CORPORAL PUNISHMENT AND THE CULTURAL DEFENSE

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I

INTRODUCTION

When individuals move to new societies with different ways of life, there are inevitably culture clashes. Collisions between normative systems involve a wide range of substantive matters, and the resolution of these disputes has generated a vast, new, multicultural jurisprudence.[1] Many cultural conflicts are related to children as there are widely divergent child-rearing practices across the globe.[2] One of the classic examples of cultural conflict is the use of physical force to socialize children.[3] In this article I focus on the jurisprudence concerning the use of corporal punishment by immigrant parents, which Anglo American courts often deem to be excessive.[4] In this article I offer an exploration of the reasons why parents consider it appropriate to impose this type of punishment and the

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1. *See generally* ALISON DUNDES RENTELN, THE CULTURAL DEFENSE (2004); CULTURAL DIVERSITY AND THE LAW: STATE APPROACHES FROM AROUND THE WORLD (Marie-Claire Foblets, Jean-Francois Gaudreault-Desbiens & Alison Dundes Renteln eds., 2010); MULTICULTURAL JURISPRUDENCE: COMPARATIVE PERSPECTIVES ON THE CULTURAL DEFENSE (Marie-Claire Foblets & Alison Dundes Renteln eds., 2009).

2. Even the concept of childhood itself as a distinct phase of the life cycle is a historical construct. *See* PHILIPPE ARIES, CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE (Robert Baldick trans., 1960). Aries discusses the expansion of the use of birching in the context of arguing that European society extended childhood into adolescence:

> The history of discipline from the fourteenth to the seventeenth century enables us to make two important points. . . . [T]here remained an essential difference between the discipline applied to children and that applied to adults, a difference which did not exist to the same degree in the Middle Ages. . . . There was therefore a tendency to diminish the distinctions between childhood and adolescence, to push adolescence back towards childhood by subjecting it to an identical discipline.

Id. at 262; *see also* CHILDREN IN HISTORICAL AND COMPARATIVE PERSPECTIVE (Joseph M. Hawes & N. Ray Hiner eds., 1991); PETER N. STEARNS, GROWING UP: THE HISTORY OF CHILDHOOD IN A GLOBAL CONTEXT (2005).

3. For a thoughtful overview of the issue of cultural relativism and the discipline of children, see HEATHER MONTGOMERY, AN INTRODUCTION TO CHILDHOOD: ANTHROPOLOGICAL PERSPECTIVES ON CHILDREN'S LIVES 156–80 (2009). For a popular treatment, see Celia W. Dugger, *A Cultural Reluctance to Spare the Rod*, N.Y. TIMES, Feb. 29, 1996, at B1.

4. In a previous essay I dealt with the more general question of the cultural defense in a wide range of child-abuse and neglect cases. *See generally* Alison Dundes Renteln, *Is the Cultural Defense Detrimental to the Health of Children*, 7 LAW & ANTHROPOLOGY 27 (1994).

different forms it takes when administered. The fundamental question is whether discipline of this sort is inherently unreasonable and, if so, whether it rises to the level of violating children's rights as defined in domestic and international law. In the twenty-first century we must decide on the most suitable policy to adopt with respect to corporal punishment given existing cultural variation in its usage.

I begin with an overview of some of the conceptual and definitional issues associated with this topic. Next, I take up the theory of cultural relativism, which highlights the importance of understanding the inner cultural logic of a community—here as regards the socialization of children. I then discuss the potential for misinterpreting cultural traditions as child abuse and possible criteria for investigating allegations of child maltreatment. Next, to demonstrate the challenges courts face, I present a series of examples of cases in which judges have addressed the appropriateness of administering corporal punishment. These cases are divided into intervention and prosecution, as legal reactions occur in both civil and criminal processes. After this review of decisions, I analyze what constitutes reasonable behavior given a particular cultural context. When cultural collisions occur, it is important to know what latitude judges have to mitigate the full impact of the law on immigrant families. Finally, I consider the jurisprudence on international children's rights as it pertains to the question of corporal punishment by scrutinizing the best-interests-of-the-child principle in the context of international human rights.

II

BACKGROUND

Before I take up the substantive questions, a word about nomenclature is in order. Child abuse refers to the (usually) deliberate act of harming a child, whereas neglect refers to an omission, the failure to care for a child properly. Some favor the term child maltreatment as it is sufficiently broad to encompass both abuse and neglect.

The literature on the subject of corporal punishment employs many different terms. In the anthropological scholarship the key question is when the discipline or socialization of children is so severe as to be classified as abuse. Indexes for books in this field sometimes do not even list the terms abuse, corporal punishment, or discipline. In philosophy, corporal punishment may refer to the punishment of either adults or children.[5] In the social sciences, the term corporal punishment may refer to various institutional settings: to the discipline of children at home and in schools as well as to the punishment of prisoners. Although some commentators assume that it is cruel to use physical force under any circumstances, for many others the question is when minimal use of force associated with discipline crosses the line to unacceptable corporal punishment.

5. David Benatar, *Corporal Punishment*, 24 SOC. THEORY & PRAC. 237, 238 (1998).

Corporal punishment often appears to involve the use of birching, flogging, belting, or other tools. The term refers to physical discipline of various sorts accomplished by such instruments or by hands only. The techniques employed to educate children about proper conduct in their communities are surprisingly varied. In its definition of corporal punishment, the United Nations committee that enforces the Convention on the Rights of the Child defines corporal or physical punishment even more comprehensively as "any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light."[6] Besides the use of the hand or a tool for striking a child, corporal punishment "can . . . involve, for example, kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or boxing ears, forcing children to stay in uncomfortable positions, burning, scalding or forced ingestion (for example, washing children's mouths out with soap or forcing them to swallow hot spices)."[7]

In North America and Europe, when immigrant parents' disciplining of children comes to the attention of authorities, parents are sometimes astonished to learn that their conduct is considered unacceptable. Parents from particular countries such as Korea,[8] Jamaica,[9] and Nigeria[10] are often those who have been taken to court. Most of the time, social workers and judges condemn parents for their use of corporal punishment; occasionally there is a call for understanding the cultural context.[11] Even though it is entirely appropriate for authorities to try to protect children from irreparable harm, some customs that seem at first glance to be corporal punishment may not be, and some disciplinary techniques

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6. Comm. on the Rights of the Child, *General Comment No. 8*, ¶ 11, U.N. Doc. CRC/C/GC/8, (Mar. 2, 2007) [hereinafter *General Comment No. 8*].

7. *Id*. The comment notes that corporal punishment can occur in many settings including the home, education institutions, justice systems, and alternative care. *Id.* ¶ 12.

8. *See* Editorial, "*Tradition" No Excuse for Child Abuse*, ATLANTA J. & CONST., June 26, 2000, at 8A. Although it is known to have been culturally acceptable in Korea, the use of corporal punishment has come under attack: "Once omnipresent among the military and police, in the legal system, the schools and at home, beatings and other physical forms of coercion are being firmly rejected by a growing number of South Koreans." Teresa Watanabe, *Sparing the Rod in S. Korea*, L.A. TIMES, Aug. 30, 1994, at A1; *see also* H.C. Hahm & N.B. Guterman, *The Emerging Problem of Physical Child Abuse in South Korea*, 6 CHILD MALTREATMENT 169, 169–79 (2001). For a nuanced study that includes discussion of Korean attitudes toward physical punishment, see Kay Kyung-Sook Song, Defining Child Abuse: Korean Community Study 140–44 (1986) (unpublished dissertation, University of California, Los Angeles) (on file with Law and Contemporary Problems).

9. *See* Gariot Louisna, *Discipline, Abuse Meet Head-On in Culture Clash*, CARIBBEAN TODAY, Aug. 31, 1998, at 31 ("A growing number of immigrant parents in the United States—especially those from Caribbean islands where parents feel free to discipline their children without limits—are finding out, almost too late, that they can be arrested for beating their children as a form of discipline. In extreme cases, they can lose all parental rights.").

10. *See infra* text accompanying notes 73–78 (discussing child abuse in Nigeria).

11. Fontes and O'Neill-Arana endorse the proposition that culture is relevant to assessment. They recommend considering culture in deciding on "the most appropriate intervention" but are disinclined to take it into account "in determining whether abuse has occurred." *See* Lisa A. Fontes & Margarita R. O'Neill-Arana, *Assessing for Child Maltreatment in Culturally Diverse Families*, *in* HANDBOOK OF MULTICULTURAL ASSESSMENT: CLINICAL, PSYCHOLOGICAL, AND EDUCATIONAL APPLICATIONS 627, 647–48 (Lisa A. Suzuki, Joseph G. Ponterotto & Paul J. Meller eds., 3d ed. 2008).

may not actually be harmful. As we shall see, a contextual analysis of the use of corporal punishment is necessary if courts are to do justice.

III

CULTURAL RELATIVISM

Cultural relativism is a theory in anthropology that calls attention to the moral code each society possesses. According to relativism, morality is socially constructed within a given cultural community.[12] One of the key aspects of the theory is the idea of enculturation, which refers to the manner by which individuals acquire the worldview of their community. Culture affects both cognition and conduct. Interestingly, individuals are largely unaware of the process by which they learn the cultural categories and value system of their community. Individuals generally presume that their own methods will be more successful than those employed in other societies. This phenomenon, ethnocentrism, is a corollary of enculturation.

The fact that the acquisition of cultural norms is for the most part unconscious does not mean individuals are incapable of discarding customs. It does mean, however, that doing so will be extremely difficult. Individuals will have to overcome the tendency to presume the validity of their own cultural categories. As cultures are always dynamic, it is within the realm of possibility that members of a community may eventually realize that they should reject a particular custom. This is entirely consistent with the tenets of cultural relativism.[13]

One of the most controversial aspects of cultural relativism is that it has been linked unjustifiably to tolerance. By casting the theory as a prescriptive one that promotes a value, some erroneously presume that relativists must endorse tolerance: that there are diverse moral systems requires us to embrace them all.[14] Yet formulating cultural relativism as a prescriptive theory that requires a posture of tolerance is unnecessary.[15] It can be regarded instead as descriptive—a theory that simply acknowledges the existence of multiple moral systems. As Robert Redfield once put it,

> [T]he two parts of the doctrine are not logically or necessarily interdependent. The first part says that people are brought up to see the value in things that their local experience has suggested. The second part says that we should respect all cultures. But there is no true "therefore" between these two parts. It cannot be proved, from the

12. Cultural relativism is a theory that has been widely misinterpreted. For an analysis of erroneous interpretations, see generally Alison Dundes Renteln, *Relativism and the Search for Human Rights*, 90 AM. ANTHROPOLOGIST 56, 56–72 (1988).

13. Some claim that relativists think that cultures are static and want them to remain fixed in time. As no relativist holds that view, this argument is a straw man.

14. The anthropologists who developed the theory of relativism were Americans who had been brought to value tolerance. Because of their own enculturation, they assumed relativism had to be logically connected to tolerance. For elaboration, see ALISON DUNDES RENTELN, INTERNATIONAL HUMAN RIGHTS: UNIVERSALISM VERSUS RELATIVISM 65 (1990).

15. *Id.* at 73.

> proposition that values are relative, that we ought to respect all systems of values. We might just as well hate them all.[16]

It is important to note this key insight—namely that there is nothing intrinsic to the theory of cultural relativism itself that necessitates acceptance of other cultural traditions.

If we accept this interpretation of the theory of cultural relativism as a descriptive theory that merely acknowledges the existence of diverse moral systems, rather than as a prescriptive one that advocates tolerance, then a culturally relative approach to child maltreatment may include moral criticism of particular customs. On what basis can a relativist criticize the treatment of children in other societies? Such criticisms rest on at least three bases: (1) that the society violates its own internal standards; (2) that the custom violates the relativist's external standard, which renders the criticism ethnocentric but nevertheless possible; and (3) that the custom violates a cross-cultural universal, an international standard supported by global consensus.

At this juncture we must turn to the task at hand—namely, how to determine what forms of discipline for children are acceptable. To do so, we need culturally appropriate ways of interpreting the treatment of customs in diverse societies. The leading scholar to address this question is Jill Korbin, whose pathbreaking scholarship deserves serious consideration. Her seminal book, *Child Abuse and Neglect: Cross-Cultural Perspectives*, demonstrates the difficulties associated with assessing child-rearing practices in diverse cultural systems, which arise partly because definitions of abuse and neglect vary.[17] She points out that American customs are considered cruel by the societies whose cultures are treated in her collection:

> Practices such as isolating infants and small children in rooms or beds of their own at night, making them wait for readily available food until a schedule dictates that they can satisfy their hunger, or allowing them to cry without immediately attending to their needs or desires would be at odds with the child-rearing philosophies of most of the cultures discussed.[18]

The theoretical position Korbin developed emphasizes that customs should not be viewed as abusive if they are regarded as consistent with cultural standards according to the members of the community and the child in question. She delineates three levels of analysis: (1) customs such as initiation

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16. ROBERT REDFIELD, THE PRIMITIVE WORLD AND ITS TRANSFORMATIONS 146–47 (1953).

17. Jill Korbin has written extensively on the subject of cultural aspects of child abuse and neglect. *See, e.g.*, Jill E. Korbin, *Child Neglect and Abuse Across Cultures*, *in* CONTEXTS OF CHILD DEVELOPMENT: CULTURE, POLICY AND INTERVENTION 122 (Robinson et al. 2008); Jill E. Korbin et al., *How Neighborhoods Influence Child Maltreatment: A Review of the Literature and Alternative Pathways*, 31 CHILD ABUSE & NEGLECT 1117 (2007); Jill E. Korbin, *"Very Few Cases": Child Abuse and Neglect in the Peoples' Republic of China*, *in* CHILD ABUSE AND NEGLECT: CROSS-CULTURAL PERSPECTIVES 166 (Jill E. Korbin ed. 1981). She is considered to be the first anthropologist to focus on child abuse.

18. Jill E. Korbin, *Introduction* to CHILD ABUSE AND NEGLECT: CROSS-CULTURAL PERSPECTIVES, *supra* note 17, at 1, 4.

rituals that seem cruel to outsiders,[19] (2) practices that deviate from the internal cultural norms,[20] and (3) structural or societal conditions that perpetuate child maltreatment.[21]

Although Korbin's brilliant scholarship provides inspiration and some direction, more cross-cultural work is needed on the actual methods of discipline employed around the world. To ascertain the validity of the various claims about the proper treatment of children, it is crucial that scholars conduct careful social-science research to investigate the specific alleged customs central to the disputes.[22]

Insofar as communities have their own systems of education, their techniques for instilling their codes of conduct in children will necessarily vary. Ethnographies have documented the diverse methods for socializing children to behave properly so they will function well in their own societies. But sometimes the situation will be more complicated because children may be brought up by parents from different cultures, families move between societies with vastly different behavioral standards, or there may be internal disagreement within a society as to the benefits of a particular custom. Children who have a bicultural or multicultural background may be more likely to comprehend the inner cultural logic of multiple belief systems. When a specific tradition is (mis)interpreted as maltreatment, these children will be able to see it from both internal and external points of view.

IV

MISINTERPRETATION OF CUSTOMS AS CHILD ABUSE

Even if a society's traditions have existed for centuries, they may no longer be followed. The dilemma is deciding what child-rearing practices should be recognized as culturally appropriate and which should be treated as forms of child abuse. Because of pervasive ethnocentrism in the operation of social-welfare agencies, some customs have been misinterpreted as child abuse or child neglect.[23] One startling illustration involves parental touching of children in ways considered bizarre by those unfamiliar with it. In some societies

19. "[P]ractices viewed as acceptable by one culture but as abusive or neglectful by another." *Id.*

20. "[E]ach group nevertheless has criteria for identifying behaviors that are outside the realm of acceptable child training." *Id.* at 5.

21. "[D]etrimental environmental and societal conditions must be distinguished from accepted child-rearing practices that are differentially perceived as abuse or neglect, and from idiosyncratic maltreatment of children which falls outside a culture's accepted range of behaviors." *Id.*

22. *See generally* Kathleen J. Sternberg, *Child Maltreatment: Implications for Policy From Cross-Cultural Research*, *in* 8 CHILD ABUSE, CHILD DEVELOPMENT, AND SOCIAL POLICY, ADVANCES IN APPLIED DEVELOPMENTAL PSYCHOLOGY 191, 191–211 (Dante Cicchetti & Sheree L. Toth eds., 1993). For an early call for more cross-cultural research, see Richard J. Gelles, *What to Learn from Cross-cultural and Historical Research on Child Abuse and Neglect: An Overview*, *in* CHILD ABUSE AND NEGLECT: BIOSOCIAL DIMENSIONS 15, 15–31 (Richard J. Gelles & Jane B. Lancaster eds., 1987).

23. LISA A. FONTES, CHILD ABUSE AND CULTURE: WORKING WITH DIVERSE FAMILIES 64 (2005).

touching children in the genital area is an innocuous way of showing affection and is not for the purpose of sexual gratification. Even though child sexual abuse is defined in most jurisdictions as a specific-intent crime requiring that an adult touch the child for the purpose of sexual gratification, parents have nevertheless been prosecuted when they touch their children innocently in accordance with tradition. For instance, in *State v. Kargar*, an Afghani refugee father who kissed his baby son's penis was prosecuted for gross sexual assault.[24] On appeal the court acknowledged that "[t]here is no real dispute that what Kargar did is accepted practice in his culture. The testimony of every witness at the *de minimis* hearing confirmed that kissing a young son on every part of his body is considered a sign only of love and affection for the child."[25] Although the Supreme Court of Maine vacated his conviction, he and his family had to endure the stress and stigma of the litigation process. In a Texas case a state court of appeals affirmed the family court's termination of parental rights.[26] The subsequent acquittal of the father for child sexual abuse in the criminal proceeding had no effect on the prior family-court decision.[27]

Other customs that have been misinterpreted as child abuse include various techniques of folk medicine that are innocuous, although they leave temporary marks.[28] Those who work with children sometimes mistakenly assume that bruises are the result of corporal punishment. For instance, coining or *cao gio*, a type of folk medicine used to cure children (and adults) of various physical ailments including the cold and influenza, is widely used among Southeast Asians. The technique involves covering the body with mentholated oil and then rubbing it with a coin that has a serrated edge like a dime or quarter. This bursts the blood vessels leaving a distinct pattern of bruises, usually on the neck and upper torso. Because of the way it appears to those unfamiliar with it, it gives cause for alarm, even though the bruises disappear in a few days.[29]

Families have been put on trial for using this type of folk medicine. In one case discussed in the medical literature, a Vietnamese father used coining when

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24. State v. Kargar, 679 A.2d 81, 82 (Me. 1996).

25. *Id*. at 85; *see also* Nancy A. Wanderer & Catherine R. Connors, *Culture and Crime:* Kargar *and the Existing Framework for a Cultural Defense*, 47 BUFF. L. REV. 829, 838–39 (1999).

26. Krasniqi v. Dallas County Child Protective Servs. Unit of Texas Dep't of Human Servs., 809 S.W.2d 927, 933 (Tex. App. 1991), *cert. denied* 503 U.S. 1006 (1992), *and cert. denied* 504 U.S. 940 (1992). The parents' lawsuit in federal court was also unsuccessful. *See* Krasniqi v. Enoch, 24 F.3d 237, 1994 U.S. App. LEXIS 14638 (5th Cir. 1994) (unpublished table decision).

27. For a discussion of the Texas *Krasniqi* case and other examples, see RENTELN, *supra* note 1, at 58–61. Another touching case in Maine is *State v. Ramirez*, No. CRIM.A. CR-04-213, 2005 WL 3678032 (Me. Super. Ct. 2005).

28. *See, e.g.*, J.A. Black, *Misdiagnosis of Child Abuse in Ethnic Minorities*, 22 MIDWIFE HEALTH VISITOR & COMMUNITY NURSE 48, 48–49, 52–53 (1986); *see also* William Y. Chin, *Blue Spots, Coining, and Cupping: How Ethnic Minority Parents Can Be Misreported as Child Abusers*, 7 J.L. SOC'Y 88, 88–114 (2005); Leslie Berger, *Learning to Tell Custom from Abuse: Child Welfare Officials Are Working with Immigrant Parents to Clear up Cultural Misperceptions that May Lead to False Reports of Trouble*, L.A. TIMES, Aug. 24, 1994, at A1.

29. Ruth E. Davis, *Cultural Health Care or Child Abuse? The Southeast Asian Practice of Cao Gio*, 12 J. AM. ACAD. NURSE PRAC. 89, 90 (2000).

his three-year-old son had a high fever. When the baby's health did not improve, the father took the child to the hospital where he tragically died. Because of the marks on the baby, the father was arrested and placed in jail. He committed suicide while in custody, ostensibly because he was ashamed at having been arrested.[30] Another family had to endure a trial for using coining but was vindicated by the expert testimony of a physician.[31] In yet another case, a father was subject to prosecution for the use of coining. Fortunately, the court dismissed the matter.[32]

Another folk remedy known as cupping has also been misunderstood in the legal system. Cupping involves placing alcohol in a glass and then placing it on the skin. It is a sort of suction technique found in Eastern Europe, Mexico, and elsewhere. In one case involving a family from the Central African Republic, *In re Jertrude O.*, a juvenile court removed a four-year-old girl from her parents' home in part because she had marks from cupping.[33] She also had hairline fractures, ostensibly because she climbed up on furniture and fell off.[34] A related concern in that case was inadequate supervision, including the parents' tendency to leave children in charge of younger children.[35] One question in the *Jertrude O.* case was whether the court should apply American parenting standards or those of the Central African Republic. The appellate court explicitly discussed this issue:

> We found sufficient evidence throughout the record to indicate that this family was in need of assistance and that the children were not receiving ordinary and proper care and attention. The record is replete with comparisons of the life styles—nomadic existence, crowded living conditions, customs, mores, supervisory practices of the children—of this Central African family with the standards expected in America. . . . The practices that caused the injuries to Jertrude, even as explained by the parents—such as lack of supervision resulting in falls causing bruising and fractures, as well as the "cupping" procedures leaving oval scars—are simply not acceptable treatment of care of children in America.[36]

Ultimately, the Maryland Court of Special Appeals ruled that the juvenile court was correct to require that the parents be educated in the child-rearing practices considered acceptable in the United States.[37] However, the court vacated the part of the disposition that removed Jertrude from her parents' home on the grounds that there was no evidence she was subject to abuse and

30. *See* Nong The Anh, *"Pseudo-battered child" Syndrome*, 236 JAMA 2288 (1976).

31. *See* Gentry W. Yeatman & Viet Van Dang, *Cai Gio (Coin Rubbing) Vietnamese Attitudes Toward Health Care*, 244 JAMA 2748, 2748 (1980).

32. Joseph Morton, *Second Coining Case Is Dropped and Asian Dad Hopes Case Helps Others*, OMAHA WORLD-HERALD, May 14, 2002, at 1B.

33. *In re* Jertrude O., 466 A.2d 885, 888 (Md. Ct. Spec. App. 1983).

34. *Id.*

35. *Id.* at 892.

36. *Id.* at 891–92.

37. *Id.* at 892.

neglect and that if there had been a serious risk, it made no sense not to remove her two younger sisters as well.[38]

Cross-cultural training of those who work with children would avoid unnecessary intervention in families. Involving social workers from more-diverse backgrounds would also help ensure greater cultural sensitivity.[39] In addition, the adoption of statutes exempting innocuous types of folk remedies would ensure that immigrant families not have to worry about healing their children in the shadow of the law. Unfortunately, until such time as policies of this sort are implemented, minority parents may face unjustified accusations of child abuse.[40]

V

JURISPRUDENCE AND INTERVENTION

In many of the cases in which individuals assert that their conduct was motivated by a cultural imperative, the standard response is, "When in Rome, do as the Romans do." This uncritical adherence to the monocultural paradigm deserves to be reconsidered at least in those cases in which the cultural tradition does not involve irreparable harm to others.[41] Instead of assuming that the standards of the dominant culture must always be followed without justification, democracies should give families and communities the right to follow their own life plans without governmental interference. Parental autonomy respecting the upbringing of children is an important principle for all families.[42] Just because a child-rearing custom is different from standard practice should not automatically give rise to suspicion. Unless a custom involves a serious threat of harm, immigrant parents should be allowed to raise their children as they see fit in accordance with the right to culture, which is guaranteed in international human-rights law.[43] The question, then, is whether the imposition of particular forms of corporal punishment on children causes them serious physical or psychological harm.

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38. *Id.* at 893–94.

39. *See* Vicki Ashton, *The Effect of Personal Characteristics on Reporting Child Maltreatment*, 28 CHILD ABUSE & NEGLECT 985, 993 (2004).

40. For a thoughtful discussion of policy proposals, see Chin, *supra* note 28, at 102–04.

41. *See* Alison Dundes Renteln, *The Cultural Defense: Challenging the Monocultural Paradigm*, *in* CULTURAL DIVERSITY AND LAW: STATE APPROACHES FROM AROUND THE WORLD, *supra* note 1, at 791, 817.

42. *See generally* Doriane Lambelet Coleman et al., *Where and How to Draw the Line Between Reasonable Corporal Punishment and Abuse*, 73 LAW & CONTEMP. PROBS. 107 (Spring 2010); James G. Dwyer, *Parental Entitlement and Corporal Punishment*, 73 LAW & CONTEMP. PROBS. 189 (Spring 2010).

43. The strongest formulation of the right to culture is found in Article 27 of the International Covenant on Civil and Political Rights. See also *General Comment No. 8*, *supra* note 6, on the interpretation of this right.

There is a history of cultural bias in social-welfare agencies as well as courts in North America and Europe.[44] Because of this historical background, those who have the power to make decisions that result in the breakup of families should exercise caution when they intervene in the home. In their essay, *Assessing Child Maltreatment in Culturally Diverse Families*, Fontes and O'Neill-Arana warn child-welfare professionals about the pitfalls of cross-cultural misunderstanding and mention one poignant example of discipline:

> A social worker recently described substantiating a charge of child abuse against Mexican parents who had forced their child to kneel on uncooked rice as a punishment. (This is a common disciplinary practice among many of the world's peoples. In Spanish it is called *hincar*.) Although the mark[s] from the rice on the bare knees vanished quickly and the parents made their children kneel for just a few minutes, the social worker said the practice seemed so bizarre that she thought it might have been a sign of the parents' mental illness and inability to care for their children. A call to anyone familiar with Latino cultures or a consultation with a relevant text would have revealed that this disciplinary practice is common in many Latin American countries and should not be considered abusive unless it is used often, for long periods of time, or in unusual ways.[45]

When professionals are confronted with unusual types of child discipline like *hincar*, they must determine whether intervention is warranted. These judgment calls can obviously have drastic consequences for families, from the removal of children from the home to criminal prosecution. The decision depends, in the first instance, on the discipline itself.

A. Discipline

The mode and marks of parental discipline can be the precipitating factor that leads to removal of children from their parents' home. For instance, in one case in Northern California a father originally from Laos disciplined his seven-year-old son for "recklessly" playing with a kitchen knife.[46] He struck his son's hand with the dull end of the same knife, leaving a bruise. The next day a teacher saw the bruise and suspected that all three Saephans children enrolled at the school were being abused. After the school authorities notified the Department of Social Services, a social worker took the three children and their baby brother away while police stood guard. On the basis of this single reported instance of corporal punishment, all the children were removed from the home. The baby tragically died while in foster care, for which the parents blamed the American legal system.

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44. *See, e.g.*, Luis Laosa, *Social Policies Toward Children of Diverse Ethnic, Racial, and Language Groups in the United States*, *in* 1 CHILD DEVELOPMENT RESEARCH AND SOCIAL POLICY 1, 1–109 (Harold W. Stevenson & Alberta E. Siegel eds., 1984); *see also* Ellen Gray & John Cosgrove, *Ethnocentric Perception of Childrearing Practices in Protective Services*, 9 CHILD ABUSE & NEGLECT 389, 389–96. The consequences of social workers' intrusion in the home can be devastating. For an incisive and compelling analysis, see generally Doriane Lambelet Coleman, *Storming the Castle to Save the Children*, 47 WM. & MARY L. REV. 413 (2005).

45. Fontes & O'Neill-Arana, *supra* note 11, at 637.

46. Benjamin Pimentel, *Grieving Laotian Family Mourns Infant*, S.F. CHRON., Feb. 19, 1994, at A19.

The Loa Iu Mien Culture Association defended the father's conduct: "[I]n Iu Mien culture, some forms of physical punishment are acceptable to discipline children."[47] Children's rights advocates also condemned the social-services department, claiming that the baby's death was "an indictment on the failure of the whole child-protective-services system in the state of California."[48] The court ruled that the children should stay in foster care until the case was resolved.[49]

In another case, *Dumpson v. Daniel M.*, brought in the New York family court, the judge had to decide whether the father, a Nigerian, had administered excessive corporal punishment to his seven-year-old son.[50] The father had received nine letters from his son's teacher about his son's misconduct at school. When the father visited the school, he met with the assistant principal to discuss his son's behavior; his son was present during the conversation. During the discussion the father struck his son with his fists, belt, and feet partly because the son "was looking at Mrs. G.'s [the assistant principal's] face while [we] were talking about him," which was considered extremely disrespectful.[51] When the assistant principal attempted to restrain the father, he hit her as well, although he apologized afterwards.[52] The father's explanation for his action was that "[i]n Nigeria . . . if a child misbehaves in school and causes shame to the family, the parent has the duty to punish immediately and in any manner he sees fit."[53] The basic notion was that the son's poor behavior had reflected badly on the family.

In considering whose standards to apply, the judge emphasized that American statutory standards should be imposed: "The sole issue for determination herein is whether the respondent's conduct constitutes excessive corporal punishment as would warrant a finding of neglect under the statute.

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47. *Id.*

48. *Id.*

49. Benjamin Pimentel, *Culture Clash Ends in Death of 5-Week-Old; Laotian Infant Had Been in Foster Care After Abuse Charge*, S.F. CHRON., Feb. 12, 1994, at A1.

50. Dumpson v. Daniel M., N.Y. L. J., Oct. 16, 1974, at 17, col. 7. For the text of this case and other like cases, see generally JUDITH AREEN, CASES AND MATERIALS ON FAMILY LAW 1210 (2d ed. 1985).

51. *Dumpson*, N.Y. L. J. at 17, col. 7. In many cultures it is considered extremely rude to look authority figures in the eyes. Averting the eyes can cause problems in our legal system, though, because it may be perceived as a sign that the speaker is prevaricating. For example, when a young refugee from Sierra Leone testified about being raped, she averted her gaze, and the clinician wondered "if this might bring the client's veracity into question." The interpreter explained that in their culture "it would not have been appropriate for the young woman to speak of such an intimate assault while 'staring' at an authority figure." Judy B. Okawa, *Considerations for the Cross-Cultural Evaluation of Refugees and Asylum Seekers*, *in* HANDBOOK OF MULTICULTURAL ASSESSMENT: CLINICAL, PSYCHOLOGICAL, AND EDUCATIONAL APPLICATIONS, *supra* note 11, at 165, 172.

Another cultural difference is that individuals are socialized from a young age not to display emotion, even if they are under extreme emotional distress. When juries look for signs of remorse, the lack of emotion associated with a stoic demeanor can lead to harsher sentences. *See* RENTELN, *supra* note 1, at 40–45.

52. *Dumpson*, N.Y. L. J. at 17, col. 7.

53. *Id.*

We think that it does."[54] Despite acknowledging the importance of respecting cultural differences, the judge concluded that the father's conduct violated the best-interests-of-the-child standard:

> In a society as culturally amorphous as our own, it is incumbent upon all members of society to be tolerant and understanding of customs that differ from their own. . . . What we have here is not a mean, vindictive, or disturbed parent, but rather a man who honestly believes that he is acting in the best interests of his children. The concept "best interests of the child" is a broad term subject to much difference of opinion. Courts have applied this rather vague standard to neglect, abuse, custody, permanent neglect and guardianship cases. Often it has become a vehicle for the court to substitute its own judgment for that of the parent in determining what is best for the child. Fortunately, we do not have to wrestle with that problem. *Any reasonable man knows that it is not in the best interests of a child for its parent to punish in the manner we have seen here.* While we are sympathetic and understanding of the respondent's motives, we must conclude that motive is irrelevant when we are confronted with the type of punishment this seven-year-old boy has received.[55]

The judge ultimately allowed the children to return home but issued a temporary order of protection prohibiting physical punishment of any of the three children.[56]

Although the judge denied the relevance of motive in *Dumpson*, the parental motive is a relevant consideration. By carefully evaluating the context of a parent's action, one can ascertain whether the act is benevolent or sadistic. The extent to which the adult is trying to inculcate important values may be a crucial factor to take into account. Although the motive is not dispositive, it may provide clues that help decisionmakers figure out what will be the best course of action for a given family.

B. Criteria for Intervention

Considering that child-welfare professionals have been unacquainted with many customs, guidelines are needed to assist them. Concrete criteria for intervention would help ensure the protection of parental autonomy as well as the rights of children. Fontes and O'Neill-Arana argue that to determine whether discipline constitutes abuse professionals should consider the following factors:

> [1.] The age of the child.
>
> [2.] How often the punishment is used.
>
> [3.] The apparent physical and emotional effects of the punishment. Does it leave a mark? Is there lingering pain? Does the punishment upset or frighten the child?
>
> [4.] The duration of the punishment. For instance, being made to stand with arms outstretched for five minutes is quite different from an hour.

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54. *Id.* For New York's anomalous classification of unreasonable corporal-punishment cases as neglect rather than as abuse, see Coleman et al., *supra* note 42.

55. *Dumpson*, N.Y. L.J. at 17, col. 7. (emphasis added).

56. *Id.*

from the West Indies punched his twelve-year-old son after he had been disobedient, leaving him with cuts and bruises on his face.[61] He was convicted of assault occasioning bodily harm and sentenced to a six-month prison term. The Court of Appeal (Criminal Division) said explicitly that the lower-court judge might have handled the case differently had this been a case of first instance; however, it was not.[62] The father had been prosecuted only a few months earlier for beating his daughter so hard that both her wrists were fractured. At the time he had been informed that this form of discipline, allegedly deemed acceptable in the West Indies, was not allowed in the United Kingdom. On appeal, the Court of Appeal upheld the lower court's decision:

> This case raises difficult issues which must be considered with care. It was said below, and no doubt with truth, that standards of parental correction are different in the West Indies from those which are acceptable in this country; and the Court fully accepts that immigrants coming to this country may find initially that our ideas are different from those upon which they have been brought up in regard to the methods and manner in which children are to be disciplined. There can be no doubt that once in this country, this country's laws must apply; and there can be no doubt that, according to the law of this country, the chastisement given to this boy was excessive and the assault complained of was proved.
>
> Nevertheless, had this been a first offence, and had there been some real reason for thinking that the appellant either did not understand what the standards in this country were or was having difficulty in adjusting himself, the Court would no doubt have taken that into account and given it such consideration as it could. The really outstanding fact in this case is that this is not the first offense.[63]

The fact that the father had been admonished not to administer such force was obviously a significant consideration. On the basis of this case and a few others, one commentator inferred that courts might show leniency to an immigrant defendant

> only if he can show: (i) that he did not know that his act was criminal under English law; (ii) that if it was morally wrong according to English mores, he did not know or did not understand what English standards were or was having difficulty in adjusting himself; and (iii) that both beliefs and difficulties were reasonable on his part.[64]

Even though the appellate court declined to mitigate the punishment in *Derriviere*, it does reveal a willingness to do so in sentencing a defendant in a case of first instance.[65] Some judges may take into account an immigrant defendant's ignorance that traditional forms of discipline are proscribed by law. This suggests that the need to give fair notice as required by due process might outweigh the proverbial wisdom that ignorance of the law is no excuse.

Some social-science literature discusses the long-standing use of corporal punishment in the West Indies, but this has come under attack. An article by a

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61. R. v. Derriviere, [1969] 53 Crim. App. 637 (U.K.).

62. *Id*. at 639.

63. *Id*. at 638–39.

64. F.O. Shyllon, *Immigration and the Criminal Courts*, 34 MOD. L. REV. 135, 140 (1971).

65. SEBASTIAN POULTER, ENGLISH LAW AND ETHNIC MINORITY CUSTOMS 275 (1986); Michael Freeman, *The Morality of Cultural Pluralism*, 3 INT'L J. CHILD. RTS. 1, 4 (1995).

scholar at the University of the West Indies identified "beatings" as a significant social problem and called for more research on the "persistent and excessive use of corporal punishment on the West Indian child."[66] This suggests that, despite its widespread use there, corporal punishment has led to growing concern about its consequences for the well-being of children.

In other cases the claim made seems even more questionable, if not spurious. For instance, in Southern California a father from Guatemala disciplined his son for stealing a pack of chewing gum by placing the boy's hands over an open flame on the stove.[67] Although the prosecutor argued that culture should not reduce the punishment, the judge commented at the sentencing,

> We find ourselves in the cross-current of customs and habits. . . . [The offense was] an isolated incident with a purpose. . . . Maybe it will keep Junior from being one of our customers downstream. What Mr. Soto was doing was of a corrective nature, even though I think if he sat back and thought about what he did, he might have taken a different approach.[68]

The judge's public comment that he had been influenced by cultural considerations to impose only a small fine when the father might have received up to six years in prison sparked a huge public outcry. One scholar, then chairman of the Ethnic Studies department at the University of California, Riverside, denied that this manner of disciplining a child was practiced in Guatemala or anywhere else in Latin America. He also expressed concern that the widespread publicity surrounding this case would convey the wrong impression that this was acceptable: "I would hate for anyone to believe that our culture relies on that type of punishment in terms of correcting a wrong."[69] Others called for the judge to be removed from the bench.[70]

There may be a question as to whether the particular type of instrument used for inflicting punishment has any basis in custom. For example, sometimes fathers used fishing rods to beat their children, as did a Swiss father in Canada and a Southeast Asian refugee father in Sacramento, California.[71] It seems unlikely, though, that the use of a fishing rod is something specifically required by culture, even if the use of physical force generally was traditionally considered permissible.

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66. Elaine Arnold, *The Use of Corporal Punishment in Child Rearing in the West Indies*, 6 CHILD ABUSE & NEGLECT 141, 141–45 (1982). Arnold discusses the debate about the origins of the custom, mentioning the theory associated with Orlando Patterson that the cruelty of slave mothers toward their own children represented the displacement of aggression toward others (the driver and overseer). *Id.* at 142.

67. Stuart Pfeifer & Jennifer Mean, *Burning Son's Hand: $100 Fine*, L.A. TIMES, Apr. 27, 2002, at B1.

68. *Id.*

69. *Id*.

70. *See e.g*., Dana Parsons, *This Just in, Judge: There's No Cultural Defense for Child Abuse*, L.A. TIMES, Apr. 28, 2002, at B3.

71. Tribunal de la Jeunesse, No. 540-41-00092-877, at *5 (Feb. 2, 1988) (on file with Law and Contemporary Problems).

How, then, can we ascertain the validity of the cultural claims put forward in these discipline cases as well as others? In cases that involve a cultural defense, we may use the following test:

1. Is the individual a member of the ethnic group?
2. Does the group have such a tradition?
3. Was the individual motivated by the tradition when he or she acted?[72]

Consider this test applied to another case in which the veracity of the claim was in question: In Houston, Texas, Akinyemi Sunday Osho, a Nigerian, punished his twelve-year-old nephew, who had been living with him for five years, by striking him with an electrical cord, and then putting pepper in the wounds. He claimed this was considered "within the bounds of acceptable discipline as defined by the native culture in Nigeria."[73] The attorney had a colleague, originally from Nigeria, speak to the judge about corporal punishment in Nigeria, and the judge was persuaded that the practice was culturally acceptable. The uncle entered a plea of no contest to the charge of injury to a child.[74]

Applying the test's first query presents some difficulty: there are hundreds of different tribes in Nigeria. It is important to know to which tribe the family belonged. Nor can the question as to whether that people still had the tradition be answered. In assessing the validity of a claim, one must check whether a custom, even if once part of the culture, ceases to be considered legitimate. Cultures change and evolve, and a tradition used for a long time may have since been rejected. This may have been the case in the Osho proceeding. Even assuming that this type of child discipline was widespread in the 1980s, there has since been a trend in Nigeria and around the world to discard it.[75]

Another difficulty in the Osho case was that the child evidently complained to his mother during her annual visits, and she apparently believed the uncle's denials of the harsh discipline.[76] According to the child, punishment he had previously received in Nigeria had been far different from the cord treatment: "grounding, taking away my allowance and sometime spanking me [with an open hand]."[77] Moreover, the child claimed he had not seen his uncle discipline

72. RENTELN, *supra* note 1, at 207.

73. *Man Gets Probation After Pouring Pepper on Boy*, HOUS. CHRON., Jan. 15, 1988, § 1, at 18.

74. Harris County Adult Probation Department, Pre-Sentence Investigation Report 1 (Dec. 30, 1987) (on file with Law and Contemporary Problems). There was also a charge of debit card abuse to which Akinyemi also entered a plea of no contest. *Id*.

75. The campaign to abolish corporal punishment in Nigeria was already underway in the 1980s, when this case occurred. *See, e.g.*, Festus Nwako, *Child Abuse Syndrome in Nigeria*, 59 INT'L SURGERY 613, 613–15 (1974), *reprinted in* 19 MED., SCI. & L. 130 (1979); D.S. Obikeze, *Perspectives on Child Abuse in Nigeria*, 63 INT'L CHILD WELFARE R. 25, 25–32 (1984); O. Ransome-Kuti, *Child Health in Nigeria: Past, Present, and Future*, 61 ARCHIVES OF DISEASE IN CHILDHOOD 198, 198–204 (1986); Eileen Wilson & Grace Afamefuna, *Child Abuse in Institutions: The Case of Day-Care Centers in Nigeria*, 10 CHILD ABUSE & NEGLECT 93, 93–98 (1986).

76. Harris County Adult Probation Department, *supra* note 74, at 5 (Statement of the nephew, part of victim-impact statement).

77. *Id*.

his own children in this cord-and-pepper manner, raising further doubt as to the validity of the cultural defense raised by the uncle.[78]

Even when the cultural authenticity of the form of corporal punishment is beyond question, one might still object to the invocation of a cultural defense on normative grounds. Some courts have in fact rejected the use of cultural arguments because to allow parents to rely on other standards would create different standards for different communities. That this is an indefensible position is sometimes considered self-evident. For instance, a court in Toronto, Canada, rejected a cultural defense when Trinidadian parents struck their fifteen-year-old daughter, Lucy, with a cord for failing to attend school.[79] Lucy stated that she and all her siblings were "accustomed" to receiving physical punishment. The court wrote,

> Counsel for the accused submitted that the Court ought to take into account the background of the accused in Trinidad, as children and the manner of discipline prevalent there during their childhood. He argues that this strict atmosphere of corporal discipline was a part of the culture of the accused. I cannot think that the background could affect the determination of whether the force used in administering the punishment was reasonable or excessive.[80]

The judge quoted the principle that "'the extent of corporal punishment tallies with the manners and customs of a people or a region,'" but specified importantly, "as long as the customs of the people or region are those of a people or region of Canada."[81] The judge continued that allowing each parent different standards under the law

> would fall into disrespect of the uncertainty of its application. It seems to me that a properly directed jury would apply the custom of their community. This concern of today's community for child abuse should be reflected in the standards to be applied. The maxim, "spare the rod and spoil the child" does not enjoy the universal approval it may have had at the turn of this century and indeed at the time of the various revisions of the Criminal Code. The formation of child abuse teams at hospitals such as the Sick Children's Hospital in Toronto reflects the distaste of our community for corporal punishment.[82]

The court concluded that the use of force on a fifteen-year-old girl was not justified, largely because the father had administered it in anger, and found both parents guilty.[83]

In a number of other cases in which the defense wished to introduce cultural evidence to explain what motivated the defendant, courts have been unwilling to allow its presentation. In one 2005 California case, the defense attorney wanted to argue that the mother had used sticks to beat her child, based on

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78. For a discussion of the application of the cultural defense test to identify false claims, see generally Alison Dundes Renteln, *The Use and Abuse of the Cultural Defense*, 20 CAN. J. L. & SOC'Y 47 (2005).

79. R. v. Baptiste, [1980] 61 C.C.C. (2d) 438, 440 (Can.).

80. *Id.* at 443.

81. *Id*. (quoting Campeau v. The King, 103 C.C.C. 355, 356, 14 C.R. 202, 209 (Quebec Court of King's Bench (Appeal Side) (1951) (Bissonnette J., dissenting)).

82. *Id.*

83. *Id.* at 445.

Chinese notions of proper behavior.[84] The attorney's point was that, absent expert testimony of Chinese cultural beliefs about discipline, the American jury would be incapable of evaluating the defendant's actions.[85]

By contrast, a court in the United Kingdom did allow experts to testify about traditional corporal punishment in the case of a mother who was from North Vietnam and of Chinese ancestry.[86] Although the family-court judge was willing to consider the mother's cultural background, it did not help her, for the experts denied that the practice was consistent with customary ones:

> [T]he physical beating of these children was excessive by way of its location—the hitting of the children in the face and on the head—for which no society finds any excuse when that beating is administered with an object such as a stick or other implement so as to cause cuts and bruises in the face. Her beating was unritualized, uncontrolled and cruel, even when judged by the standards of her own people.[87]

This case demonstrates that judges can, with the assistance of expert testimony, determine whether the cultural defense raised has merit or not. Insofar as litigants will invoke cultural arguments, it would benefit the legal system to allow the consideration of cultural-background evidence to aid in the proper disposition of difficult cases.

VII

ASSESSMENT OF CASES

How should social workers, prosecutors, and judges evaluate cases in which immigrant families use corporal punishment? To answer this, we must consider the extent of public support for the custom. Interestingly, there has been consistent, widespread support for physical punishment in the United Kingdom and in the United States. One of the seminal treatments of the subject, *The History of Corporal Punishment*, emphasizes the deeply rooted support for this practice based in part on the biblical proverb, "Spare the rod, spoil the child."[88] The Bible is often cited to justify parental imposition of this type of

84. *See* Points and Authorities, Re: Cultural Expert at 2, People v. Weili Kao, Super. Ct. No. 04F04427 (Cal. Super. Ct. Aug. 8, 2005).

85. A court in the United Kingdom rejected the argument that the use of Chinese sticks to discipline a child was acceptable. *See* Re H [1987] 2 FLR 12.

86. *Id*.

87. *Id.*

88. GEORGE RYLEY SCOTT, THE HISTORY OF CORPORAL PUNISHMENT: A SURVEY OF FLAGELLATION IN ITS HISTORICAL, ANTHROPOLOGICAL, AND SOCIOLOGICAL ASPECTS 94 (1938). Although much other scholarship cites the "spare the rod" proverb, paremiologists have gathered data suggesting many think the proverb has outlived its usefulness. *See, e.g.*, Alfie Kohn, *You Know What They Say . . . Are Proverbs Nuggets of Truth or Fool's Gold* 22 PSYCHOL. TODAY, Apr. 1988, at 36, 36–41, *reprinted in* "GOLD NUGGETS OR FOOL'S GOLD?" MAGAZINE AND NEWSPAPER ARTICLES ON THE (IR)RELEVANCE OF PROVERBS AND PROVERBIAL PHRASES 83 (Wolfgang Mieder & Janet Sobieski eds., 2006) ("Few proverbs have been so thoroughly disproved—or have caused so much harm as this one. Nearly 40 years of research have shown conclusively that the 'rod' produces children who are more aggressive than their peers.").

punishment.[89] Similarly, survey data reveals that Americans have generally supported physical punishment, although such support was declining somewhat toward the end of the twentieth century.[90]

Even if a custom enjoys widespread support, it may have to be discarded if it is found to violate a fundamental human right. In this context, the question is precisely whether the tradition should be viewed as causing irreparable harm, either physical or psychological. One of the methodological challenges in measuring the effects of corporal punishment on children is separating out the violence involved from the child's humiliation. It may be that other ways of socializing children avoid physical force but do not avoid the stigma of the child's being made to understand that her conduct is deficient. If humiliation is viewed as an irreparable psychological harm because it causes long-term trauma, then this might imply that many nonviolent forms of child socialization are also unacceptable on the basis of the irreparable-harm principle. In short, it can be difficult to reach a conclusion about the propriety of particular parenting techniques without knowing the exact context in which they are administered.

Given that there are many factors to consider and that the evidence may not offer any definite answers about the effects of corporal punishment, policymakers must ask whether the presumption should or should not favor its use. Because of the possible risks to children from excessive corporal punishment, in the absence of definitive proof that it causes irreparable harm, some might take the view that the presumption should be against using this form of discipline. Others might prefer not to base policy decisions on the consequences of using or not using corporal punishment. Those taking a categorical or deontological approach might view it as an inherently degrading practice that violates a child's right to dignity. For those who regard it as a violation of human rights, even if there were irrefutable proof that the practice had benefits such as instilling moral virtue in the child, it would be unacceptable.

Whether one rejects corporal punishment on consequentialist or categorical grounds, it is still conceivable that parents should be entitled to explain to a court of law what motivated their conduct. At least when there is a clear lack of parental understanding that the conduct in question constitutes a crime, judicial leniency may be appropriate. If the goal of the legal system is to educate parents, then they should not be subject to penal sanctions. It would be far better to use other techniques to inform parents that their customary forms of disciplining children can no longer be employed. Mandating parenting classes, anger-management seminars, or other courses would be a more humane

89. Christopher G. Ellison & Matt Bradshaw, *Religious Beliefs, Sociopolitical Ideology, and Attitudes Toward Corporal Punishment*, 30 J. FAM. ISSUES 320, 323 (2009).

90. M.A. Straus & Richard Gelles, *Violence in American Families: How Much Is There and Why Does It Occur?*, *in* TROUBLED RELATIONSHIPS 141, 159 (C.M. Chilman, F.M. Cox & E. Nunnally eds., 1988); *see also* MURRAY A. STRAUS & DENISE A. DONNELLY, BEATING THE DEVIL OUT OF THEM: CORPORAL PUNISHMENT IN AMERICAN FAMILIES 20 (1994).

approach.[91] A less punitive modus operandi would also be more likely to ensure family solidarity consistent with the philosophy of family unification.

Those who advocate abolition of all physical punishment must acknowledge the consequences of implementing this policy. Requiring that parents put aside traditional discipline can have consequences for families. Children whose immigrant parents resort to those traditional measures quickly learn to call 911.[92] Empowering children in this manner clearly alters the balance of power in a family.[93] There must be other incentives and disincentives available to parents to enable them to bring up their children to respect authority and rules. In one community in New York, a political figure advised parents to tell their children they could have a new pair of shoes (sneakers) only if they were well behaved.[94] Such alternatives, though, may not have gone over well, as they appear as bribery.

VIII

CONTEXTUAL UNDERSTANDING OF REASONABLENESS IN A MULTICULTURAL WORLD

For several decades there has been a global trend toward the abolition of corporal punishment.[95] Over 100 countries have banned its use as a disciplinary technique in schools and in penal institutions, and over 150 forbid its imposition as punishment for a crime committed by a child.[96] As of 2009, twenty-three

91. *See* Linda Veazey, *Immigrants and Knowledge of U.S. Law*, 92 JUDICATURE 202, 203 (2009).

92. Dugger, *supra* note 3. Parents also sometimes call emergency numbers to find out whether they can continue to administer punishment. In Japan, when child-abuse hotlines were instituted, mothers called to find out if they could still discipline their children or if this would be considered abusive. HEATHER MONTGOMERY, AN INTRODUCTION TO CHILDHOOD: ANTHROPOLOGICAL PERSPECTIVES ON CHILDREN'S LIVES 178 (2009).

93. One Korean American student explained in class that a friend from a similar background had called 911 when the father threatened to use corporal punishment. They took a trip to Korea that summer, and when they returned, the friend never again called 911. It is possible that families will find ways to circumvent bans on corporal punishment if they come from countries where it is still allowed.

94. Dugger, *supra* note 3.

95. *See* Peter Newell, *Respecting Children's Right to Physical Integrity: What the World Might Be Like . . .*, *in* THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE 215, 215–26 (Bob Franklin ed., 1995); Karen J. Ripoll-Nunez & Ronald P. Rohner, *Corporal Punishment in Cross-Cultural Perspective: Directions for a Research Agenda*, 40 CROSS-CULT. RES. 220, 222–23 (2006). Although governments have been officially prohibiting physical discipline in various institutional settings, it still occurs in many parts of the world. *See generally* Carol R. Ember & Melvin Ember, *Explaining Corporal Punishment of Children: A Cross-Cultural Study*, 107 AM. ANTHROPOLOGIST 609 (2005). Ironically, there is more support for physical discipline in the United States than in many other places. *See* David Levinson, *Physical Punishment of Children and Wifebeating in Cross-cultural Perspective*, 5 CHILD ABUSE & NEGLECT 193, 195 (1981).

96. Joan E. Durrant et al., *Protection of Children from Physical Maltreatment in Canada: An Evaluation of the Supreme Court's Definition of Reasonable Force*, 18 J. AGGRESSION, MALTREATMENT & TRAUMA 64, 65 (2009). The empirical study assessed the data to see whether it provided stronger support for abolition or limitation; it provided stronger support for the former. *Id.* at 82.

countries also banned its use in all settings, including the home.[97] The goal of the social movement, the Global Initiative to End All Corporal Punishment, as the name suggests, is to abolish corporal punishment altogether.

Some courts have followed a different approach. They have attempted to limit the imposition of physical punishment to "reasonable" corporal punishment,[98] which presumably requires that parents or authority figures proffer a compelling justification. Assuming that they can justify its use, it should not be excessive; it must not violate some notion of proportionality—that is, it should not be more severe than the offense the child has committed.

Determining what constitutes a "reasonable" use of discipline presents considerable difficulties because of varying notions of reasonable conduct. In pluralistic societies with families from vastly different cultures who practice different religions and who have widely divergent experiences, it is unrealistic to expect we can identify a single standard of reasonable conduct. The reality is that perceptions about reasonableness are culturally specific, which has been recognized to some degree in debates about the use of the provocation defense in criminal law. Increasingly, scholars and practitioners have recognized that the reasonable-person test must be understood in a particular cultural context.[99]

If courts employ a culturally specific reasonable-person test in criminal cases, they may have to accept different reasons for punishing children to socialize them. They might also have to entertain the possibility that other methods of imposing punishment are legitimate. As long as we continue to have corporal punishment, it will remain problematic to allow parents to impose it only for those reasons designated as acceptable and in the manner authorized by the dominant culture. Because of the danger of using a double standard for immigrant families by punishing them at a much higher rate, it might be safer not to attempt to limit use of corporal punishment to avoid "excessive" use.[100] On this view, abolition of corporal punishment altogether would arguably be fairer.

Another argument against the limitation approach is that even if corporal punishment can be administered safely, it inherently involves the "risk of escalation."[101] According to this perspective, considering physical punishment safe is illusory.

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97. *Id.* at 65 n.1. (Sweden, Finland, Norway, Austria, Cyprus, Denmark, Latvia, Croatia, Israel, Germany, Bulgaria, Iceland, Hungary, Ukraine, Romania, Greece, Netherlands, New Zealand, Portugal, Uruguay, Spain, Venezuela, and Costa Rica).

98. *See* Coleman et al., *supra* note 42, at 137-38 (noting that this is the traditional approach taken in the United States, based on earlier United Kingdom doctrine).

99. *See* MICHAEL SALTMAN, THE DEMISE OF THE 'REASONABLE MAN': A CROSS-CULTURAL STUDY OF A LEGAL CONCEPT (1991); *see also* Stanley Yeo, *Ethnicity and the Objective Test in Provocation*, 16 MELB. U. L. REV. 67 (1987); Stanley Yeo, *Sex, Ethnicity, Power of Self-Control and Provocation Revisited*, 18 SYDNEY L. REV. 304 (1996).

100. This argument that ethnic-minority parents receive disproportionate attention for their allegedly improper parenting could be viewed as a form of racial profiling.

101. Durrant et al., *supra* note 96, at 68.

Abolition may also be justifiable because of an apparent emerging norm of customary international law prohibiting corporal punishment.[102] As societies use it less and less, one might argue that the custom has fallen into desuetude.[103] To the extent that legal systems are enacting policies forbidding the use of physical discipline in various institutional settings and to the extent that their citizens believe those systems are bound to do so, children's rights advocates may eventually be able to show that a new norm of customary international law has crystallized.

The Convention on the Rights of Child (CRC) provides some textual support for the eradication of corporal punishment insofar as its provisions seemingly prohibit physical discipline. Article 37 stipulates that "no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment."[104] Presumably, children could already invoke this right because this phrase replicates Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights (ICCPR). By including it in the CRC, jurists made it clear that children could invoke it against parents, guardians, school officials, or any other authority figure who is responsible for taking care of children, as indicated in Article 19 of the CRC. Lest any doubt remain as to the scope of the treaty's application, the Committee on the Convention on the Rights of the Child issued a policy statement, The Right of the Child to Protection from Corporal Punishment and Other Cruel, or Degrading Forms of Punishment, which stipulates that spanking and other similar forms of punishment constitute violations of international children's rights.[105]

The CRC also guarantees children the right to culture in Article 30, which some might invoke to claim that children must be socialized in such a way as to ensure the maintenance of their cultural identity. The counterargument is that a limit on cultural traditions is implicit in Article 24(3), which prohibits traditions which are "prejudicial to the health of children."[106] The CRC General Comment 8 explicitly rejects the proposition that the right to religious freedom guaranteed in Article 18 of the ICCPR provides a right and perhaps even a duty

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102. The United Nations Secretary General launched a study on violence against children which included corporal punishment. *See* UNITED NATIONS, WORLD REPORT ON VIOLENCE AGAINST CHILDREN (2006), *available at* http://www.unviolencestudy.org/. The report provides some evidence of an emerging norm. 2009 was announced as the target date for universal abolition. *See* Michael D.A. Freeman, *Upholding the Dignity and Best Interests of Children: International Law and the Corporal Punishment of Children*, 73 LAW & CONTEMP. PROBS. 211 (Spring 2010); Elizabeth T. Gershoff, *More Harm than Good: A Summary of Scientific Research on the Intended and Unintended Effects of Corporal Punishment on Children*, 73 LAW & CONTEMP. PROBS. 31 (Spring 2010).

103. This was evident in the discussion of discipline in Korea and Nigeria, when families claimed that corporal punishment was culturally accepted even though there were strong social movements developing to prohibit it.

104. Convention on the Rights of the Child art. 37, opened for signature Nov. 20, 1989, 1577 U.N.T.S. 3.

105. *General Comment No. 8*, *supra* note 6.

106. *See* Freeman, *supra* note 65, at 6.

to use corporal punishment: "Freedom to practise one's religion or belief may be legitimately limited in order to protect the fundamental rights and freedom of others."[107] Here the need to protect children's right to dignity and physical integrity is presented as trumping the right to religious liberty. The widely ratified instrument is likely to be a powerful tool for advocates opposed to corporal punishment as "legalized violence against children."[108]

An evolving jurisprudence in human-rights tribunals also appears to oppose many forms of corporal punishment.[109] The European Court of Human Rights handed down a series of decisions concluding that birching, caning, and other similar methods of discipline should be construed as human-rights violations because they constitute "cruel or degrading treatment or punishment."[110] The Court has held that the use of corporal punishment was inhumane in schools[111] and that the caning of a young boy by his stepfather violated Article 3 of the European Convention of Human Rights.[112] And though the Northern Ireland Commissioner for Children and Young People sought a ruling that the use of a defense known variously as the right of parental correction, punishment, or chastisement was inconsistent with the European Convention on Human Rights, the attempt was foiled by a failure to show standing.[113]

The European system has also issued publications designed to raise public awareness of the ongoing campaign to abolish corporal punishment of children.[114] One poignant cartoon is captioned, "Hitting adults is called assault. Hitting animals is called cruelty. Hitting children is 'for their own good.'"[115] One policy recommendation is to remove any existing defenses in statutes or common law that would justify corporal punishment by parents or others.[116] It rejects the notion that there could be a religious requirement to use this type of discipline.

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107. *General Comment No. 8*, *supra* note 6, ¶ 29.

108. *Id*. ¶ 18.

109. *See* Freeman, *supra* note 102.

110. *See* A. v. United Kingdom, 90 Eur. Ct. H.R. 2692, 2699 (1998).

111. Campbell v. United Kingdom, 48 Eur. Ct. H.R. (ser. A) (1982).

112. *A.*, 90 Eur. Ct. H.R. at 2699.

113. Northern Ireland Commissioner for Children and Young Peoples' Application [2009] NICA 10 (Civ) (N. Ir.). The Court of Appeal in Northern Ireland found that the Commissioner was not a victim and therefore not entitled to seek a ruling on this matter. The Court seemed concerned that deciding that the common-law defense was no longer available would constitute the imposition of retrospective change in law. As there would be no way to limit the application of the ruling to future cases, it seemed unwise to decide the matter in the absence of an actual case or controversy. *Id.* ¶ 22.

114. *See* MONIKA SAJKOWSKA, PROTECTING CHILDREN AGAINST CORPORAL PUNISHMENT (2004); COUNCIL OF EUROPE PUBLISHING, ABOLISHING CORPORAL PUNISHMENT OF CHILDREN: QUESTIONS AND ANSWERS (2007).

115. COUNCIL OF EUROPE PUBLISHING, *supra* note 114, at 6.

116. *Id.* at 28.

Other regional human-rights systems have rejected corporal punishment in some institutional settings.[117] The Inter-American Court of Human Rights held that the use of corporal punishment in penal institutions was unacceptable.[118] In addition, the African Commission on Human and People's Rights outlawed the use of lashes in school.[119]

Even if a global consensus against the use of corporal punishment is growing, it could, of course, be followed by a backlash, given the historical and cultural support for corporal punishment in the past. For example, New Zealand passed a law banning its use so as to make its domestic law consistent with its international obligations under the CRC. This mobilized a pro-smacking movement, which launched a referendum to repeal the law.[120]

Despite the efforts of a few pro-spanking advocates, the campaign to ban physical methods of disciplining children seems to be expanding. To the extent that member states believe they are obligated to ban corporal punishment, and to the extent that they have done so, one might conclude that the right against corporal punishment is an emerging norm of customary international law.[121] If that is so, it will be increasingly difficult for defendants in criminal cases to prevail when they raise cultural defenses. If a practice is no longer part of the culture, it cannot provide the basis for a valid cultural defense.

Furthermore, whereas the right to culture is undeniably a basic human right, children's rights are fundamental human rights as well. The right of children to be free from threats to their physical integrity deserves protection, and the evidence is mounting that corporal punishment causes irreparable harm to children.[122] Although some doubt may linger about its long-term effects, the presumption should be to discard the practice.[123]

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117. *See, e.g.*, Legal Status and Human Rights of the Child, Adv. Op. OC-17/2002, Inter-American Court of Human Rights (2002).

118. Caesar v. Trinidad & Tobago, 2005 Inter-Am. Ct. H.R. (ser. C) No. 123, ¶ 73 (2005).

119. Doebbler v. Sudan, No. 236/2000 (African Comm'n on Human & People's Rights (2003)).

120. Child Rights Information Network, *Ban on Corporal Punishment in the Home—Referendum and After*, http://www.crin.org/resources/infodetail.asp?id=22344.

121. For the court cases handed down by national supreme courts, see Endcorporalpunishment.org, Key Judgments, http://www.endcorporalpunishment.org/pages/hrlaw/judgments.html (last visited Oct. 10, 2009).

122. *Compare* Coleman et al., *supra* note 42, at 144-49 (noting that scientific evidence indicates that modest corporal punishment may lead to increased anxiety, greater aggressiveness, and lower self-esteem), *and* Gershoff, *supra* note 102, at 40-47 (noting that scientific evidence indicates that corporal punishment may lead to increased mental-health problems, reduced cognitive ability, and greater levels of aggression and antisocial behavior) *with* Robert E. Larzelere & Diana Baumrind, *Are Spanking Injunctions Scientifically Supported?*, 73 LAW & CONTEMP. PROBS. 57, 69 (Spring 2010) (noting that current research indicates that customary spanking is not associated with any more-adverse outcomes in children than is any other type of corrective discipline).

123. After evaluating the major reviews on the effects of corporal punishment, Ripoll-Nunez and Rohner urge caution in drawing any definitive conclusions about the effects of punishment. *See* Ripoll-Nunez & Rohner, *supra* note 95, at 243–44. They call for much cross-cultural research with more-careful conceptual and methodological rigor. *Id.*; *see also* STRAUS & DONNELLY, *supra* note 90, at 189–90.

IX

CULTURE AND BEST INTERESTS OF THE CHILD

It is common in many legal systems to invoke the best-interests-of-the-child standard to decide upon the most appropriate course of action in many disputes. Relying on this nebulous standard in situations with cultural collisions is particularly problematic. The challenge is knowing how to apply the standard precisely when views as to what is best for the child diverge.

In a thoughtful essay on the status of the best-interests-of-the-child principle in international law, Philip Alston, a leading human-rights scholar, addressed the tension between cultural rights and children's rights, noting that the inclusion of the principle was controversial even before the process of drafting the CRC was complete. A major difficulty in the transposing of the domestic norm to international law was the vagueness of the standard. Alston concedes, "If human rights norms in general can be said to be inherently indeterminate, the best-interests principle is located by most of its critics as the most indeterminate outer margins even of that body of norms."[124]

Parents are generally thought to have the right to raise their children as they wish, subject to limits based on cultural rights, religious liberty, and privacy. They may pass their beliefs and traditions on to those children, for the continuation of cultural communities depends on it. If corporal punishment becomes a thing of the past, then what alternatives will enable parents to bring up their children to be upstanding moral citizens instilled with civic virtue? Although the American parenting technique in vogue in the early twentieth century was a "time out" in which children were required to stay in their rooms with their toys, books, and computers (if they had them), this hardly seemed a real form of punishment. Such techniques raise the question as what suitable alternatives may be found to allow parents to encourage their children to follow tradition.

Have we reached an impasse on the question of corporal punishment for children? The challenge is to figure out how to protect children's rights and parents' rights to autonomy and culture simultaneously. Abdullahi An-Na'im proposed the use of cross-cultural dialogue as a way of forging consensus. In his insightful essay, *Cultural Transformation and Normative Consensus on the Best Interests of the Child*, he poses questions about how to determine whether discipline is in the best interests of the child, which forms of it do not violate human-rights standards, and how to proceed to build a universal consensus on these matters.[125] Although the status of corporal punishment may still be an

124. Philip Alston, *The Best Interests Principle: Toward a Reconciliation of Culture and Human Rights*, *in* THE BEST INTERESTS OF THE CHILD: RECONCILING CULTURE AND HUMAN RIGHTS 1, 18 (Philip Alston ed., 1994). The critics mentioned by name are Robert Mnookin and David Chambers. *Id.* at 24 n.45.

125. Abdullahi An-Na'im, *Cultural Transformation and the Normative Consensus on the Best Interests of the Child*, *in* THE BEST INTERESTS OF THE CHILD: RECONCILING CULTURE AND HUMAN RIGHTS, *supra* note 124, at 62–81.

unsettled question, he is optimistic that cross-cultural agreement can eventually be achieved through dialogue. Despite some doubt about the likelihood that this dialogue approach can yield consensus,[126] there is evidence of a worldwide trend away from the use of corporal punishment.[127]

Any such cross-cultural, universal support for the rejection of corporal punishment would mean that the cultural argument should not mitigate punishment in cases in which parents raise cultural defenses. The existence of the universal signifies that the international community banned it and that the culture itself has done so as well. Demonstrating the existence of such a consensus would also increase the chances that states will enforce the CRC so as to prevent corporal punishment because the policy would resonate with values embedded in their own domestic legal systems.

X

CONCLUSION

Individuals invoke cultural arguments in civil and criminal proceedings that address the welfare of their children. Courts should allow evidence regarding their methods of socializing their children because otherwise the motivations for their actions may well be incomprehensible. To determine the validity of the cultural claims put forward, judges should apply the cultural-defense test. This will ensure that spurious claims are rejected. However, even if the practice satisfies the requirements of the test, it may be deemed normatively unreasonable. If the use of physical force exceeds what the culture regards as reasonable or if the practice can cause irreparable harm, whether physical or psychological, the cultural consideration should not affect the disposition of the case. Allowing the presentation of evidence does not mean the information will necessarily influence the outcome. The question of admissibility is separate from the question of how much weight it should receive.

Although it would be ideal to have a bright-line rule to distinguish acceptable uses of discipline from those that are excessive, it is unfortunately not feasible to do so. Courts will have to take a case-by-case approach to the evaluation of the cultural claims in discipline cases to determine whether intervention and prosecution are warranted. Eventually, when there is clear

126. *See* Leigh Kathryn Jenco, *"What Does Heaven Ever Say?" A Methods-Centered Approach to Cross-Cultural Engagement*, 101 AM. POL. SCI. REV. 741, 741–55 (2007). Jenco asks important questions about how to approach questions of consensus: "Is there a way to conduct cross-cultural inquiry so as to supplant, rather than embrace, the Eurocentrism [some] assume is unavoidable? And how must the way we practice not only cross-cultural theory but also political theory in general be changed to reflect this new approach?" *Id.* at 741.

127. Even the United States may be changing to be opposed to spanking. *See* Murray Straus & Michael Donnelly, *Theoretical Approaches to Corporal Punishment, in* CORPORAL PUNISHMENT OF CHILDREN IN THEORETICAL PERSPECTIVE 3, 5 (Michael Donnelly & Murray A. Straus eds., 2005). If it was possible finally to ban the execution of juveniles, perhaps outlawing corporal punishment will be as well. The Supreme Court upheld the use of corporal punishment in schools in 1977 in *Ingraham v. Wright*, 430 U.S. 651 (1977).

international consensus against the use of corporal punishment, the issue of whether to acknowledge culturally varying customs may cease to be a matter of concern. At some point in the future the use of all forms of physical punishment may well be illegal.

The proverb "Spare the rod, and spoil the child" may have fallen out of favor, at least in its literal form. Nevertheless, the notion that children need to be educated is not anachronistic; children must learn respect for authority, the importance of adhering to the rule of law, and consideration for others. If traditional techniques are forbidden, then parents will have to come up with innovative methods of socializing children.