind the remaining provisions. This limitation will provide significant protection for the physical well-being of the child. Moreover, because this protection is in place, the need to review the reasonableness of, or necessity for, the imposed punishment becomes less compelling. As such, the countervailing force of parental autonomy is strengthened.

The language of the second limitation, drawn from the Model Penal Code, is specifically included under the proposed statute to address disciplinary conduct that does not result in a physical consequence.\textsuperscript{345} This goal is accomplished by excluding application of

\textsuperscript{342} This definition of physical injury is meant to capture bruising, lacerations, burns, fractures, or internal injuries. It is not intended to include fleeting pain or red marks that are temporary. See, e.g., WASH. REV. CODE ANN. § 9.A.16.100 (West 1988).

\textsuperscript{343} MODEL PENAL CODE § 3.08 (1985).

\textsuperscript{344} Although the language is borrowed from the Model Penal Code, jurisdictions following the reasonable moderate approach may also exclude conduct that creates a substantial risk of the enumerated factors. Parental discipline that creates substantial risks to the child are generally not determined to be reasonable. See, e.g., State v. Leaf, 623 A.2d 1329, 1331 (N.H. 1993).

\textsuperscript{345} It should be noted that although the language of the second limitation is drawn from the Model Penal Code, the practical effect is different. Under the Model Penal Code there is no prohibition against the infliction of physical injury. There, the only limitation is against conduct that causes or creates a substantial risk of serious injury. See MODEL PENAL CODE § 3.08 (1985).
the defense when the parent places the child at substantial risk of death, serious physical or emotional injury, or gross degradation. The second prong addresses three situations.

The language of the proposed statute excluding parental conduct that places the child at a substantial risk of gross degradation is included to address conduct damaging to the emotional well-being of the child, as well as conduct that violates community standards of decency—the types of parental conduct commonly made criminal by the crime of child abuse. It could be argued that conduct placing the child at risk for gross degradation would, by definition, place the child at risk for serious emotional injury. Thus, precluding both types of conduct is redundant. It is, however, possible that parental conduct not resulting in a medically diagnosable emotional injury could nevertheless be offensive to the values of the culture. It should also be noted that the phrase “gross degradation” is left undefined. Because of the subjective nature of the term “degradation,” and the fact that it is so dependent upon community standards, logic dictates that the fact finder resolve the issue on a case-by-case basis. Although admittedly this injects subjectivity into the evaluation of parental conduct, it would seem to be a valid approach to resolving issues that do not have a physical impact on the child.

The inclusion of a requirement that the parental conduct not place the child at a substantial risk of serious emotional injury is of extreme importance, particularly because the statute does not contain a requirement that the punishment be reasonable or necessary. For example, assume that a small boy is kept locked in a bedroom every night for a period of five years as punishment for stealing food. Parents charged with child abuse could assert that the force used to detain the boy was imposed for a disciplinary purpose. Because the proposed statute eliminates the assessment of necessity and reasonableness, such parental conduct would be protected unless the factor of emotional injury is at issue. This points to the conclusion that when reasonableness and necessity are not included as defense criteria, the emotional aspects of a child’s well-being must be contemplated in framing the defense.

Finally, the third basis for denying application of the proposed defense is that a parent must not place the child at a substantial risk of serious physical injury. This provision is frequently included in current codifications of the defense. It is an important provision to...
include because it captures conduct that is neither degrading nor emotionally damaging to the child but instead represents a failed attempt to cause harm to the child or reckless conduct that is socially unacceptable. For example, consider the situation where a stepfather points a .44 caliber magnum at his three-year-old child and tells her to stop crying or he will shoot. Whether the gun goes off or not, the conduct could be deemed to have placed the child at a substantial risk of serious physical injury. Thus, even if the child is not harmed emotionally or physically, the proposed statute recognizes that society has an interest in protecting children from conduct that is so fraught with potential for injury.

In summary, the statute is designed to protect children from physical and emotional abuse. It is also intended to place outside the defense conduct that rises to the level of socially unacceptable and shocking behavior. To the greatest extent possible, invasion into parental decisions is limited in that actions not resulting in physical injury will be less subject to question. This is accomplished in two ways.

First, conduct not resulting in a physical consequence must place the child at a "substantial risk" for one of the listed factors. The use of the word "substantial" should capture conduct that is probable or expected rather than that which is a remote possibility. This is especially important with respect to conduct that is emotionally harmful or degrading. Because many common parental actions may have a somewhat demeaning effect or an emotional consequence, the risk that harm will flow from the conduct should be substantial in nature.

Second, when conduct does not result in physical injury, it must rise to the level of a "serious" or "gross" deviation from accepted behavior. This higher level of tolerance in the nonphysical context is acceptable because the language is meant to address consequences that are subjective by nature and because the physical well-being of the child is protected.

C. Anticipated Effect

The practical implications for parents who are prosecuted for using force against their children can best be analyzed by examining the proposed defense as it would apply to several types of crimes. Consider first, the least serious classification of assaults, those addressing conduct that is offensive or that places another in apprehension of serious bodily harm. Clearly, parents would be able to assert the proposed defense whenever their conduct fell within the scope of these
assault statutes because it would have no physical consequence. As the proposed statute indicates that inflicting physical injury is not protected by the defense, it necessarily follows that something less than physical injury is included within the protection offered. Thus, parents who swat a child on the posterior, grab their cheeks, slap a hand (actions that would likely be deemed offensive contact if the victim were an adult), or assert a threat to “tan your hide” (an action that could be treated as a threat to inflict serious injury) could successfully assert the defense. This type of conduct would be protected because it does not result in physical injury and because it does not place the child at a substantial risk for either a serious or gross consequence.

With respect to these minor misdemeanor assaults, arguably the proposed statute more greatly respects parental autonomy than those jurisdictions using the reasonable and moderate approach. This parental deference results because the fact finder is not asked to evaluate either the reasonableness of, or necessity for, the punishment. In terms of practical effect on individual defendants, the proposed approach would result in little change from the current status of the law, no matter what the approach, because the defense would continue to insulate conduct that is moderate and noninjurious.

At the opposite end of the spectrum, the most serious category of assaults are reserved for conduct that results in or places a person at risk for serious physical injury. Again, under any current approach to the corporal punishment defense, children have been protected from conduct designed to result in injury that is either permanent, protracted, or life threatening. 349 This form of discipline is either specifically excluded from the defense, as in the Model Penal Code, 350 or has been consistently found to be unreasonable or unnecessary in jurisdictions relying on the reasonable and moderate approach. 351 Because the proposed defense places physical injury outside the parameters of the defense, serious injury will naturally be excluded as well.

The proposed statute will not result in a significant change at either end of the spectrum of parental disciplinary conduct. It will, however, have significant implications for parental conduct falling between these two poles. Middle-level assaults are generally aimed at conduct that results in physical injury as opposed to serious physical injury. The proposed statute will most directly impact this group of assaults.

349. See infra Appendix. In several states the only form of discipline specifically excluded is deadly force. See supra note 156.
350. Model Penal Code § 3.08.
Under the proposed approach, a parent who causes physical injury to his child will be unsuccessful in relying on the defense to protect his conduct. In comparison to the Model Penal Code approach, parental latitude with respect to the degree of force that can be utilized will be greatly curtailed. For example, a parent who caused severe bruising to the buttocks of a child might be able to establish that the force used was not designed to cause or known to create a substantial risk of serious physical injury to the child. Thus, under the Model Penal Code approach, the parental conduct could be protected. In contrast, under the proposed approach, the same injury would be classified as physical injury, and therefore the parent could not rely on the defense to prevent conviction.

In jurisdictions where the extent of acceptable punishment is undefined, the most significant impact of the proposed statute would be to provide greater guidance to parents and fact finders with regard to the range of acceptable parental discipline. Because the defense will specifically exclude conduct resulting in physical injury, it again means that parents will have less latitude with regard to the punishment imposed. As the law now stands, in the reasonable and moderate jurisdictions, as well those that evaluate necessity, the fact finder could evaluate the circumstances surrounding the punishment and find that the infliction of the physical injury was reasonable or necessary, or both. Although it might just as well find that it was neither, the issue would at least be in controversy. Under the proposed approach, the fact finder is always confronted with a threshold issue: was there physical injury? If this question is resolved in the affirmative then the defense is unavailable.

The practical implications for parents who are charged with child abuse as opposed to assault are indistinguishable with respect to those aspects of abuse statutes that address the physical well-being of the child. With respect to those provisions of abuse statutes that deal with the emotional well-being of the child (for example, provisions prohibiting degradation or cruel punishment), the question before the fact finder will be whether the conduct placed the child at a substantial risk for gross degradation or serious emotional injury.\textsuperscript{352} The language used is very similar to that contained in the Model Penal Code and, as such, will do little to change the current status of the law in those states using this approach.\textsuperscript{353} In contrast to the reasonable/moderate/necessary jurisdictions, the inclusion of the serious emotional injury and gross degradation limitation is designed to replace a subjective evaluation of the parental conduct (was it necessary or reasonable) with a standard that addresses the direct impact on the child.

\textsuperscript{352} See discussion supra Part III.F.2.

\textsuperscript{353} Compare MODEL PENAL CODE § 3.08, with discussion supra Part III.F.2.
As applied, the proposed statute borrows and combines the best features of current standards. The resulting framework will provide more guidance to parents and greater protection for children. It will yield greater autonomy for parents when their conduct does not result in injury to the child. It will also provide greater protection for children when parents use force with a physical consequence. Stated otherwise, the proposed approach is preferable to the reasonable/moderate/necessary approach because it gives specific guidance to parents as to the limits of lawful disciplinary interaction with their children. It also informs parents that nonphysically invasive discipline will be protected unless it poses a substantial risk of serious or gross harm to the well-being of the child. In contrast to the Model Penal Code approach, the proposal will eliminate the protection for conduct that causes a child to suffer physical injury. Thus, in comparison, the proposed statute will clearly ratchet-down the level of acceptable force currently tolerated in Model Penal Code jurisdictions.

VI. Societal Implications

Although the anticipated practical effects of the proposal will be to provide greater protection to individual children and more guidance to parents and fact finders, it can be speculated that the most profound impact of the statute may be an evolution of attitudes toward the use of physical force to discipline. Moreover, it can be argued that a society less inclined to injure children in the name of discipline would also be less inclined to tolerate child abuse. This is precisely what happened in Sweden when the practice of corporal punishment was legislatively addressed.

Between the period of 1965 and 1979, the Swedish government took a progressively more active role in restricting a parent's right to use corporal punishment to discipline their children. These efforts culminated in 1979 when the Swedish Parliament enacted a law precluding the use of corporal punishment by parents. The catalyst for the governmental response to corporal punishment was, at least in part, the rising incidence of child abuse in Sweden. One of the most interesting aspects of the Swedish ban on corporal punishment is that it was not enacted as part of the Swedish Criminal Code and violation of the law does not include criminal sanctions. Instead, the Swedes undertook substantial efforts to disseminate information designed to assist parents in raising children without the use of corporal punishment. In addition, the government used the public school system as

355. See id. at 449.
356. See id. at 448.
357. See id. at 451-52.
a vehicle to inform children that they could not be struck by their parents.\textsuperscript{358}

Recent studies of child abuse and the use of corporal punishment in Sweden point to several interesting developments. First, public attitudes toward corporal punishment have continued to steadily decline since 1965. The first reported study, conducted in 1965, indicated that fifty-three percent of Swedish adults considered corporal punishment of children to be occasionally necessary.\textsuperscript{359} In 1968, the supporters of corporal punishment had declined to forty-two percent, and by 1971, only thirty-five percent of surveyed individuals continued to stand behind the use of corporal punishment.\textsuperscript{360} In 1981, the number of supporters had fallen to twenty-six percent.\textsuperscript{361} Most recently, a 1995 report indicates that only eleven percent of the Swedish population supports the use of corporal punishment.\textsuperscript{362} Importantly, as the societal tolerance of corporal punishment has steadily declined in Sweden, so has the rate of fatal child abuse.\textsuperscript{363}

In light of the cultural impact of the ban on corporal punishment in Sweden, it could be suggested that a total ban on corporal punishment would be preferable to the approach suggested above. There are, however, several factors that suggest otherwise. First, the Swedish government undertook a series of measures designed to curtail the use of corporal punishment by parents. The initial measures began in 1965 and culminated with the ban fourteen years later in 1979.\textsuperscript{364} It can be argued that the process of molding attitudes was a gradual one, and that as such, the Swedish public slowly became acclimated to greater governmental restriction of the use of disciplinary force. Second, public support for corporal punishment in this country far ex-

\textsuperscript{358} See id. at 454; Straus & Yodanis, supra note 53, at 65.

\textsuperscript{359} See Olson, supra note 354, at 449 (citing Swedish Save the Children Fed’N, Corporal Punishment and Child Abuse 2 (A. Haeuser trans., 1981)).

\textsuperscript{360} See id. at 450.

\textsuperscript{361} See id. at 454.


\textsuperscript{363} For example, a study of trends in criminal homicide in Stockholm during the period of 1951-87, by Olof Wikstrom, indicated that overall homicide rates had generally risen during the study period. However, with respect to the homicide of children by their parents, the peak period was during the 1950s and 1960s. During the 1970s and 1980s, a downward trend is observed, and during the period of 1985-87, there were no reported incidents of the homicide of a child by their parents. See Olof H. Wikstrom, Context-specific Trends in Criminal Homicide in Stockholm 1951-1987, 1 Crime & Crime Prevention 88, 93 (1992). A second study by Somander and Rammer evaluating the homicide of children in Sweden during the 1971-80 period indicated that 96 children were homicide victims. While homicide rates in Sweden during this time period generally increased, and the rates of child homicide attributable to a parental-suicide-child-homicide incident remained stable, the number of children who died from fatal child abuse declined. Specifically, during the final five-year period of the study (1981-85), no deaths were attributable to child abuse. See Lis K.H. Somander & Lennart M. Rammer, Intra- and Extrafamilial Child Homicide in Sweden 1971-1980, 15 Child Abuse & Neglect 45, 47-52 (1991).

\textsuperscript{364} See Olson, supra note 354, at 448-49.
ceeds Swedish support at its zenith. As mentioned above, public support for corporal punishment of children in the United States is more likely to fall in the ninety percent range, as opposed to the fifty-three percent maximum known approval rate in Sweden.

Finally, and perhaps most importantly, the United States has a long legal history emanating from the English common law that supports the use of corporal punishment and dissuades unnecessary interference in matters of family autonomy. Although the original codification of Swedish family law authorized the use of corporal punishment by parents, by 1949 the legislature had begun to question whether parents should have the right to "punish," and by 1957 the ability to assert the corporal punishment privilege as a defense in criminal actions was eliminated. Each of these factors support the proposition that although the Swedish model is one that many child advocates would support, the political, social, and legal climate in this country may be less receptive to an outright ban of corporal punishment. The proposed statutory framework, however, could be viewed as a reasonable first step leading to a society that is less tolerant of child abuse.

A second societal impact to be derived from the proposed defense is that prosecutors may have greater guidance as to when criminal prosecution is and is not appropriate in cases involving the disciplinary use of force. Whether the criminal justice system is an appropriate mechanism for addressing the child abuse crisis is a matter subject to controversy. However, within the context of abuse that arises from the use of disciplinary force, the decision to seek prosecution or not should be made upon the standard factors utilized in

365. See supra Part II.B.2.b.
366. See supra note 359 and accompanying text.
367. See Olson, supra note 354, at 448.
368. See Douglas J. Besharov, Child Abuse: Arrest and Prosecution Decision-Making, 24 AM. CRIM. L. REV. 315 (1987). Many experts believe that the solution to the child abuse crisis lies in providing adequate resources to social service agencies who intervene in families where children have been abused. The proponents of the social service approach often contend that the prosecution of parents who abuse their children is destructive to the family unit, does little to provide treatment to offenders, and may deter parents from seeking medical treatment for injured children. See id. at 318-19. In response to these contentions, Besharov suggests that the criminal justice system may offer some significant advantages over intervention by social service agencies. See id. at 319-24. In support of this argument, he points out that it has been estimated that in up to 40% of the cases involving substantiated abuse, parents have significant personality problems that are unreceptive to typical social service treatment plans. See id. at 319. Additionally, he reasons that even in well-funded social service projects, statistics indicate that abuse recidivism occurs in approximately 50% of the families who are in treatment. See id. Finally, he suggests that the standard practice of social service agencies in removing the child from the home and placing them in what often turns into long-term foster care may be as disruptive to family unity as the alternative of criminal prosecution. See id. at 318. These factors, among others, cause Besharov to suggest that the criminal justice system may offer significant benefits over the traditional social service approach to child abuse. See id. at 319-24.
prosecutorial decision making, rather than the lack of clarity with respect to a potential defense that could be asserted by a parent.

For example, assume that a father beats his six-year-old boy with an extension cord for making what he perceived to be sexual advances toward the boy's two-year-old sister. Further, assume that the injuries inflicted caused long-lasting, multiple bruises on the child's back and bottom. In jurisdictions using the reasonable/moderate/necessary standard, the prosecutor can only speculate as to whether the jury would find that the punishment was reasonable or necessary. Although the imposed punishment is harsh, the misconduct of the child is controversial. As such, it becomes difficult to anticipate the likely perspective of the fact finder. Because prosecutorial resources are limited and the potential outcome is questionable, the prosecutor may well refrain from seeking prosecution. Applying the same hypothetical in Model Penal Code jurisdictions, it is less likely that the prosecutor would proceed with prosecution. Because the child did not suffer permanent injury or disfigurement, the defense would apply unless the jury found that the parental conduct placed the child at a substantial risk for serious injury. Thus, even though the subjective elements of reasonableness and necessity are removed from the Model Penal Code approach, the high threshold of force authorized by the defense would again serve as a deterrent to prosecution.

Finally, applying the hypothetical to the suggested proposal, the prosecutor would evaluate the threshold question of whether physical injury was inflicted. Because the injury inflicted falls within the proposed definition of physical injury, the father's conduct would not be protected by the defense. Consequently, the clarity of the proposed defense would facilitate prosecution if the case was otherwise suitable for prosecution.

369. The American Bar Association has suggested the following factors as typical issues to consider in the process of pursuing criminal prosecution: (1) whether the prosecutor believes that the defendant is guilty; (2) the degree of harm caused by the crime; (3) the disproportion of the punishment in relation to the offense; (4) improper motivation by a complaining party; (5) reluctance of victim to testify; (6) cooperation of the defendant in other potential criminal prosecutions; and (7) whether prosecution by a second jurisdiction is anticipated. American Bar Ass'n, Standards Relating to the Prosecution Function and the Defense Function ch. 3, § 3.9(b) (2d ed. 1979).

370. See State v. Nevels, 609 S.W.2d 725 (Mo. Ct. App. 1980). The disciplinary action taken by the defendant in this case arose because the six-year-old victim was alleged to have been involved in sexual play with his two-year-old sister, and he had failed to learn his ABCs. See id. at 726. Tragically, the hypothetical posed does not include a complete rendition of the force used by the defendant. Additionally, the child's head was held under water, he was thrown across a room, and stomped in the stomach. See id. The autopsy performed on the victim indicated that the child died as the result of numerous internal injuries and bleeding in the brain. See id. at 725-26.

371. It is true that in cases involving conduct that does not result in physical injury, subjective concerns presented by the proposed defense would continue to be factored into the prosecutor's decision to pursue criminal charges. When criminal laws encompass conduct that does not have a physical consequence, a subjective issue always come into play. This would appear to be
The importance of this clarity cannot be understated. If the hypothesis that current standards used to define the defense are an impediment to prosecution is correct, then the quickly following assumption is that many parents who abuse their children are not held accountable for their conduct. It has been estimated that approximately five percent of the instances of child abuse result in criminal prosecution. Although the reasons for this phenomenon are complex, it is not far-fetched to speculate that the corporal punishment defense is a contributing factor.

The immediate goal of the proposed statute is to provide a legal framework that strikes a balance between the continuing viability of the parental defense while simultaneously providing a clear statutory prohibition against force that results in injury. The statute has been drafted to include components that appeal to supporters and detractors of the practice of using corporal punishment. Less assessment of why and how a punishment is imposed has been balanced against a clear prohibition against physical injury. It is hoped that such a balance will result in a politically appealing alternative to current statutory schemes.

The process of suggesting a politically acceptable solution is only the most immediate of the intended goals of the proposed statute. It is also anticipated that if adopted, the proposed statute will nudge societal attitudes on the value of using corporal punishment to teach the concepts of right from wrong. That is to say, if society condemns discipline that results in injury then a clear statement has been made that discipline and harm are no longer compatible concepts. Although wishful thinking may be afoot, it can be hoped that, whatever the contours of the ensuing debate, a society less tolerant of child abuse will emerge. Although the complexity of the child abuse phenomena can seem insurmountable, a statutory proposal that places its focus on protecting the physical integrity of children is a cost-effective and sensible first step.

VII. Conclusion

Research of this nature cannot be undertaken without becoming keenly aware of the fact that parental acts of aggression can assume heinous dimensions that shock the conscience and burden the soul. The reported cases tell us that in the name of discipline children are

an unavoidable consequence of punishing conduct that offends human decency, is grossly degrading, or has a serious impact on the emotional well-being of the child.

beaten with belts,\textsuperscript{373} electrical cords,\textsuperscript{374} sticks,\textsuperscript{375} coat hangers,\textsuperscript{376} bats,\textsuperscript{377} and studded weapons.\textsuperscript{378} They are locked in rooms without food or heat and forced to carry excrement\textsuperscript{379} or to eat urine-soaked food.\textsuperscript{380} They have plastic bags placed over their heads,\textsuperscript{381} are knocked into walls,\textsuperscript{382} are scalded,\textsuperscript{383} or emersed in freezing water.\textsuperscript{384} They are forced to drink water until they die,\textsuperscript{385} or they are beaten until they jump from windows to their death.\textsuperscript{386} They are injured, they are scarred, and they die.

Some might suggest that the defense is working as it should because most of these parents have been brought to justice. Others would contend that these cases are abhorrent aberrations. It could even be speculated that it is the pernicious ingenuity of certain parental discipline that engenders our concern. If this perspective is assumed, two questions must be posed. How do we explain the staggering number of reported cases of abuse, many of which have suspected origins in the use of disciplinary force? And most importantly, would parents so frequently abuse their children if society clearly prohibited their physical injury?

If the parental force defense plays any role at all in the abuse of children then logic dictates that the issue of how much discipline is too much must be reexamined. In the course of that examination it is clear that the physical and emotional well-being of children must be protected. At the same time, the right of parents to discipline children and raise them as they see fit cannot be ignored.


\textsuperscript{376} See Stoker v. Commonwealth, 828 S.W.2d 619, 621 (Ky. 1992).


\textsuperscript{378} See State v. Killory, 243 N.W.2d 475, 478 (Wis. 1976).


\textsuperscript{385} See State v. Crawford, 406 S.E.2d 579 (N.C. Ct. App. 1991); State v. West, 404 S.E.2d 191, 193-94 (N.C. Ct. App. 1991). The defendants maintained that the water was administered for a medical reason. See Crawford, 406 S.E.2d at 583. It was the state's contention that the water was administered as a disciplinary measure. See id. at 582-83.

The balance sought by the proposed statute seeks to recognize both factors. By removing the question of reasonableness and necessity from the consideration of the fact finder, parental autonomy is not only maintained, but enhanced. By refusing to condone conduct that places a child at risk for serious emotional injury and limiting acceptable physical interaction to that which does not result in physical injury, the well-being of the child is protected. Simply stated, there is less reason to question the reasonableness or the necessity for disciplinary punishment if the physical and emotional well-being of the child is sacrosanct.

Any human that has ever parented a child recognizes why the reluctance to set a bright line has been so long lasting and so prevalent. Raising children has never been easy. The recognition that loss of patience, temper, and restraint is a frequent occurrence in family life is universally accepted. With just this thought in mind, some may think the proposed statute casts too wide a net—that loving parents will be subjected to criminal castigation for a moment of ineffective parenting.

Although the likelihood of this contingency seems remote, it is impossible to know how judges and juries will interpret a particular statutory proposal, and clearly this statute will decrease the degree of force that is lawful in most jurisdictions. Yet, in the final analysis, the proposal simply says that in the process of teaching children right from wrong, parents must not grossly degrade, inflict physical injury upon, or subject to serious emotional harm the children entrusted to their care.

It is expected and intended that a standard that delineates crime and punishment in this fashion will require parents to discipline their children with greater restraint; all in all, a small price to pay for a society whose children have been shaped by a gentle hand.
## APPENDIX

<table>
<thead>
<tr>
<th>States</th>
<th>Common Law</th>
<th>Justification Statute</th>
<th>Statutory Incorporation</th>
<th>Special Notes</th>
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* This category is meant to be illustrative of states that reference the scope of the parental privilege in the context of a specific crime; for example, child abuse or child endangerment. This listing does not purport to be exhaustive, and it does not include statutes that make it a crime to use, for example, inhumane corporal punishment or to cruelly punish.

† Key:

- **R/M**: Reasonable and moderate force
- **R/R**: Reasonable force that is reasonably necessary
- **MPC**: Model Penal Code
- **MPC/M**: Model Penal Code approach that modifies factors indicating excessive punishment
- **Combined**: Includes statutes that require force to be reasonable and reasonably necessary plus additional language excluding conduct that results in or creates a substantial risk of factors such as death, serious injury, disfigurement, emotional distress, or extraordinary pain.
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