PARENTAL ENTITLEMENT AND CORPORAL PUNISHMENT

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I
INTRODUCTION

Corporal punishment is conduct distinguished legally from generic assault and battery by its context and purpose—namely, its use by one person having authority over another for the purpose of improving the latter's behavior and character. With respect to context, public debate concerning corporal punishment in recent decades has been limited to the situation of parents' or their agents' (principally school teachers) using it on children. Indeed, opponents of corporal punishment often point to the settled, widespread conviction that it is never appropriate for adults in a position of authority over other adults to hit the latter for purposes of correction.[1] With respect to purpose, although there are worries that parents will strike children with illicit purpose or with no purpose if given permission to strike them at all,[2] the core issue in the corporal punishment debate is whether striking children for the purpose of correction is permissible. Because of corporal punishment's specific context and purpose, pertinent political and public debate typically focuses on

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1. *See, e.g.*, 114 PARL. DEB., S. 39th Parl., 2d Sess. 1400 (2007) (statement of Hon. Hervieux-Payette), *available at* http://www.parl.gc.ca/39/2/parlbus/chambus/senate/deb-e/011db_2007-11-14-e.htm?Language=E&Parl= 39&Ses=2#69 [hereinafter Canadian PARL. DEB.] (describing corporal punishment as "a practice that is outdated, barbaric, and discriminatory towards our children"); Susan H. Bitensky, *The Poverty of Precedent for School Corporal Punishment's Constitutionality Under the Eighth Amendment*, 77 U. CIN. L. REV. 1327, 1332–33 (2009) (finding "tremendous cause for concern from the standpoint of human suffering and child endangerment"); Peter Munro, *Smack the Child, Go to Jail: Parents Pressured*, SUN HERALD (Sydney), Aug. 23, 2009, at 14 (noting comment by a proponent of legislation to ban corporal punishment that "children here are the only people against whom violence is sanctioned and justified as discipline").

2. *See, e.g.*, Peter Gelzinis, *Spanking Law Won't Hit Where It Really Hurts*, BOSTON HERALD, Nov. 28, 2007, at 8 (relating comments by sponsor of bill to ban corporal punishment suggesting that the ban would reduce the incidence of excessive parental violence against children); Munro, *supra* note 1 (relating comment by public official in Australia that "anything that a parent does out of frustration or temper is absolutely wrong, but we should be able to decipher between what is child abuse and what is not"); Carolyn Norton, *Move on to Ban School Paddling*, HERALD-SUN (Durham, N.C.), Mar. 15, 2007, at A1 (reporting that state legislator introduced bill to ban paddling in public schools "after hearing about a Robeson County case where a twelve-year-old boy was so severely bruised by a teacher's spanking that he was taken to the emergency room").

whether and to what extent child rearing differs from other contexts in which one person might wish to change the behavior and attitudes of another.

Child rearing might be unique in terms of its empirical features, such as the nature of children's minds or the motivations and dispositions of parents in controlling their children. Those features might support a claim that corporal punishment is uniquely effective with children, necessary with children, or not harmful to children. Empirical arguments concerning the needs and welfare of children have in fact dominated debate concerning corporal punishment. Supporters of a ban contend that corporal punishment is not effective or at least not necessary, that it inflicts psychological damage on children, that it undermines children's trust in parents, that it encourages children to use violence, and that parents often hit children with improper motivation and disposition.[3] Opponents of a ban contend that corporal punishment is necessary or especially effective, at least with some children; they deny that spanking or paddling is psychologically damaging, often citing their own personal

3. *See, e.g.*, Canadian Found. for Children, Youth & the Law v. Canada, [2004] S.C.R. 4, 116–17 (Can.) (Deschamps, J., dissenting) ("The government's explicit choice not to criminalize some assaults against children violates their dignity."); H.R. 3922, 185th Leg., 1st Spec. Sess. (Ma. 2007) (stating that reasons for a bill to prohibit corporal punishment included "the emotional harm and risks of bodily harm associated with corporal punishment"); Canadian PARL. DEB., *supra* note 1, at 1520–30; COUNCIL OF EUROPE, ABOLISHING CORPORAL PUNISHMENT OF CHILDREN 9 (2007), http://www.coe.int/t/transversalprojects/children/pdf/QuestionAnswer_en.pdf (noting that corporal punishment violates children's human rights, causes physical and psychological harm, encourages violence as a solution to conflict, and is an ineffective disciplinary measure); Susan H. Bitensky, *Spare the Rod, Embrace Human Rights: International Law's Mandate Against All Corporal Punishment of Children*, 21 WHITTIER L. REV. 147 *passim* (1999); Elizabeth T. Gershoff, *More Harm Than Good: A Summary of Scientific Research on the Intended and Unintended Effects of Corporal Punishment on Children*, 73 LAW & CONTEMP. PROBS. 31, 54-56 (Spring 2010) (concluding that corporal punishment is no more effective than other disciplinary methods and that "the risk for harm . . . far outweighs any short-term good"); Elizabeth T. Gershoff & Susan H. Bitensky, *The Case Against Corporal Punishment of Children*, 13 PSYCHOL. PUB. POL'Y & L. 231, 236–37 (2007) (disputing the hypothesis that there might be a "genetic basis for the association of parental corporal punishment with child behavior problems"); Brandee Hayhurst, *Bill May Expel Corporal Punishment*, TIMES-NEWS (Burlington, N.C.), Mar. 23, 2007, *available at* http://www.thetimesnews.com/news/school-85-punishment-corporal.html (citing an advocate for children who argued for a ban on the grounds that "spanking is ineffective compared to discipline programs that teach children positive behavior" and that it is hypocritical to "take a piece of wood and hit it upside a child's backside for things like fighting or being violent"); Keith Howard, *Spanking Ban Debate Brings Attention to Issue*, LOWELL SUN (Mass.), Nov. 29, 2007, *available at* NewsBank, File No. 7590380 (citing supporter of spanking ban as asserting that corporal punishment does not work, but rather just induces more misbehavior); Mandy Locke, *UNC Study Links Spankers to Abusers*, NEWS & OBSERVER (Raleigh, N.C.), August 19, 2008, at B1 (discussing a study showing that parents who spank children with an object are nine times more likely to abuse the children through more severe means, and quoting a child advocate as saying a result of spanking is that the "relationship of trust is broken"); Munro, *supra* note 1 (citing studies linking corporal punishment with "increased child aggression and delinquency, and increased adult criminal and antisocial behavior"); Laurel J. Sweet, *Bay State Going Slap-Happy; House to Debate Ban on Spanking*, BOSTON HERALD, Nov. 27, 2009, at 2 (quoting Swedish embassy official as saying, "There are other ways and means to bring up children than to beat them . . . . Much better ways."). Critics of corporal punishment in schools also complain that it is administered in a discriminatory fashion, with minority and disabled students disproportionately suffering paddlings. *See, e.g.*, Sam Dillon, *Disabled Students Are Spanked More*, N.Y. TIMES, Aug. 11, 2009, at A10.

experience to make both empirical points; and they assert that the state interference in family life a ban would entail would itself be harmful to children.[4]

In addition to its empirical features, corporal punishment of children might be unique in terms of its normative features—in particular, in terms of the persons involved having rights or duties unique to the child-rearing context. Arguments against corporal punishment generally rely on a normative premise denying this uniqueness. The premise is that children possess the same moral rights adults are thought to possess, even as against their parents, and that some of those rights preclude corporal punishment—namely, a right not to be hit or, more generally, a right against attacks on dignity or bodily integrity.[5]

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4. *See, e.g.*, *Canadian Found.*, S.C.R. at 40–46, 64–66 (Binnie, J.) ("Parliament could reasonably conclude that the intervention of the police or criminal courts in a child's home in respect of 'reasonable' correction would inhibit rather than encourage the resolution of problems within families."); Christian Educ. S. Africa v. Minister of Educ. 2000 (4) SA 757 (CC) at 804 (S. Afr.) (reciting argument of religious school organization that "physical punishment only became degrading when it passed a certain degree of severity"); COUNCIL OF EUROPE, *supra* note 3, at 33 (noting that personal experience makes it difficult for many supporters of corporal punishment to change their minds, because "[n]one of us likes to think badly of our parents, or of our own parenting"); Robert E. Larzelere & Diana Baumrind, *Are Spanking Injunctions Scientifically Supported?*, 73 LAW & CONTEMP. PROBS. 57, 86 (Spring 2010) ("[S]ome parents are at risk for extremely permissive parenting or for increased verbal hostility when they are prohibited from using spanking or equally effective back-up tactics."); Deana A. Pollard, *Banning Corporal Punishment: A Constitutional Analysis*, 52 AM. U. L. REV. 447, 481 (2002) (noting that state statutes authorizing corporal punishment of children "generally contain express legislative findings . . . regarding discipline and the parents' need to train and educate their children"); Dillon, *supra* note 3 (quoting one school principal as saying that paddling is necessary when other means fail and another as saying "I was whipped as a child, so it's fine with me."); Kelli Hernandez, *Is Corporal Punishment on the Outs?: School Board to Address Issue Monday*, NORTHWEST FLA. DAILY NEWS, Apr. 11, 2009, *available at* http://www.nwfdailynews.com/news/punishment-16620-corporal-school.html (quoting lobbyist for corporal punishment ban: "You always have those legislators that will say, 'I got it, I deserved it and I turned out fine.'"); Rachelle Kliger, *A Painful Education in the Middle East*, YEMEN TIMES, May 18, 2009, *available at* NewsBank, File No. a0d2d5de78f4a2fdd7b519aa9235a7be0789b57 (reporting statements by teachers in middle-eastern countries that if they are not permitted to hit pupils, academic achievement will decline); Munro, *supra* note 1 (citing 2006 survey in Australia finding that sixty-nine percent of respondents "thought it sometimes necessary to 'smack a naughty child'"); Norton, *supra* note 2 (quoting school superintendent who defended paddling a misbehaving pupil as sometimes "the only way to affect his behavior"); Lesley Thomas, *Why Smacking Is a Hit Again*, DAILY TELEGRAPH (London), Feb. 21, 2008, *available at* http://www.telegraph.co.uk/news/ features/3635705/Why-smacking-is-a-hit-again.html (quoting contributors to mumsnet.com asserting that smacking is effective and sometimes the only effective way to manage children); Tracy Sabo & Vivienne Foley, *More than 200,000 Kids Spanked at School*, CNN.COM/US, http:// www.cnn.com/2008/US/08/20/corporal.punishment/index.html (quoting James Dobson of Focus on the Family as saying "we have systematically eliminated the tools with which teachers have traditionally backed up their word. We're now down to a precious few" and a school superintendent as saying "It works on some . . . ."). Some opponents also raise the specter of police arresting parents and throwing them in jail for slight physical restrictions on children, such as putting on a child's seat belt, *see* Canadian PARL. DEB., *supra* note 1, at 1530–40, but the very ludicrousness of that concern is suggestive of how weak a justification based on a parental entitlement to hit children is viewed to be.

5. *See, e.g.*, *Canadian Found.*, S.C.R. at 62, 64 (Binnie, J.), 112–15, 117 (Deschamps, J., dissenting) (finding that corporal punishment infringes children's dignity and makes them into second-class citizens); X, Y and Z v. Sweden, App. No. 8811/79, 5 Eur. Comm'n H.R. Dec. & Rep. 147, 156 (1982) (observing that the Swedish criminal law of assault as applied to children "is intended to protect

In popular discourse, normative arguments against a legal prohibition on parents' using corporal punishment with children sometimes rest on a general moral condemnation of state intrusion into family life.[6] That complaint, however, is hardly specific to child rearing; the same argument was made against state intervention to prevent husbands from hitting their wives for the purpose of behavior modification.[7] And it clearly goes too far, insofar as it would seem to rule out any laws against child abuse and neglect, even though everyone recognizes there must be some such laws.

One normative contention one might expect to dominate defenses of corporal punishment, insofar as it does ostensibly differentiate child rearing from other contexts, is that parents possess special rights—that is, that corporal punishment must be allowed because parents are morally entitled to deal with their children as they wish, absent clear and substantial harm. Yet that sort of parental-entitlement-based claim, though once common and certainly sometimes still expressed, is not especially prominent in debates concerning corporal punishment today.[8] Moreover, when defenders of corporal punishment

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potentially weak and vulnerable members of society"); *Christian Educ. S. Africa*, *supra* note 4, at 8–9 (summarizing South African Minister of Education's claim that corporal punishment of children violates their constitutional rights); H.R. 3922, 185th Leg., 1st Spec. Sess. (Ma. 2007); COUNCIL OF EUROPE, *supra* note 3, at 5 ("Children have the same rights as adults to respect for their human dignity and physical integrity."); Quebec Commission des droits de la personne et des droits de la jeunesse, Corporal Punishment as a Means of Correcting Children 8 (1998) ("Corporal punishment violates the child's dignity, partly due to the humiliation he or she is likely to feel, but mainly due to the lack of respect inherent in the act."); Bitensky, *supra* note 3, *passim*; Munro, *supra* note 1 (noting pressure on Australia from the U.N. Commission on Children's Rights).

6. *See, e.g.*, Gelzinis, *supra* note 2 (opining that the "spare-the-rod-spoil-the-child, government-out-of-my-life crowd is sure to be in full froth" when the Massachusetts legislature considered a bill to prohibit spanking); Howard, *supra* note 3 (quoting a state legislator opposed to a bill that would ban spanking as saying "I just don't think it's something for the state to get into"); Thomas Hammarberg, *Europe Is Moving Towards a Total Ban on Domestic Violence Against Children*, COUNCIL OF EUROPE, http://www.coe.int/ t/commissioner/Viewpoints/080121_en.asp (last visited Oct.20, 2009) (noting "widespread opinion that relation inside the family are no matter for outsiders").

7. *See* Meghan E.B. Norton, *The Adulterous Wife: A Cross-historical and Interdisciplinary Approach*, 16 BUFF. WOMEN'S L.J. 1 *passim* (2008) (discussing historical attitudes toward husbands' use of violence to discipline wives in the Anglo American legal tradition); Katerina Shaw, *Barriers to Freedom: Continued Failure of U.S. Immigration Laws to Offer Equal Protection to Immigrant Battered Women*, 15 CARDOZO J. L. & GENDER 663, 686 (2009) (discussing attitudes today among certain Asian and Middle Eastern immigrant groups in the United States); Sweet, *supra* note 3 (quoting a man who had been charged with assault for hitting his child with a belt as saying, "Are they going to start legislating that you can't raise your voice to your kids? That you can't tell them when to go to bed? We'll be communists then.").

8. *Cf. Canadian Found.*, S.C.R. at 118–19 (Deschamps, J., dissenting) (observing that the majority had stipulated that the purpose of Ontario's authorization of corporal punishment was "to protect children and families from the intrusion of the criminal law" when in fact its purpose when enacted was to serve notions of parental entitlement resting on "traditional notions of children as property"); Gershoff & Bitensky, *supra* note 3, at 246 (noting dramatic change in the legal environment governing corporal punishment in the past thirty years, with more than half of U.S. states passing laws to ban it in schools, as well as change in the social-science community, with "many national professional organizations" calling for a ban); *id.* at 249 (noting that twenty-three countries have passed laws in recent decades banning corporal punishment in the home); *id.* at 253 (describing substantial increases in parental concern to protect children from harm and parental willingness to accept advice on child

do invoke parental rights, they typically do so in a limited way—one carefully tied to assertions about children's needs or parents' superior ability to determine what disciplinary action a particular child needs in a particular situation.[9] Even when the claim is bolstered with an invocation of religious conviction, it is typically not that some religion prescribes a different way of life in which hitting has special meaning, but rather that adherents respect the wisdom of religious authority about how best to instill a sense of discipline in children.[10] In addition, one is as likely to encounter claims that parents have a duty to use corporal punishment as one is to encounter claims that parents are entitled to use corporal punishment on children.[11]

This treatment of parents' normative status differs from that in other child-rearing contexts, such as parental opposition to regulation of religious schooling and parental freedom to circumcise boys. Examining that difference might illuminate distinctive features of corporal punishment relative to other child-rearing controversies. One aim of this article is therefore to examine the role that parental-entitlement claims play in debates about corporal punishment of children and to explain why they are less prominent and less grandiose than in certain other contexts. In addition, this article explains why parental

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rearing from outsiders); *Spare the Rod, Say Some*, ECONOMIST, May 31, 2008, ("[A] consensus against hitting children is clearly gathering momentum in the developed, law-governed parts of the world. . . . Some parents may still insist that their right to dissuade a toddler from doing very dangerous things is also worth protecting; but they are losing the argument.").

9. *See, e.g.*, *X, Y and Z*, 5 Eur. Comm'n H.R. Dec. & Rep. at 148, 150 (summarizing argument that a ban on corporal punishment restricts parents' freedom of conscience); *Anti-corporal Punishment Bill: Hearing on A.B. 755 Before the Assembly Committee on Public Safety*, 2009 Leg., 2007–2008 Sess. 5 (Ca. 2007) (explaining the Attorney General's position that the lawfulness of corporal punishment depends on necessity and reasonableness under the circumstances); COUNCIL OF EUROPE, *supra* note 3, at 13 (responding to the argument made by the legislator quoted in Gelzinis' article); Gelzinis, *supra* note 2 (quoting legislator who sponsored bill to ban spanking as saying, "[E]very parent is convinced they know how to do it just right, and it's none of anybody else's damn business—least of all the state['s].").

10. *See, e.g.*, Christian Educ. S. Africa v. Minister of Educ. (4) SA 757 (CC) (S. Afr.), *supra* note 4, slip op. at 3–4, http://www.saflii.org/za/cases/ZACC/2000/11.html (setting forth biblical texts cited by plaintiff, which connect corporal punishment with teaching discipline); David E. Pratte, *Is it Unloving to Spank Our Children?*, THE GOSPEL WAY, http://www.gospelway.com/topics/family/spanking.php (last visited Oct. 20, 2009) ("So God Himself uses chastening as an act of love. Are we wiser than God?").

11. *See, e.g.*, Hun Yin Fa [Marriage Law] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 10, 1980, effective Jan. 1, 1981) 2000 Standing Comm. Nat'l People's Cong. Gaz. art. 23 (P.R.C.) ("Parents shall have the right and duty to subject their children who are minors to discipline . . . ."); Ronald L. Pitzer, *Parental Attitudes and Beliefs Regarding Punishment as a Means of Child Discipline*, CHILDREN, YOUTH & FAMILY CONSORTIUM, http://www.cyfc.umn.edu/family/resources/GB1018.htm (last visited Oct. 20, 2009) (describing "a normative expectation in American society that parents will use physical punishment with their children"); Ryan Wolf, *"Spanking Judge" Punished by State Commission on Judicial Conduct*, VALLEYCENTRAL.COM, http://www.valleycentral.com/news/news_story.aspx?id=281247 (last visited Oct. 20, 2009) (discussing warning given to judge who ordered parents of truants either to pay a fine or paddle their child in the courtroom); How to Spank Your Child in a Loving and Nurturing Manner, http:// motherfac.blogspot.com/2007/01/how-to-spank-your-child-in-loving-and.html (last visited Oct. 20, 2009) ("It is a parent's right—no, it is the parent's duty to spank her child when she needs it.").

entitlement should in fact not play any role in these debates and why any normative claims should instead be couched solely in terms of children's rights. That conclusion as to the proper scope of parental-rights claims does not dictate a particular policy outcome, for it is possible to make plausible arguments for or against corporal punishment in terms of children's rights, depending on what empirical assumptions one makes. But adhering to proper limits on normative claims can help to clarify whether and to what extent particular empirical issues are crucial to the policy analysis.

II
TYPES OF PARENTAL-RIGHTS CLAIMS

Having a right is conceptually different from merely being permitted to do something. One might happen to be legally free to do many things that the state arguably could, if it wished, prohibit one from doing. Driving down particular streets or at a particular speed is an example; that the law permits it does not mean that one has an entitlement to do it. Having a right is also different from possessing power or authority to take certain actions. The law gives attorneys authority to represent other persons in court without ascribing to them a right to do so. Teachers are empowered or authorized to discipline children, but we do not ordinarily say they have a right to do so; we say, rather, that they are permitted to do so. To have a right means to have an entitlement for one's own sake that one can assert to prevent others from taking away or withholding something from one, or from interfering with one's actions. And a right entails others' owing duties to the right holder. Thus, a claim of parental entitlement goes beyond saying that it would be an innocuous or good thing to permit, empower, or authorize parents to do certain things: it rather asserts that it would be wrong for the state to prohibit or interfere with parents' doing certain things and that the wrong would be a breach of duties owed to parents.

Substantively, parents' rights claims comprise two categories—possession rights and control rights. Possession rights are claims to a legal relationship with and custody of a child, whereas control rights are claims to power and freedom in child rearing once a parent–child custodial relationship is established.[12] A right to engage in corporal punishment is within the latter category. Other common claims to power and freedom in child rearing arise in medical and education contexts; parents sometimes object to state-imposed requirements for

12. The former are reflected in the line of Supreme Court cases from *Stanley v. Illinois*, 405 U.S. 645 (1972) to *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), addressing the rights of unwed biological fathers to become legal parents. The latter are reflected in Supreme Court decisions addressing parents' rights to control their children's education, such as *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), to be exempt from child-labor laws, Prince v. Massachusetts, 321 U.S. 158 (1944), and to decide whether and when children will spend time with third parties such as grandparents, Troxel v. Granville, 530 U.S. 57 (2000).

care of children's bodies, and parents sometimes object to state-prescribed curricula in public or private schools.[13]

In addition to varying by subject matter, claims to parental-control rights vary in terms of their moral basis—specifically, in terms of whose interests the rights are said to protect. Ordinarily, individuals' rights are understood to protect just their own interests (including their interests in having their choices be effective, whether the choices are on the whole good for them or not).[14] If I have a right and the state violates it, the state has done a wrong to me, and it is hard to make sense of the state's having wronged me except in terms of my interests. However, it is a peculiarity of parents' rights discourse that they are often justified not (only) on the basis of parents' own interests, but also or alternatively on the basis of children's interests or the interests of society generally. Thus, one finds arguments that parents should have control rights because this is best for children or because this promotes certain societal aims such as cultural diversity, as well as arguments that parents should have control rights for the sake of their own preference satisfaction, perhaps as compensation for their child-rearing efforts and sacrifices.[15] Part III below returns to this peculiarity and suggests that it makes most parents' rights discourse incoherent and misguided. The present focus, though, is on the specific content of parents' rights claims in different contexts, which does not appear to be much influenced by any widespread sense of when such claims are coherent and apt and when they are not.

Examining the particular content of parental-entitlement claims in the corporal-punishment context and contrasting it with the content of such claims in other contexts might reveal why they are less prominent in the one context than in others. Doing so might reveal, too, something about the relative inherent strength or appropriateness of such claims in the corporal-punishment context and so clarify which empirical issues are crucial to assessing the validity of parental-rights claims in this context. The analysis below uses as points of contrast parent–state conflicts over regulation of religious schools and debates

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13. *See* Douglas County v. Anaya, 694 N.W.2d 601 (Neb. 2005) (rejecting parental religious objection to a newborn-metabolic-screening mandate); JAMES G. DWYER, RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS 45 (Cornell Univ. Press 1998).

14. *See* James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371, 1406–11 (1994) (distinguishing the right to self-determination from the right to control others).

15. *See* Dwyer, *supra* note 14, at 1426–46. Societal interests are sometimes invoked to justify other individual freedoms as well. For example, John Stuart Mill defended free speech in part on the grounds that a free marketplace of ideas is most conducive to progress toward truth. *See* JOHN STUART MILL, ON LIBERTY 59 (John Gray ed., Oxford Univ. Press 1991) (1859). But one proffering such an argument is unlikely to speak in terms of individual rights, rather than simply individual freedom, because it is incongruous with our understanding of the purpose of rights to say, "I should have this right because that would be good for others." For arguments concerning corporal punishment and cultural diversity, see generally Alison Dundes Renteln, *Corporal Punishment and the Cultural Defense*, 73 LAW & CONTEMP. PROBS. 253 (Spring 2010).

about the permissibility of male circumcision, the former lying in the area of education and the latter in the area of care of children's bodies.

Parents' rights claims have been dominant in political and legal debates concerning regulation of religious schools, and they invoke all three moral bases—parents' rights, children's rights, and society's interest in cultural diversity. Parents' rights–based arguments against substantive restrictions on religious schooling rest on claims that according parents plenary rights to control children's education (1) is best for children because parents are in the best position to make decisions about children's schooling, given that parents care most about and know best their own children; (2) protects parents' interest in exercising their religion and living by their own lights; and (3) serves society's collective interest in cultural diversity.[16] Parents' rights–based claims are also prominent in arguments for continuing to permit parents to have their baby boys circumcised, against objections that this violates the boys' basic right to bodily integrity, and they generally rest solely on parents' interests—predominantly, the interests of Jewish or Muslim parents in following the dictates of their religions and fathers' interests in making their sons' privates look like theirs.[17] Parents' rights–based arguments in the corporal-punishment context, in contrast, are, as noted above, secondary to a debate over the best way to raise children, and the arguments are generally limited to claims that according parents a right to spank is necessary to serve children's welfare.

Why these differences in the emphasis on and moral basis for assertions of parental entitlement? Looking more closely at what parents are seeking in each context suggests an answer. In the religious-school-regulation context, parents are effectively demanding the power to establish aims for their children's development different from those the state has established for children generally. Parents and religious-school administrators do not typically maintain that state curricular regulations are based on faulty or inadequate empirical research or are poorly designed to ensure a good secular education for children. Rather, they assert that their first priority must be to ensure the spiritual welfare of their children by immersing them in an ideologically congenial environment, and they might even reject outright the aim of providing a secular education, at least in certain subjects such as science and history.[18] As such, invocation of children's rights or of children's interests as a basis for the parents' having rights are inapt in this context. Any court adjudicating the parent–state conflict could not itself conclude that the parents are correct about the content or relative importance of their children's spiritual welfare because state actors in a liberal society are not supposed to make judgments about

16. *See* Dwyer, *supra* note 14, at 1426–46.

17. *See, e.g.*, Joel Silverman, *Circumcision: The Delicate Dilemma*, THE JEWISH MONTHLY, Nov. 1991, *available at* http://jewishcircumcision.org/thejmonthly1991.htm (quoting a rabbi as saying that "medical opinions have nothing to do with circumcision for Jews. We're not talking about medical benefits. This is not a surgical procedure for us. This is the covenant between us and God.").

18. *See* DWYER, *supra* note 13, at 17.

spiritual matters. At most, a court might conclude that letting the parents act on the basis of what *they believe to be* their children's spiritual welfare will serve *the parents' interests* in abiding by their religious faith.

Arguments based on parental interests therefore have the most purchase in the religious-school-regulation context. Defenders of unregulated religious schooling do nevertheless sometimes contend that parental rights serve children's welfare, and the contention has superficial appeal because in nonreligious contexts the assertion that parents know best is coherent, even if often empirically doubtful. They simply fail to acknowledge that a child-welfare-based argument is incoherent in connection with an ideological contest over whether the state's secular aims or the parents' religious aims for child rearing should be controlling.[19]

Arguments for parental rights of control over schooling that are based on cultural diversity, on the other hand, are coherent and superficially plausible. Eliminating certain forms of schooling could preclude formation of certain types of persons (for example, persons lacking awareness of any way of life other than that of their parents) and could result in extinction of some cultural communities or ways of life. However, the empirical hypothesis that there would be insufficient diversity of some sort as a result of imposing on all private schools academic standards or restrictions as to what students can be taught (for example, no aggressively sexist teaching) is ultimately quite implausible (is there not substantial diversity even among the ninety percent of Americans who graduate each year from public school?) and not readily susceptible to proof. Thus, arguments for a plenary parental right of control over private schooling gain only weak support from invocation of a societal interest in diversity. It is really parents' interest in living according to their religious views that carries the moral weight in the religious-school-regulation context.

In the corporal-punishment context, in contrast, parents are typically not asking to establish their own aims for children's development and well-being. Parents who wish to spank do not assert in public debates that they want some sort of life for their children different from that of mainstream society—for example, a life of pain and fear.[20] Nor do they assert an interest of their own in

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19. One does sometimes see an argument for parental power over schooling that appeals more indirectly to children's interest—namely, that independently of the quality of the schooling parents choose, children are adversely affected when the state makes their parents upset by thwarting the parents' preferences. *See*, *e.g.*, Michael S. Wald, *Children's Rights: A Framework for Analysis*, 12 U.C. DAVIS L. REV. 255, 280 (1979) (describing the claim that "[i]f we want to bolster the family, parents have to want to perform traditional functions, and they must be able to feel confident that they can perform these functions"). This line of reasoning is rarely prominent, however, because of the obvious moral-hazard concern that it raises—namely, that parents will fare better in public contests the more upset they appear to their children.

20. Underlying the practice of corporal punishment for some parents and religious-school officials is a belief that children should develop an attitude of submissiveness and humility of a sort or to a degree that differs from the mindset the state aims to instill. Underlying that belief is, in turn, a certain ideological view about the inherent nature of humanity and about the proper relationship between the individual and his or her god or the faith community. *See* DWYER, *supra* note 13, at 29. The expression

enjoying a way of life different from the mainstream, one that involves hitting children, nor a societal interest in having a diversity of lifestyles, some that involve hitting and some that do not. Such assertions would not garner much sympathy. Their position, even when they claim support for it in religious texts, is rather that their way of serving the shared aim of instilling proper self-discipline in children is a good one.[21] The disagreement is about means rather than ends. As such, arguments for parents' rights to spank typically rest on children's interests rather than parents' interests or societal interests. Opponents of a ban on corporal punishment do sometimes invoke collective interests—namely, the societal need for future adults to be law-abiding[22]—but not often, and generally not to bolster a claim of parental entitlement. Thus, in the corporal-punishment context, parents assert a right to adopt their preferred means to an end shared with the rest of society (proper discipline of children), whereas in the religious-school-regulation context, parents assert a right to pursue different ends—ends that the state in a liberal society cannot itself adopt. And in the corporal-punishment context, the primary moral basis for parents' rights is children's welfare, whereas in the religious-school-regulation context it is parents' interests, with societal interests playing a secondary role.

The two differences together make sense. When the subject matter is some aspect of child rearing, when everyone agrees that the most important thing is to raise children properly, and when there is no disagreement about what outcome for children is sought, one would expect any parental demands to freedom of choice in the means to achieving that outcome to be couched in terms of children's welfare. In contrast, when there is disagreement about the outcome to be sought, and for some the outcome is one that the state is categorically precluded from embracing (for example, eternal salvation), one

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"beat the devil out of them" captures this outlook. But one does not find such adults speaking in public debates regarding corporal punishment about beating the devil out of children, perhaps because they realize that there would be little public receptivity to an argument that parents are entitled to choose a life of submissiveness and self-abnegation for their children.

21. *See, e.g.*, X, Y and Z, 5 Eur. Comm'n H.R. Dec. & Rep. at 154, 156–57 (rejecting the argument that applying Swedish law of assault to corporal punishment of children would violate parents' rights to freedom of conscience and religion); Kliger, *supra* note 4 (quoting an expert on Islamic law who explained that it encourages parents to use corporal punishment only as necessary to instill discipline, and to guard against using it so much that the child becomes "displeased, inactive and lazy"). One possible interest of parents that might be at stake in any regulation of their child rearing is their self-image as parents who always do what is best for their children, which might be threatened by a law prohibiting something they do. If that self-image is incorrect, though, because they in fact do one or more things that are not best for their children, it is not clear that they have an interest in maintaining that (false) self-image.

22. *See, e.g.*, Lawrence Diller, *The Truth About Spanking: Promoting a Ban is Counterproductive*, NAT'L REV., April 21, 2008, *available at* http://nrd.nationalreview.com/article/?q=M2JmZmU2MzY2YWZmMDI1OTY4YzhjNjM3NTRjYmYyMTI= (arguing that a decline in spanking has caused "a sixfold increase in criminal assaults . . . along with major increases in juvenile delinquency and substance abuse" in Sweden, and suggesting that it might also be the cause of "a wildly growing increase in the use of psychiatric drugs for childhood mental disorders"); Rich Mkhondo, *Bring Back the Rod and Cane*, STAR (South Africa), July 31, 2008, at 18 (arguing that anarchy in schools and violent crimes in society are a result of diminished use of corporal punishment).

would expect parental-entitlement claims to be couched in terms of satisfying the desires of parents and perhaps also in terms of toleration and diversity.

It would not be difficult, though, to construct arguments for a parental right to spank that treat parents' interests or societal interests as independent and sufficient justifications,[23] so it is worth exploring why such arguments are rarely made. An argument based on parents' interests could begin with an assumption that hitting children, relative to other means of disciplining them, can be easier, enable parents to relieve stress, or carry on a family tradition. An argument based on societal interests could begin with an assumption that crime is so costly that society benefits when parents use the disciplinary strategy most likely to prevent criminal conduct, so long as it does not cause substantial and permanent physical damage (because that would reduce productivity too much), coupled with a debatable empirical supposition that spanking is more likely to prevent criminal conduct than is any means of discipline that does not involve hitting. Such arguments, insofar as they treat interests of persons other than children as independent justification regardless of their coinciding with children's interests, implicitly treat as acceptable sacrificing some welfare interest of children for the sake of serving others' interests. It might be that people are generally uncomfortable making arguments that implicitly treat others instrumentally. Yet it could be said also of arguments for a parental right of control over schooling based on parental or societal interests that they implicitly treat children instrumentally.[24]

So why are such arguments less common in the corporal-punishment realm? The answer to that question would appear to lie in the nature of hitting relative to indoctrinating. Hitting is conduct directed at the body, to which adults also feel vulnerable, that causes immediate and tangible suffering, and that is universally regarded as a wrong in all cases when it passes some threshold of severity. We generally view the body as more sacrosanct and more vulnerable than the mind. Because adults worry about being hit themselves, they are more sensitive to the harm that hitting can cause. The immediacy of suffering triggers a negative gut reaction, even in many parents who spank their children.[25] And recognition that extreme hitting is wrong even with respect to children rules out the position that hitting is inherently unobjectionable. In contrast, indoctrination is aimed at the mind, which is viewed as inevitably subject to incursions from without, especially for children. It is not something adults worry about happening to themselves. Any harm it might cause is fairly amorphous and manifest only after a long period. And there is no consensus that

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23. It is also possible to present plausible arguments that corporal punishment is bad for parents. *See, e.g.*, Chick Moorman & Thomas Haller, *Spanking: "This is Going to Hurt Me More than It Hurts You,"* UNCOMMON PARENTING, http://www.uncommon-parenting.com/advice-articles/spanking-this-is-going-to-hurt-me-more-than-it-hurts-you/ (last visited Oct. 20, 2009) (describing how spanking leads children to disconnect from their parents and causes parents to lose stature in their children's eyes).

24. *See* DWYER, *supra* note 13, at 81.

25. *See e.g.*, PAUL KROPP, I'LL BE THE PARENT, YOU BE THE KID: THE HOT BUTTON TOPICS IN PARENTING 95 (Random House Can. 1998) (1991).

indoctrination can be so extreme as to warrant state interference; many people are comfortable even with what they view as the most reclusive and indoctrinatory of child-rearing environments, such as religious cults, unless the reclusiveness serves to shield physical or sexual abuse from public awareness.

These distinctions, on the whole, appear to make people believe greater justification is needed for hitting than for indoctrination, and serving the interests of persons other than the ones who are being hit is inherently weaker as a justification than is serving the interests of the persons who are being hit. The interests of other persons at stake would need to be very great and not able to be served in some other way. Stated in terms akin to constitutional-rights adjudication, a right not to be hit is widely recognized as a fundamental moral right, infringement of which is justifiable only when the least restrictive means are used to serve a legitimate and compelling interest. In contrast, not much consideration is given to the notion of a right not to be indoctrinated,[26] and it might be that most people would not put it on the list of fundamental rights—because there is nothing inherently bad about having some set of moral beliefs or because some amount of exogenous belief formation is inevitable for humans. Indeed many defenders of parental entitlement with respect to children's ideological formation characterize the issue as whether a parent or the state is going to indoctrinate the child.[27] If there is only some weaker form of moral right against being indoctrinated, lesser justification would be needed to infringe the right, and serving the interests of other persons might suffice in some cases, especially when the indoctrination is of a fairly moderate form, as is true of most religious schools.

In sum, the best explanation for the greater prominence of parents' rights claims and for the appeal to the interests of parents and society in supporting those claims in the religious-school-regulation context would appear to be that this context involves parental objections to aims for child rearing, not simply to means of achieving shared aims, making appeal to children's interests inapt. The religious-school-regulation context involves indoctrination, which might appear not to infringe any fundamental right and therefore not require especially compelling justification, so justifications based on interests of persons other than children can appear sufficient to many people. Corporal punishment, in contrast, involves hitting, which requires more compelling justification, and showing that it is actually beneficial to the persons whose prima facie right not to be hit is being infringed is the most compelling justification one could offer.

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26. Significantly, constitutional challenges to religious instruction and symbols in public schools, and challenges to state funding of religious schools, have always invoked the Establishment Clause rather than First or Fourteenth Amendment rights of school children. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 648–49 (2002) (analyzing an Ohio school-choice program under the Establishment Clause).

27. *See, e.g.*, Cathleen A. Cleaver & Greg Erken, *Parental Rights: Who Decides How Children Are Raised?*, 9 FAM. POL'Y 1, 4 (1996); Stephen G. Gilles, *Review Essay: Hey, Christians, Leave Your Kids Alone! Religious Schools v. Children's Rights*, 16 CONST. COMMENT. 149, 184 (1999) (stating that children in public schools tend to become "conformists, hedonists, even nihilists").

The focus of debate is thus on the costs and benefits of spanking for children, to which claims of parental entitlement are largely superfluous. As discussed further below, if defenders of spanking could demonstrate empirically that spanking is necessary for the proper upbringing of children, that should be enough to make the case for its permissibility, especially in an environment like that prevailing in the United States—that is, one in which it is currently legally permitted and widely condoned.

Circumcision shares some features with religious schooling and some with corporal punishment. It is like religious schooling insofar as most parents choose it for cultural or ideological reasons, if they in fact consciously choose it (in the United States, many parents sign consent forms simply because the practice is taken for granted here),[28] so to some extent parents' choices reflect aims different from those of the state in connection with how medical professionals treat babies' bodies.[29] Many Jews and Muslims want to circumcise their sons in large part because they believe this is necessary in order to conform to the dictates of their religion.[30] Other parents choose circumcision for nonreligious but cultural reasons, such as pressure from grandparents and friends who chose it for their sons or from fathers' wanting their sons to look like them in this respect.[31] The state cannot constitutionally endorse keeping faith with God as an aim of child rearing, and it generally does not base regulations concerning medical treatment of children on cultural considerations.

Nonetheless, states across the globe have long permitted circumcision of boys (though most now prohibit comparable procedures on girls). In the United States, most states in fact subsidize the practice through their Medicaid programs.[32] This is not because of legislative findings that circumcision is good for boys' health. The medical community has debated the health benefits and

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28. *See* PAUL M. FLEISS & FREDERICK M. HODGES, WHAT YOUR DOCTOR MAY NOT TELL YOU ABOUT CIRCUMCISION: UNTOLD FACTS ON AMERICA'S MOST WIDELY PERFORMED—AND MOST UNNECESSARY—SURGERY 139 (Warner Books 2002); George W. Kaplan, *Circumcision: An Overview*, 7 CURRENT PROBS. PEDIATRICS 1, 14–15 (1977) (advocating informed consent by parents and describing the hurried treatment that consent forms receive on the mother's way to the delivery room).

29. *Cf.* Arleen A. Leibowitz, Katherine Desmond & Thomas Belin, *Determinants and Policy Implications of Male Circumcision in the United States*, 99 AM. J. PUB. HEALTH 138, 138 (2009) (noting that Medicaid programs in sixteen states do not cover circumcision).

30. Increasingly, there is disagreement among Jews as to the dictates of Jewish law with respect to circumcision and as to its appropriateness, given the findings of medical science about the practice. *See, e.g.*, THE COVENANT OF CIRCUMCISION: NEW PERSPECTIVES ON AN ANCIENT JEWISH RITE (Elizabeth Wyner Mark ed., Brandeis Univ. Press 2003); Melissa King, *Why Circumcise?*, STAR TRIB. (Minneapolis, Minn.), Aug. 16, 2006, at 1E; Silverman, *supra* note 17.

31. *See, e.g.*, Silverman, *supra* note 17; Tom Scheve, How Circumcision Works, http://health.howstuffworks.com/circumcision5.htm (last visited Oct. 20, 2009).

32. *See* Amber Craig & Dan Bollinger, *Of Waste and Want: A Nationwide Survey of Medicaid Funding for Medically Unnecessary, Non-therapeutic Circumcision*, *in* BODILY INTEGRITY AND THE POLITICS OF CIRCUMCISION: CULTURE, CONTROVERSY, AND CHANGE 233, 235 (George C. Denniston et al. eds., Springer 2006).

costs of circumcision,[33] but this debate has not much affected popular thinking or legislative discussion about the subject. The facts that no government on earth mandates circumcision and that a substantial number of U.S. states have ceased Medicaid funding for circumcision in recent years suggests that the science does not support an argument that boys need to be circumcised for health reasons. Indeed, major medical organizations have taken the position that parents should not have their baby boys circumcised absent a physical abnormality creating a medical necessity.[34] One child-welfare reason many parents in the United States have had for circumcising is that they do not want their sons to appear abnormal in the school locker room,[35] but that concern has never had much currency in other western nations (where circumcision has largely been limited to Jews and Muslims) and has little currency in the United States today, both because communal showering is now fairly uncommon in schools and because half of boys in the United States are uncircumcised (indeed, in some parts of the country, where the circumcision rate is well below fifty percent, this concern points in the opposite direction).[36] And the concern would, of course, be eliminated immediately by a law prohibiting circumcision. So circumcision is like unregulated religious schooling in that the state permits it without having a clear child-welfare justification for doing so, and defenses of the practice tend to involve parents' rights claims that rest on parents' interests rather than on children's interests.

On the other hand, circumcision is like corporal punishment insofar as it entails an incursion on bodily integrity, indeed one much more severe than spanking. As such, both trigger objections that the practice violates basic human rights of children.[37] And, like corporal punishment, surgical alteration of boys'

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33. For summaries of some of the medical debates, see FLEISS & HODGES, *supra* note 28; W.D. Dunsmuir & E.M. Gordon, *The History of Circumcision*, 83 BRIT. J. UROLOGY 1 *passim* (1999).

34. *See* Circumcision Resource Center, Position Statements of Medical Societies in English-Speaking Countries, http://www.circumcision.org/position.htm (last visited Oct. 20, 2009).

35. *See* Circumcision Resource Center, Circumcision to Look Like Others, http:// www.circumcision.org/ others.htm (last visited Oct. 20, 2009).

36. *See* Dan Bollinger, Normal Versus Circumcised: U.S. Neonatal Male Incidence Ratio, http://www.cirp.org/library/statistics/bollinger2004/ (last visited Jan. 20, 2010); Dan Bollinger, Normal Versus Circumcised: U.S. Neonatal Male Genital Ratio, http://www.cirp.org/library/statistics/ bollinger2003/ (last visited Oct. 20, 2009); Circumcision Information and Resource Pages, United States Circumcision Incidence, http:// www.cirp.org/library/statistics/USA/ (last visited Oct. 20, 2009); International Coalition for Genital Integrity, Medicaid Defunding of Non-therapeutic Infant Circumcision, http://www.icgi.org/Medicaid_Project/index.htm (last visited Oct. 20, 2009); *see also* Roni Caryn Rabin, *Steep Drop Seen in Circumcisions in U.S.*, N.Y. TIMES, Aug. 17, 2010, at D6.

37. *See, e.g.*, Marilyn Fayre Milos & Donna Macris, *Circumcision: A Medical or a Human Rights Issue?*, 37 J. NURSE-MIDWIFERY 87S, 89S (1992); James W. Prescott, Marilyn Fayre Milos & George C. Denniston, *Circumcision: Human Rights and Ethical Medical Practice*, 59 HUMANIST, 45, 45–46 (1999); Doctors Opposing Circumcision, Human Rights Report: International Human Rights Law and the Circumcision of Children, http://www.doctorsopposingcircumcision.org/info/info-humanrights2006.html (last visited Oct. 20, 2009); Paul Mason, *Male Circumcision & Human Rights*, CIRCUMCISION AND HUMAN RIGHTS, http:// www.circumstitions.com/Rights.html (last visited Oct. 20, 2009); J. Steven Svoboda, *Infant Male Circumcision: Examining the Human Rights and Constitutional Issues*, NAT'L

penises is a practice that obviously can go too far—that is, everyone would grant there is some threshold beyond which the conduct is too severe and abusive. There is a common way of circumcising that people generally view as not extreme, but there are less- and more-intrusive things one could do to a penis for purposes of carrying on a tradition or making a boy's penis look like his father's.[38] Consistent with the view offered above that people generally feel that much greater justification is needed for infringement of rights to bodily integrity and that the best justification one can offer is one tied to the interests of the person whose bodily integrity is being violated, one would expect defenders of circumcision to focus just on supposed medical benefits of circumcision for males. But they also invoke parental rights to a substantial degree and tend to base the parental-rights claims on parental interests rather than on children's interests. Why is that?

The best explanation might be that the medical case for circumcision is less convincing to people than is the behavioral case for corporal punishment. As is true with leaving religious schools free of academic regulations, when a clear child-welfare justification is lacking *for the state*, defenders of a practice in political discourse are more likely to rely on parents' rights and parents' interests and to maintain simply that opponents of the practice have not made a compelling child-welfare case for restricting parents. But why is it that the child-welfare case for circumcision is less convincing than the child-welfare case for corporal punishment? In both realms, plausible empirical claims support both sides and some scientific studies support parental permission, but the weight of evidence points toward banning the practice, as evidenced by the fact that major health organizations have taken positions against it.[39] The two issues thus cannot be distinguished on the basis of the strength of the child-welfare arguments for or against.

In addition, with both circumcision and corporal punishment, there is a history of denying any injury to children. One widespread but clearly false belief is that newborns cannot feel pain or that any pain they experience is short-lived and alleviated by anesthetics.[40] In addition, religiously infused attitudes toward sexuality have made it difficult for people to recognize loss of penile sensitivity as a harm. Likewise, there has been little recognition that corporal punishment could inflict any harm beyond the momentary sting of the spanking (unless it crosses the amorphous boundary between abuse and non-

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ORG. TO HALF THE ABUSE AND ROUTINE MUTILATION OF MALES, http://www.noharmm.org/svoboda.htm (last visited Oct. 20, 2009).

38. *See* YUKI'S INTACTIVISM RESOURCES, http://www.angelfire.com/ca5/intact/fgm.html (last visited Oct. 20, 2009) ("There are different types of MGM ranging from minor to severe; they include genital piercing, circumcision, subincision, and castration.").

39. *See supra* text accompanying notes 33 and 34.

40. *See, e.g.*, Alan Greene, *No Excuse for Circumcision Pain!*, DR. GREENE, http://www.drgreene.org/ body.cfm?id=21&action=detail&ref=759 (last visited Oct. 20, 2009) (citing evidence that newborns circumcised without anesthesia "experience true pain accompanied by increased blood pressure, increased heart rate, decreased oxygen in the blood, and a surge of stress hormones").

abuse), and the great majority of people who were spanked themselves are inclined to deny that their parents harmed them in the process. The denial of harm has become more difficult to maintain in both realms; the sexual revolution of the 1960s and studies of human sexuality have made it more difficult to deny that lost penile sensitivity is a harm,[41] and the elevation of children's social status and the explosion of research on children's psychological health in recent decades has forced people to recognize that there can be a psychological impact from spanking and that any such impact matters morally. But the denial persists with respect to both practices.

Thus, as to both circumcision and corporal punishment, empirical evidence is somewhat ambiguous and resistance to acknowledging any harm to children is pervasive. Some alternative explanation is needed for the greater persuasiveness of child-welfare justifications for corporal punishment. One possibility is that when empirical evidence does not point uniformly in one direction, people are more willing to rely on homespun wisdom respecting children's moral and psychological development than they are respecting children's physical health.[42] We recognize our personal ignorance when it comes to medicine, and probably most people who do wade into the empirical debate about circumcision's health costs and benefits quickly begin to feel lost, whereas there is a widespread belief in nonprofessional expertise when it comes to discipline. Repeatedly, one finds resistance to a ban on corporal punishment expressed in terms of supposed general wisdom and on personal experience (that is, "I was whooped, and it did me good.").[43]

Another possibility is that the universality of corporal punishment—that is, the fact that in nearly all nations of the globe, corporal punishment of children has been the norm—lends credence to the homespun wisdom.[44] We gain much confidence in our inherited beliefs about child rearing from knowing that most of the world shares the beliefs, and we are naturally reluctant to conclude that the entire human race has been doing something bad to children for a very long time. In contrast, circumcision has never been a routine practice in most western countries (in Europe, the vast majority of men are uncircumcised), and in the United States, nonreligious circumcision became the norm only in the mid-nineteenth century and has waned considerably in popularity in recent decades.[45] The much lower incidence of circumcision undermines any suggestion that baby boys need it. It seems plausible to claim that a parent has a duty to

41. *See, e.g.*, Gregory J. Boyle et al., *Male Circumcision: Pain, Trauma and Psychosexual Sequelae*, 7 J. HEALTH PSYCHOL. 329, 334 (2002) (describing structural and functional consequences of circumcision).

42. *See* Gershoff & Bitensky, *supra* note 3, at 258 (noting the tendency of nonexpert participants in local policy debates about school corporal punishment toward "reliance on personal experience over empirical data").

43. *Id.*

44. *See* EUR. PARL. ASS., *Report: Europe-wide Ban on Corporal Punishment of Children*, 23d Sitting, Doc. No. 10199 (2004).

45. Rabin, *supra* note 36.

spank a misbehaving child for the child's own good, but not to claim that a parent has a duty to circumcise a child. No objective observer would accuse the half of American parents who do not circumcise their boys of being neglectful parents, whereas it is not uncommon to hear blame directed at parents of unruly children for not giving them a good spanking. Many people believe that sparing the rod will produce a generation of spoiled children, but there is no social perception that the diminishing rate of circumcision in the United States or the always-low rate of circumcision in Europe creates a public-health problem.

In sum, parents' rights claims are less prominent with respect to corporal punishment than they are with respect to circumcision and are more likely to rest on assertions about what children need than on suggestions that the state should permit parents to gratify their desires, even though both corporal punishment and circumcision entail violations of bodily integrity and therefore require strong justification. And the reason for the difference between these two cases appears to be that people find the child-welfare justifications for corporal punishment more convincing than those for circumcision, even though in both cases the weight of scientific evidence appears to be against those supposed justifications (as evidenced by opposition to both from major professional organizations). This, in turn, might be because the justifications for corporal punishment appeal to homespun wisdom and personal experience rather than to complex studies in the physical sciences, and the universality of the practice gives the homespun wisdom greater credibility.

Contrasting corporal punishment with religious schooling and with circumcision thus reveals a possible explanation for why parents' rights claims play a lesser role in public and political discourse concerning corporal punishment. In an era when the legal system and society recognize children as persons with legal and moral rights of their own, the best defense of any child-rearing practice that some parents wish to use is that it is actually good for children in a way that the state and the majority of people can recognize. Arguments against any substantive regulation of religious schooling cannot invoke the "for their own good" defense because the conclusion its proponents seek is that parents should be able to define the good for their children in a way that the state cannot and that the majority does not recognize. So they must appeal instead to the interests of parents; and to impute gravity to those interests, they attribute to parents an entitlement to satisfaction of the interests. In connection with children's mental development, appealing to the interests of persons other than the children (that is, parents) seems both less offensive and sufficient to justify the claimed right, at least insofar as they are a kind of interest (compliance with religious commands) that receives independent constitutional protection. Thus, parents' rights claims are much more prominent in connection with opposition to state regulation of religious schools. Arguments for the continued permissibility of circumcision, in contrast, can invoke a child-welfare defense of the practice that is facially plausible, so parents' rights claims are somewhat less prominent than in the religious-school-

regulation context. However, that defense is less convincing to people than is a child-welfare defense of corporal punishment, so defenders of circumcision are more likely to appeal also to parents' rights and to base that appeal on parents' own interests. Yet parents' own interests are not likely to appear as sufficient justification respecting a practice entailing severe incursion on children's bodily integrity. The weakness of both child-welfare and parental-interest justifications for circumcision helps explain why the practice has diminished considerably in the United States in recent decades.

The lesson for the corporal-punishment debate is therefore this: Parents' rights claims are not especially prominent or adamant in that debate because people generally understand that an incursion on bodily integrity requires strong justification; people are increasingly inclined to concede that this is true of children as well as of adults; and the best and perhaps only sufficient justification is that the incursion is on the whole beneficial for the person. Most people feel confident in the child-welfare justifications for corporal punishment because there are some studies to support them and, perhaps more importantly, the universality and pervasiveness of the practice bolster the homespun wisdom that at least some children need to be spanked sometimes to instill proper discipline. So long as the child-welfare justification maintains its appeal, parents' rights claims are superfluous, and to the extent anyone advances them, they are likely to appeal to children's interests as the moral basis for the right. Thus, the focus of debate has been and will remain whether spanking is on the whole beneficial or harmful to children.

III

PARENTAL CHILD-REARING RIGHTS AS CONCEPTUAL ERROR

As noted in part I, we generally view rights as protections of the right-holder's own choices and interests. It is odd to justify one person's having a right in terms of another person's interests. Why not say that it is the other person who possesses the right? Yet in the child-rearing realm, it is very common to speak of parental entitlement, even when the supposed justification for the entitlement is children's welfare. In the United States, it is fairly rare to speak of *any* parenting practice as a matter of children's entitlement, even when the argument is that a practice is good for or even necessary for children. Other western countries are much more comfortable in speaking of children's rights in connection with their upbringing,[46] but even there, defenses of corporal punishment rarely mention children's having a right to it.

Opponents of corporal punishment might therefore make some headway by pushing the point that speaking of parents' rights as a protection of children's

46. The Family Code of the Russian Federation, for example, contains an entire chapter entitled "Rights of Minor Children," as well as a chapter entitled "Rights and Duties of Parents." *See* RUSSIAN FAMILY LAW: THE FAMILY CODE OF THE RUSSIAN FEDERATION AND FEDERAL LAW ON ACTS OF CIVIL STATUS 30, 35 (William E. Butler ed. & trans., Simmonds & Hill Publishers 1998).

interests is anomalous and conceptually incoherent and by insisting that any talk of rights resting only on children's interests be in terms of children's rights rather than parents' rights. They should seek to inject greater conceptual clarity into normative discussions by demanding that proponents of corporal punishment, if they truly believe that children need it for their proper development, should be willing to assert and defend the proposition that children have a right to be spanked, and that if proponents of corporal punishment ever invoke parental rights they should be prepared to identify parental interests that the rights would protect and to explain why those interests *of parents* are sufficient to justify licensing parents to hit their children.

Of course, it is not necessary in order for a child-rearing practice to be legally permitted that we can coherently and convincingly assert that children need it. Permitting can entail simply not prohibiting, and there are many innocuous or modestly beneficial or modestly harmful parenting practices that the state does not have sufficient reason to require or prohibit. But if some form of treatment is truly necessary for a child's well-being, then the state is likely to mandate it, and it would be natural to speak of such a mandate as reflecting a right of the child. Some state codes, for example, characterize education as a right of children. Thus, anyone who takes the strong empirical stance that corporal punishment is *necessary* for children's well-being—that is, that there is no alternative way to instill proper discipline—should be prepared to say that children have a right to it. Yet anyone is likely to feel a visceral resistance to pronouncing that some person has a right to be hit, and that resistance might cause defenders of spanking to back down from that strong empirical stance. If they do so, and adopt the more modest position that spanking is just an effective tool, they can be pushed to explain why parents should not be required to adopt alternative means that do not involve hitting.

In addition, forcing proponents of corporal punishment to speak of parental rights only if they can identify interests of parents that support such an entitlement should make talk of parental rights in this context disappear. Because the practice at issue involves a physical attack and because religious motivation is really not a salient aspect of spanking, no parental interest is likely to appear strong enough to support the rights claim, and some might be no different from the interests people have in other contexts in striking other persons. An interest in carrying on a spanking tradition is a weak one. Interests in venting frustration[47] or in avoiding the loss of time involved in alternative ways of changing children's behavior are not interests unique to parenting; hitting other adults could also be a way of alleviating frustrations and a more expedient way of altering their behavior. The strongest argument based on parental interests might be one based on parents' interest in avoiding moral or legal responsibility for harms their children cause third parties. We impose a

47. *See, e.g.*, Thomas, *supra* note 4 (quoting a cofounder of mumsnet.com as saying most mothers on the site "admit they've done it once or twice in anger but feel awful about it").

duty on parents to supervise their children and to prevent them from harming others, and third parties can seek damages against parents for their children's intentional torts.[48] But that interest is not really unique; employers can be liable for their employees' torts and so have an interest in deterring their wrongdoing that might be served by whipping them. And it would support the entitlement only as far as the interest extends, which might mean only in situations in which a child appears likely to harm third parties.

Another type of interest often attributed to parents is one simply in dominion over their children, in controlling their children's lives. This sort of interest, though, is simply an illegitimate one, not one that can ground a right. Rights in our legal and moral culture are protections of self-determination and self-regarding interests, never protections of anyone's desire to control the life of another per se. Even if the interest is characterized more charitably as one in satisfying a desire that one's child's life goes well, it is still not the sort of interest that can ground an entitlement. This is readily perceived in other contexts in which one person might very altruistically wish that another person's life go better, such as pro-life activists who truly care about the spiritual and psychological welfare of pregnant women contemplating abortion; their concern cannot give rise to any entitlement on their part to have a say in the abortion decision and certainly not to inflict punishment on women who choose to abort. Even when the adult whose life someone wants to control is nonautonomous, satisfying the altruistic desire to ensure that the nonautonomous person's life goes well is not an interest that popular morality or law treats as a basis for attributing a right; custodians of incompetent adults are afforded some freedom and power to act in the best interests of their wards, but they are viewed as having that freedom and power as a matter of privilege, not entitlement. To view it as a matter of entitlement would appear to treat the nonautonomous adult instrumentally, as a means to gratifying the caretaker, and we reject such instrumental treatment of persons. We should do the same when the nonautonomous persons involved are children.

Thus, a proper understanding of rights and greater care in tying rights to interests of the supposed right-holder should result in elimination of parents' rights talk from public discourse about corporal punishment and greater attention to the specific content of children's rights, if in fact they have any at stake. Defenders of corporal punishment should be asked to clarify whether they believe children have a right to be spanked. If not—that is, if they abjure the position that children *need* corporal punishment, such that parents who fail to use it are violating a duty they owe to their children—then they should be

48. *See, e.g.*, CONN. GEN. STATS. § 52-572 (2009); GA. CODE ANN. § 51-2-3 (2006); TENN. CODE ANN. §§ 37-10-101–37-10-103 (2005); Henneberry v. Simoneaux, No. M2005-02032-COA-R3-CV, 2006 WL 2450138 (Tenn. Ct. App. Aug. 22, 2006) (holding that parental liability does not extend to negligent acts of their children); Hun Yin Fa, *supra* note 11, at art. 23 ("If children who are minors cause damage to the state, the collective, or individuals, their parents shall have the duty to bear civil liability."); RESTATEMENT (SECOND) OF TORTS § 316 (1965).

asked to clarify whether they believe children possess at least a presumptive right not to be hit (if not an absolute right). If they maintain that children do not have *that* right, they should be required to explain why not, given the attribution of such a right (or an even stronger right—that is, an absolute right) to all other persons. If they concede that children do have that presumptive right, they should be asked to articulate what sort of showing is necessary to override that right not to be hit, or in other words, what can justify an infringement of the right. Debate could then focus just on this normative question of what empirical showing as to children's interests is required to override their right not to be hit and then on the empirical question of whether that showing has been made. If a parental right to spank and children's right to be spanked are both eliminated from the equation, and if a presumptive right not to be hit is attributed to children, then the burden of proof would lie squarely on the defenders of corporal punishment and any ambiguity in the scientific literature would therefore have to count in favor of banning the practice.

For their part, opponents of corporal punishment can pursue at least two lines of argument. One, which has perhaps received insufficient attention, is to argue that children have an absolute right not to be hit, so that even if corporal punishment were on the whole best for children in terms of their healthy or proper development, it is still impermissible, perhaps because some dignitary harm overrides welfare concerns (as appears to be assumed with respect to hitting adults). The second, more-common approach is to first establish that children have at least a presumptive right not to be hit, which is easily done, and then to argue that no considerations override that presumption. That latter argument must refute parental rights claims, but I have explained why that, too, is easily done, and more readily so by pushing the conceptual points I made above. This focuses the debate on child-welfare justifications, with the burden of proof on defenders of corporal punishment. However, opponents should articulate and defend a particular test for meeting that burden (for example, must defenders show it is absolutely necessary for proper development or just that it is on the whole good for some children?) and should also squarely address and explain the universality of hitting as a method of child rearing (how can it be wrong if it has been so common in so many cultures for so long?).

IV

CONCLUSION

Claims of parental entitlement have had some currency in public discourse concerning corporal punishment, but not as much as they have had in some other child-rearing contexts, such as regulation of religious schooling and infant male circumcision. The simple explanation for the relatively small role of such claims in discussion of corporal punishment is that they are largely superfluous. They appear plausible only insofar as they rest on concerns about children's well-being, and such concerns can be addressed directly, invoking children's

rights or invoking no rights at all. But parents' rights talk can create a distraction and muddy the waters, so the discourse could be improved by eliminating such talk. A better understanding of the nature of rights among participants in the debate, and of the clarity gained by tying rights to the persons whose interests are properly at stake, should lead them to banish parents' rights from the normative landscape. If anyone has rights at stake, it is children, and discussion should focus on the specific content of those rights and how much discretion or freedom they leave for parents to discipline their children.