

Willis v. State: Condoning Child Abuse as Discipline

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Introduction

Indiana has long recognized the parental privilege to use physical force, including corporal punishment, to discipline children.¹ Parents assert this privilege as a defense when prosecuted for violent acts against their children.² Consequently, parents who engage in physical discipline that would otherwise constitute criminal battery are sometimes able to escape conviction.³ However, parental assertion of the privilege was not always as successful a defense as it may be today. Indiana's treatment of forceful discipline has evolved from a time when a court convicted a parent of battery even though the child was not physically injured,⁴ to its current state, where a parent can cause a child visible injury and not receive a battery conviction.⁵

Until recently, Indiana case law provided very little guidance as to the form and extent of discipline that its courts would consider reasonable and within the limits of the parental discipline privilege.⁶ Previously, no true standard existed, except that privileged abuse could not be cruel, excessive, or otherwise unreasonable.⁷ Indiana's judicial determinations of what constituted excessive or unreasonable child discipline were subjective because there were few rules and little guidance.⁸

¹ *Hornbeck v. State*, 45 N.E. 620, 620 (Ind. Ct. App. 1896) ("The law is well settled that a parent has the right to administer proper and reasonable chastisement to his child without being guilty of assault and battery.").

² *Mitchell v. State*, 813 N.E.2d 422, 427 (Ind. Ct. App. 2004) (discussing a parent raising the defense of legal authority in a prosecution for battery against a child).

³ *Hornbeck*, 45 N.E. at 620.

⁴ *Hinkle v. State*, 26 N.E. 777, 778 (Ind. 1891) (finding that a father chained his daughter to a sewing machine for an entire day and convicting him of assault and battery despite child's lack of physical injury).

⁵ *Willis v. State*, 888 N.E.2d 177, 184 (Ind. 2008).

⁶ *Mitchell*, 813 N.E.2d at 427.

⁷ *Johnson v. State*, 804 N.E.2d 255, 257 (Ind. Ct. App. 2004).

⁸ *Mitchell*, 813 N.E.2d at 427.

The Indiana Supreme Court first addressed the parental discipline privilege⁹ in *Willis v. State*.¹⁰ The court's decision to adopt the Restatement view¹¹ changed Indiana's policy regarding child battery prosecutions.¹² There, it delineated the standards its courts should use when parents raise the privilege as a complete defense to child battery charges.¹³ Although the court attempted to clarify the issue of reasonable and privileged discipline,¹⁴ the new policy is only a superficial improvement because application of the Restatement's reasonableness factors¹⁵ still requires subjective determinations. What one parent or court believes is reasonable may be drastically more harmful than what another parent or court would find reasonable. Additionally, *Willis* will likely have extremely negative implications for children in Indiana, as the court has authorized parents to use force against children. This is tantamount to condoning child abuse and embraces its repercussions.

This Note discusses the parental privilege to engage in the physical discipline of children and proposes that Indiana

⁹ *Willis v. State*, 888 N.E.2d 177, 181 (Ind. 2008).

¹⁰ *Willis v. State*, 888 N.E.2d 177 (Ind. 2008).

¹¹ RESTATEMENT (SECOND) OF TORTS § 147 (1965) (“A parent is privileged to apply such reasonable force or to impose such reasonable confinement upon his child as he reasonably believes to be necessary for its proper control, training, or education.”).

¹² *Willis*, 888 N.E.2d at 184 (Sullivan, J., dissenting) (“[T]he Court’s opinion constitutes a change in our State’s policy toward child abuse.”).

¹³ *Id.* at 182.

¹⁴ *Willis*, 888 N.E.2d at 182.

¹⁵ RESTATEMENT (SECOND) OF TORTS § 150 (1965):

In determining whether force or confinement is reasonable for the control, training, or education of a child, the following factors are to be considered: (a) whether the actor is a parent; (b) the age, sex, and physical and mental condition of the child; (c) the nature of his offense and his apparent motive; (d) the influence of his example upon other children of the same family or group; (e) whether the force or confinement is reasonably necessary and appropriate to compel obedience to a proper command; (f) whether it is disproportionate to the offense, unnecessarily degrading, or likely to cause serious or permanent harm.

prohibit corporal punishment against children.¹⁶ Part I reports on the evidence social scientists have obtained regarding the effects of corporal punishment on children. Part II explores how other jurisdictions treat corporal punishment and the parental privilege, both in the United States and globally. Part III discusses the evolution of prosecutions in Indiana for offenses that result from parental use of physical force against children. Part III also briefly explains the provisions of the Indiana Code relevant to offenses involving physical force against a child, the standards for proving such offenses, and factors involved in obtaining convictions and affirmances on appeals. Part IV examines the entire court history of *Willis v. State*. Part V discusses the potential ramifications of *Willis* in Indiana. Finally, Part VI advocates for the reversal of *Willis* and a ban on corporal punishment in Indiana.

I. Social Science Data on Corporal Punishment of Children

Parental utilization of physical discipline against their children can be extremely harmful and have a detrimental impact on the children later in life.¹⁷ Still, at least 84% of Americans believe that spanking is a legitimate form of discipline and sometimes necessary.¹⁸ Furthermore, over 90% of Americans use corporal punishment on toddlers, and more than half continue to use it on adolescents.¹⁹ A study on its

¹⁶ This Note will focus only on the *parental* privilege to engage in physical discipline of children. It does not address the issues of corporal punishment in schools or alternative care settings. Corporal punishment in those settings is a separate area of law, often treated differently than parental corporal punishment.

¹⁷ See Murray A. Strauss, David B. Sugarman & Jean Giles-Sims, *Spanking by Parents and Subsequent Antisocial Behavior of Children*, 151 ARCH. PEDIATR. ADOLESC. MED. 761 (1997) (discussing a study finding that corporal punishment may lead to anti-social behavior, depression, alienation, aggression, masochism, and physical assault on future spouse and children).

¹⁸ MURRAY A. STRAUSS, BEATING THE DEVIL OUT OF THEM: CORPORAL PUNISHMENT IN AMERICAN FAMILIES AND ITS EFFECTS ON CHILDREN, CH. 6: PHYSICAL ABUSE 88 (2nd ed. 2001).

¹⁹ *Id.* at 88-89.

effects found that an “extremely high prevalence and chronicity of spanking . . . suggest[s] a serious threat to the well-being of American children.”²⁰ The unfortunate reliance on corporal punishment illustrates that parents are either uneducated or ignoring the statistics regarding the potentially detrimental effects of corporal punishment.²¹

Importantly, most studies on the relationship between corporal punishment and child aggression find a correlation.²² Research “consistently indicates that spanking harms children by increasing the chances of physical aggression and delinquency”²³ and is associated with adult problems such as depression, spousal abuse, and reduced occupational success.²⁴ The American Academy of Pediatrics found the following consequences of spanking for parent and child: it (1) increases the chance of physical injury to children under 18 months; (2) may cause agitated, aggressive behavior that may lead to a physical altercation between the parent and child; (3) models aggressive behavior as a solution to conflict and has been linked to aggressive behavior in preschool and school children; (4) alters the parent-child relationship and makes discipline more difficult when corporal punishment is no longer an option; and it (5) is no more effective than other long-term strategies.²⁵ It further found that: (1) relying on physical discipline makes other strategies less effective; (2)

²⁰ JEAN GILES-SIMS, MURRAY A. STRAUS & DAVID B. SUGARMAN, CHILD, MATERNAL, AND FAMILY CHARACTERISTICS ASSOCIATED WITH SPANKING, *FAMILY RELATIONS* 44:170-176, 175 (1995).

²¹ *Id.* at 83-90 (discussing the evidence regarding effects of corporal punishment and why it is ignored); *see also* Strauss et al., *supra* note 17, at 761 (suggesting parents spank without considering the potential side effects).

²² Strauss et al., *supra* note 17, at 761.

²³ Giles-Sims, et al., *supra* note 21 at 175; *see also* David Orentlicher, *Spanking and Other Corporal Punishment of Children by Parents: Overvaluing Pain, Undervaluing Children*, 35 *HOUS. L. REV.* 147, 158-59 (1998).

²⁴ *Id.*

²⁵ American Academy of Pediatrics: Guidance for Effective Discipline – Committee on Psychosocial Aspects of Child and Family Health, http://aappolicy.aappublications.org/cgi/content/full/pediatrics;_101/4/723 (last visited Feb. 15, 2009).

patterns of spanking are sustained or increased; (3) there is a greater likelihood that the parent will spank in the future because it provides the parent with relief from anger; (4) parents who spank are more likely to use other forms of unacceptable corporal punishment; and (5) spanking has been associated with higher rates of physical aggression, more substance abuse, and increased risk of crime and violence when used on older children and adolescents.²⁶ It is evident that corporal punishment may negatively affect the parent utilizing it as a disciplinary tool, and the children, both immediately and later in life.

Moreover, a correlation also exists between the frequency of hitting and mental illness.²⁷ The more a parent hits a child, the more likely it is that the child will develop depression as they grow older.²⁸ Studies show there is a relationship between corporal punishment and emotional and behavioral problems, including low self-esteem, depression, increased anxiety, and low educational achievement.²⁹ Corporal punishment also tends to be associated with an increase in antisocial behavior, regardless of whether parents provide cognitive stimulation and emotional support,³⁰ and despite socioeconomic status, ethnic group, and sex of the child.³¹ A meta-analytic review of research on the consequences of corporal punishment also found a correlation between corporal punishment and: (1) immediate compliance of children with parental demands; (2) lack of moral internalization; (3) increased aggression; (4) increased

²⁶ *Id.*

²⁷ David Orentlicher, *Spanking and Other Corporal Punishment of Children by Parents: Overvaluing Pain, Undervaluing Children*, 35 HOUS. L. REV. 147, 157 (1998).

²⁸ *Id.* at 157. The correlation is still present after controlling for variables such as the sex of the child, socioeconomic status, alcohol abuse by the child later in life, and violence between the child's parents.

²⁹ Strauss et al., *supra* note 17, at 761; *see also* David Orentlicher, *Spanking and Other Corporal Punishment of Children by Parents: Overvaluing Pain, Undervaluing Children*, 35 HOUS. L. REV. 147, 156 (1998).

³⁰ Strauss et al., *supra* note 17, at 766.

³¹ *Id.*

delinquent, criminal, and antisocial behaviors; (5) erosion of the parent-child relationship; (6) mental health problems; (7) adult abuse of children or spouse by the previous child victim; and (8) child abuse.³²

As already stated, the negative implications of corporal punishment are not limited to childhood.³³ Corporal punishment leads to attitudes favoring violence, and it fosters physical abuse in adulthood.³⁴ One study found that parents who were hit multiple times as teenagers had the highest rate of physical abuse toward their own children.³⁵ The evidence also indicated an increased risk for teens who were hit only once to later become physically abusive towards their children³⁶ and that the more a child experiences corporal punishment, the greater the chance that the child will physically assault a future spouse.³⁷

Additionally, the continued acceptance of physical discipline is even more problematic in light of scientific evidence that corporal punishment is no more effective with young children than other methods of discipline, and is actually less effective with older children.³⁸ Particularly, the American Academy of Pediatrics has found spanking less successful than time-out or removal of privileges.³⁹ It also found that the effectiveness of corporal punishment decreases with use.⁴⁰ Therefore, the only way to maintain the initial

³² Elizabeth Thompson Gershoff, *Corporal Punishment by Parents and Associated Child Behaviors and Experiences: A Meta-Analytic and Theoretical Review*, 128(4) PSYCHOLOGICAL BULLETIN 539, 541-42 (2002).

³³ Strauss et al., *supra* note 17, at 766 (“[Corporal punishment] is associated with adult behavior problems.”).

³⁴ Strauss, *supra* note 18, at 97.

³⁵ *Id.* at 95.

³⁶ *Id.*

³⁷ *Id.* at 90.

³⁸ MURRAY A. STRAUSS AND ANITA K. MATHUR, SOCIAL CHANGE AND THE TRENDS IN APPROVAL OF CORPORAL PUNISHMENT BY PARENTS FROM 1968 TO 1994 *in* FAMILY VIOLENCE AGAINST CHILDREN: A CHALLENGE FOR SOCIETY 91-105, 103 (1996).

³⁹ American Academy of Pediatrics, *supra* note 25.

⁴⁰ *Id.*

desirable effect of eliminating negative behavior is to increase the intensity of the punishment, which can quickly escalate into what would constitute abuse.⁴¹

Despite the massive quantity of research showing a correlation between corporal punishment and undesirable emotional and behavioral responses, some opponents still claim that corporal punishment is not harmful and is actually beneficial to children.⁴² While there is conflicting evidence,⁴³ one of the main criticisms is that scientific studies do not show a causal connection between corporal punishment and its negative effects.⁴⁴ There are two explanations for the deficiency in the research: first, the causal relationship may be bi-directional, meaning that negative behaviors may cause parents to use corporal punishment and the use of corporal punishment may cause negative behaviors;⁴⁵ and second, ethical concerns do not allow for research testing the causal theory.⁴⁶ “Experimental research is considered unethical among most researchers because of the various associations between spanking and later problems . . . [I]t would be unethical to subject any child to spanking to determine whether spanking has harmful effects.”⁴⁷ This lack of causal proof still does not negate the masses of other research that have shown corporal punishment has negative effects. Any harm to a child is too much harm. As long as “a consensus on where to draw the line between acceptable corporal punishment and dangerous physical abuse is noticeably absent

⁴¹ *Id.*

⁴² See, e.g., Jason M. Fuller, *The Science and Statistics Behind Spanking Suggest that Laws Allowing Corporal Punishment Are in the Best Interests of the Child*, 42 AKRON L.REV. 243 (2009).

⁴³ *Id.* at 247.

⁴⁴ *Id.* at 290-92.

⁴⁵ Strauss et. al, *supra* note 17, at 763; see also Orentlicher, *supra* note 27, at 160.

⁴⁶ Deana Pollard, *Banning Child Corporal Punishment*, 77 TUL. L. REV. 575, 599-600

(2003)

⁴⁷ *Id.*

in the United States,”⁴⁸ children will continue to be abused in the name of discipline.

Unfortunately, abuse is already prevalent in Indiana, which is likely due, at least in part, to the use of corporal punishment. In 2006, 2,609 Indiana children were victims of physical abuse,⁴⁹ which was Indiana’s highest record in four years.⁵⁰ Child protection workers removed 180 of those children from their homes.⁵¹ Children who were previous victims were 96% more likely to experience a recurrence of abuse than children who were not former victims.⁵² The statistics do not indicate how much of the abuse began as corporal punishment and escalated, but the numbers clearly show that violence against children is a serious problem.

II. Corporal Punishment and Parental Privilege in Other Jurisdictions

The international community has made a strong movement towards an entire abolition of the use of corporal punishment in homes and schools.⁵³ In the United States, “every state, as well as the U.S. Supreme Court, has addressed the use of disciplinary force against children in one legal context or another.”⁵⁴ Acknowledging that parental use of corporal punishment in disciplining children is a deep-rooted

⁴⁸ Gershoff, *supra* note 32, at 540.

⁴⁹ U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION ON CHILDREN, YOUTH AND FAMILIES, CHILD MALTREATMENT 2006, 42 (U.S. Government Printing Office 2008). This number does not include unreported victims.

⁵⁰ *Id.* at 38-40.

⁵¹ *Id.* at 95.

⁵² *Id.* at 30.

⁵³ See United Nations Convention on the Rights of the Child, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3; *see also* Global Initiative to End All Corporal Punishment of Children, <http://endcorporalpunishment.org> (last visited Feb. 15, 2009).

⁵⁴ Kandice K. Johnson, *Crime or Punishment: The Parental Corporal Punishment Defense – Reasonable and Necessary, or Excused Abuse?*, 1998 U. ILL. L. REV. 413, 416 (1998) (footnotes omitted).

historical practice,⁵⁵ all fifty states have recognized some form of parental privilege.⁵⁶

A. Worldwide

Although there is no worldwide consensus on how legal systems should treat corporal punishment and the parental privilege, a global movement towards complete abolition of corporal punishment has been gaining momentum.⁵⁷ This global initiative is in large part due to the multitude of social science evidence that shows the negative consequences of utilizing corporal punishment against children.⁵⁸ However, despite recent global trends, many countries still allow corporal punishment, both in the home and other settings.⁵⁹

⁵⁵ Christopher B. Fuselier, *Corporal Punishment of Children: California's Attempt and Inevitable Failure to Ban Spanking in the Home*, 28 J. JUV. L. 82, 82 (2007) (discussing the use of corporal punishment in Biblical times and in ancient Greece and Rome).

⁵⁶ See *infra* Part II.C.; see also Johnson, *supra* note 54, at app.; see also Kimberlie Young, *An Examination of Parental Discipline as a Defense of Justification: It's Time for a Kinder, Gentler Approach*, 36 NAVAL L. REV. 1, 11-25 (1999).

⁵⁷ Global Initiative to End All Corporal Punishment of Children, Global Progress - United States of America, <http://endcorporalpunishment.org/pages/progress/reports/usa.html> (last visited Feb. 15, 2009).

⁵⁸ Global Initiative to End All Corporal Punishment of Children, Introduction: The Other Arguments Against Corporal Punishment of Children, <http://endcorporalpunishment.org/pages/intro/intro.html> (last visited Feb. 15, 2009) (“Research into the harmful physical and psychological effects of corporal punishment . . . add[s] further compelling arguments for condemning and ending the practice.”).

⁵⁹ Global Initiative to End all Corporal Punishment of Children, Introduction: Progress Towards Ending Corporal Punishment, <http://endcorporalpunishment.org/pages/intro/intro.html> (last visited Feb. 15, 2009) (“Despite the growing consensus that corporal punishment breaches children’s fundamental human rights, most of the world’s children are still subjected to legalized assaults by their parents and by other carers and teachers.”).

In 1979, Sweden became the first nation to prohibit parental corporal punishment of children.⁶⁰ “The ban demonstrates how a democratic government can interfere with traditional family relationships without creating an explosive public backlash.”⁶¹ The Swedish government amended its Parent and Guardianship Code to forbid parents from subjecting their children to corporal punishment or other “injurious or humiliating treatment.”⁶² Additionally, a strong education campaign accompanied the new law, effectively ensuring compliance and contributing to its acceptance.⁶³ The purpose of the law was not to subject perpetrators to criminal sanctions, but to “change societal views without coercion.”⁶⁴ In fact, the government did not include any penalties in the law other than the potential for a government agency to remove children from their homes.⁶⁵ Significantly, since the ban on corporal punishment, the rate of child abuse in Sweden has decreased,⁶⁶ which may show that there is a link between such educational campaigns and a decrease in corporal punishment.

Similarly, in 1996, Italy’s highest court, the Supreme Court, judicially proscribed parental use of corporal punishment as a technique for raising or educating children.⁶⁷ Historically, the Italian government allowed men to use any means they saw fit in “correcting” their wives and children.⁶⁸ However, as the country moved away from fascism and began to recognize the rights and dignity of individuals, it also began limiting the use of force against children in institutional

⁶⁰ Dennis Alan Olson, *The Swedish Ban of Corporal Punishment*, 1984 *BYU L. REV.* 447, 447 (1984).

⁶¹ *Id.* at 456.

⁶² *Id.* at 447.

⁶³ *Id.* at 454.

⁶⁴ *Id.* at 454, 447.

⁶⁵ *Id.* at 454.

⁶⁶ Pollard, *supra* note 46, at 589 (“Child abuse rates in Sweden have declined since the ban went into effect.”).

⁶⁷ Susan H. Bitensky, *Spare the Rod, Embrace Our Humanity: Toward a New Legal Regime Prohibiting Corporal Punishment of Children*, 31 *U. MICH. J.L. REFORM* 353, 380 (1998).

⁶⁸ *Id.* at 383.

settings.⁶⁹ The evolution of Italy's family law, the Italian Constitution, and human rights treaties such as the U.N. Convention on the Rights of the Child all influenced the Supreme Court's decision.⁷⁰ The Court hoped that the law would "filter into society as a new norm and create an atmosphere in which physical chastisement of children is not socially acceptable."⁷¹

In contrast to Sweden and Italy, parental corporal punishment is still lawful in Mexico. The states have not reached a consensus regarding a standard of reasonableness;⁷² each Mexican state has its own laws and policies regarding child abuse.⁷³ Some states condone or encourage physical abuse; in others, only severe injury is problematic.⁷⁴ Yet, other states consider minor infractions abuse.⁷⁵ Some even legislatively encourage physical punishment, based on the view that corporal punishment is a culturally acceptable form of discipline.⁷⁶ The lack of a universal definition necessarily means that there are different standards for child protection workers in different states; it also blurs the line as to when Mexican authorities can intervene to protect child abuse victims, leaving some children at risk. Thus, the lack of consistency and Mexico's failure to define child abuse continues to be problematic for the nation's children.⁷⁷

Significantly, in 1989, the United Nations General Assembly culminated sixty-five years of work toward formal international legal recognition of the human rights of children

⁶⁹ *Id.* at 383-84.

⁷⁰ *Id.* at 383.

⁷¹ Bitensky, *supra* note 67, at 386.

⁷² Michael Futterman, *Seeking a Standard: Reconciling Child Abuse and Condoned Child Rearing Practices Among Different Cultures*, 34 U. MIAMI INTER-AM. L. REV. 491, 502 (2003) (discussing the lack of consistency between the Mexican federal government and the states and the varying policies of states regarding child abuse).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Futterman, *supra* note 72, at 499 (discussing the impact of the lack of a universal standard and definition of child abuse and parental violence).

by adopting the Convention on the Rights of the Child.⁷⁸ The United Nations Convention on the Rights of the Child made a clear pronouncement of international law prohibiting the use of corporal punishment against children.⁷⁹ Today, the Committee on the Rights of the Child, tasked with monitoring compliance to the Convention, does not condone or allow corporal punishment of children.⁸⁰ Additionally, the Treaty on the Rights of Children requires all United Nations signatory nations to prevent violence towards children.⁸¹ The United States and Somalia are the only member countries that have not ratified this treaty.⁸² Although former United States Secretary of State Madeleine Albright signed the Convention on behalf of President Clinton in 1995, Congress has not ratified it.⁸³

Significantly, twenty-four nations around the world have achieved *full* abolition of all corporal punishment of children.⁸⁴ This number does not include Italy, as legislation to this effect does not yet exist there.⁸⁵ The Republic of Moldova is the most recent country to join the ranks of nations with full

⁷⁸ Cynthia Price Cohen, *Introductory Note* to United Nations Convention on the Rights of the Child, 28 I.L.M. 1448, 1448 (1989).

⁷⁹ Pollard, *supra* note 46, at 592.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ The Campaign for U.S. Ratification of the Convention on the Rights of the Child (CRC), What is the Status of the CRC?, <http://childrightscampaign.org> (follow "Get Informed" hyperlink; then follow "What is the Status of the CRC?" hyperlink) (last visited Feb. 15, 2009).

⁸⁴ See Global Initiative to End All Corporal Punishment of Children, Global Progress – States with Full Abolition, <http://endcorporalpunishment.org/pages/frame.html> (last visited Sept. 13, 2009). The countries abolishing corporal punishment, in order from most recent abolition, include: the Republic of Moldova, Costa Rica, Venezuela, New Zealand, Hungary, Iceland, Bulgaria, Denmark, Norway, Spain, Uruguay, Netherlands, Romania, Germany, Croatia, Cyprus, Finland, Portugal, Greece, Ukraine, Israel, Latvia, Austria, and Sweden. Italy and Nepal are not included in this list, as they have not legislatively proscribed corporal punishment as of yet.

⁸⁵ *Id.*

prohibition of corporal punishment.⁸⁶ Further, the Global Initiative to End All Corporal Punishment is continuing to work toward worldwide abolition.⁸⁷

B. The United States Supreme Court

In 1923, the United States Supreme Court declared in *Meyer v. Nebraska*⁸⁸ that the substantive due process liberty interests guaranteed by the Fourteenth Amendment of the United States Constitution included the right of individuals to establish a home and raise children.⁸⁹ Two years later, in *Pierce v. Society of Sisters*,⁹⁰ the Court explained that the Constitution protected the right of parents and guardians to direct the upbringing and education of children under their control as a part of the same liberty interest.⁹¹ Through these cases, the Court began to establish a trend of protecting the rights of parents to raise their children as they saw fit.⁹²

Later, in *Prince v. Massachusetts*,⁹³ the Court also acknowledged the importance of protecting children. It stated, “It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens.”⁹⁴ Almost thirty years later, in *Wisconsin v. Yoder*,⁹⁵ the Court acknowledged that the “primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”⁹⁶ However, according to the Court, parental power

⁸⁶ *Id.*

⁸⁷ See Global Initiative to End all Corporal Punishment of Children, *supra* note 59.

⁸⁸ *Meyer v. Nebraska*, 262 U.S. 390 (1923).

⁸⁹ *Id.* at 399.

⁹⁰ *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).

⁹¹ *Id.* at 534-35.

⁹² *Id.* (disallowing a statute to interfere unreasonably with the liberty of parents and guardians to direct the upbringing and education of their children, under the doctrine of *Meyer v. Nebraska*).

⁹³ *Prince v. Massachusetts*, 321 U.S. 158 (1944).

⁹⁴ *Id.* at 165.

⁹⁵ *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

⁹⁶ *Id.* at 232.

could be subject to limitation if its utilization jeopardized the health or safety of the child.⁹⁷ Although neither of those cases involved parents engaging in criminally prohibited behavior, the Court established that parental control might be limited where children are harmed.⁹⁸ This would presumably extend to physical violence. In recognition of the new trend toward limiting parental control in order to protect children, Justice Stevens, in his dissent, said, “Despite this Court’s repeated recognition of these significant parental liberty interests, these interests have never been seen to be without limits.”⁹⁹ I contend that courts should balance the liberty interest of parents to raise children against the State’s *parens patriae* interests¹⁰⁰ and the welfare of children.¹⁰¹

The United States Supreme Court has not specifically addressed the limits of the parental discipline privilege and the right of parents to use corporal punishment. However, in *Ingraham v. Wright*,¹⁰² the most relevant case to this issue, the Court held that the Cruel and Unusual Punishment clause of the Eighth Amendment does not apply to corporal punishment as a method of discipline in schools.¹⁰³ The clause only applies to persons convicted of crimes.¹⁰⁴ Consequently, the states have wide latitude regarding the treatment of the parental privilege and corporal punishment of children.¹⁰⁵

⁹⁷ *Id.* at 233-34.

⁹⁸ *Prince*, 321 U.S. at 166 (acknowledging that rights of parenthood can be limited and parental control can be restricted).

⁹⁹ *Troxel v. Granville*, 530 U.S. 57, 87 (2000) (Stevens, J., dissenting).

¹⁰⁰ See BLACK’S LAW DICTIONARY 1144 (8th ed. 2004) (discussing the doctrine under which the state has a duty to protect those unable to care for themselves).

¹⁰¹ *Troxel*, 530 U.S. at 88-89 (Stevens, J., dissenting).

¹⁰² *Ingraham v. Wright*, 430 U.S. 651 (1977).

¹⁰³ *Id.* at 664.

¹⁰⁴ *Id.*

¹⁰⁵ The United States Supreme Court has not ruled on the parental discipline privilege or proscribed corporal punishment, and Congress has similarly not regulated this area. Thus, per the Supremacy Clause and the Tenth Amendment of the United States Constitution, the states have independent authority to regulate both.

C. The States

Currently, in all states, corporal punishment is lawful in the home.¹⁰⁶ Twenty-eight states and the District of Columbia, however, prohibit corporal punishment in public

¹⁰⁶ All 50 states have addressed the use of physical discipline or the parental discipline privilege, which would have been unnecessary if corporal punishment was unlawful. *See* ALA. CODE § 13A-3-24(1) (2005); ALASKA STAT. § 11.81.430(1)(a) (2006); ARIZ. REV. STAT. ANN. § 13-403(1) (2001); ARK. CODE. ANN. § 5-2-605(1) (Supp. 2008); *People v. Whitehurst*, 12 Cal. Rptr. 2d 33, 35 (Cal. Ct. App. 1992); COLO. REV. STAT. § 18-1-703(1)(a) (2007); CONN. GENN. STAT. § 53a-18(1) (2007); DEL. CODE. ANN. tit. 11, § 468(1) (2007); *Martin v. United States*, 452 A.2d 360, 362 (1982); *Marshall v. Reams*, 14 So. 95 (Fla. 1893); GA. CODE ANN. § 16-3-20 (1996); HAW. REV. STAT. § 703-309(1) (1993); *State v. Peters*, 780 P.2d 602, 606 (Idaho Ct. App. 1989); *People v. Johnson*, 479 N.E.2d 481, 483 (Ill. App. Ct. 1985); IND. CODE § 35-41-3-1 (2006); *State v. Arnold*, 543 N.W.2d 600, 602-03 (Iowa 1996); *Paida v. Leach* 917 P.2d. 1342, 1349 (Kan. 1996); KY. REV. STAT. ANN. § 503.110 (West 2008); LA. REV. STAT. ANN. § 14:18(4) (2008); ME. REV. STAT. ANN. tit. 17-A § 106 (1983); *Anderson v. State*, 487 A.2d 294, 298-99 (Md. Ct. Spec. App. 1985); *Commonwealth v. O'Conner*, 555 N.E.2d 865, 868-69 (Mass. 1990); MICH. COMP. LAWS § 750.136(b)(9) (1979); MINN. STAT. § 609.06(6) (2008); MISS. CODE. ANN. § 43-21-105(m) (West 2008); MO. REV. STAT. § 563.061(1) (1999); MONT. CODE ANN. § 45-3-107 (2007); NEB. REV. STAT. § 28-1413(1) (1995); NEV. REV. STAT. § 200.275 (1995); N.H. REV. STAT. ANN. § 627.6(I) (1996); N.J. STAT. ANN. § 2C: 3-8 (West 2008); N.M. STAT. § 30-6-1(D) (1978); N.Y. PENAL LAW § 35.10(1) (McKinney 2008); *State v. Jones*, 95 N.C. 588 (1886); N.D. CENT. CODE § 12.1-05-05(1) (Supp. 2007); OHIO REV. STAT. ANN. § 2919.22(B)(3) (West 2008); OKLA. STAT. tit. 21 § 643(4) (2008); OR. REV. STAT. § 161.205(1) (2003); PA. CONS. STAT. § 509(1) (1998); *State v. Thorpe*, 429 A.2d 785, 788 (R.I. 1981); S.C. CODE ANN § 63-7-20(4) (1076); S.D. CODIFIED LAWS § 22-18-5 (1998); *Johnson v. State*, 21 Tenn. (1 Hum.) 283, 283 (1840); TEX. PENAL CODE ANN. § 9.61(a) (Vernon 2008); UTAH CODE ANN. § 76-2-401(1)(c) (West 2008); *In re F.P.*, 665 A.2d 597 (Vt. 1995); *Carpenter v. Commonwealth*, 44 S.E.2d 419, 423-35 (Va. 1947); WASH. REV. CODE § 9A.16.100 (2009); *State v. McDonie*, 109 S.E. 710, 715 (W. Va. 1921); WIS. STAT. § 939.45(b) (2007); *Keser v. State*, 706 P.2d 263 (Wyo. 1985); *see also Johnson, supra* note 47, at app.; *see also Kimberlie Young, An Examination of Parental Discipline as a Defense of Justification: It's Time for a Kindlier, Gentler Approach*, 36 NAVAL L. REV. 1, 11-25 (1999).

schools.¹⁰⁷ This prohibition also applies to private schools in Iowa and New Jersey.¹⁰⁸ Thirty-one states have prohibited corporal punishment as discipline for children in a juvenile detention facility.¹⁰⁹ Thirty states prohibit corporal punishment in all alternative care settings;¹¹⁰ the remaining twenty states and the District of Columbia prohibit corporal punishment in some, but not all, alternative care settings.¹¹¹

Although many jurisdictions have specifically codified the parental discipline privilege,¹¹² “[s]tates typically do not define corporal punishment, but define instead the line between reasonable and excessive corporal punishment.”¹¹³ This line may not always be clear and is malleable. Thus, because jurisdictions handle corporal punishment as a means of parental discipline in a multitude of ways, it remains in flux.¹¹⁴

1. Common Law Jurisdictions

As the District of Columbia Court of Appeals stated in *Newby v. United States*,¹¹⁵ “Parental good intentions do not excuse physical abuse.”¹¹⁶ In this case the court states that the parental privilege is a common law defense.¹¹⁷ The government must only prove that the parents did not use the force for discipline or that the force was unreasonable.¹¹⁸ It does not have to prove the parent acted with malice in order to obtain an assault conviction.¹¹⁹

¹⁰⁷ Global Initiative to End All Corporal Punishment of Children, *supra* note 59.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² See *Willis v. State*, 888 N.E.2d 177, 181 n.5 (Ind. 2008).

¹¹³ Orentlicher, *supra* note 27, at 150.

¹¹⁴ See *infra* Part II.C.1-2.

¹¹⁵ *Newby v. United States*, 797 A.2d 1233 (D.C. Ct. App. 2002).

¹¹⁶ *Id.* at 1244.

¹¹⁷ *Id.* at 1241.

¹¹⁸ *Id.* at 1237.

¹¹⁹ *Id.*

In Rhode Island, however, case law creates a privilege based on a test of reasonableness.¹²⁰ “Within the bounds of moderation and for the purpose of the best interests of the child, the parent is entitled to be the judge of what is required and the means to be adopted.”¹²¹ A parent meets the test of unreasonableness when that “parent ceases to act in good faith and with parental affection and acts immoderately, cruelly, or mercilessly with a malicious desire to inflict pain, rather than make a genuine effort to correct the child by proper means.”¹²²

Similarly, Iowa case law mandates that parents only use corporal punishment for corrective purposes.¹²³ “Corrective purposes” means parents must use discipline only for behavior modification, not to “satisfy the passions of an angry parent.”¹²⁴ The courts must determine whether the amount of force used rendered the punishment “abusive rather than corrective in character.”¹²⁵

2. *Statutory Jurisdictions*

The legislature in Maine has codified the parental privilege.¹²⁶ The statute requires the force be reasonable and that the parent reasonably believe it was necessary to prevent or punish misconduct.¹²⁷ Additionally, the recklessness standard is an element incorporated into the statutory law.¹²⁸ Thus, the state can only bring criminal charges when the parent’s belief grossly deviates from what a reasonable and prudent parent would believe is necessary in the same situation.¹²⁹

¹²⁰ *State v. Thorpe*, 429 A.2d 785, 788. (R.I. 1981).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *State v. Arnold*, 543 N.W.2d 600, 603 (Iowa 1996) (“When the parent goes beyond the line of reasonable correction, his or her conduct becomes criminal.”).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ ME. REV. STAT. ANN. tit. 17-A, § 106(1) (1983).

¹²⁷ *Maine v. Wilder*, 748 A.2d 444, 448 (Me. 2000).

¹²⁸ *Id.* at 451.

¹²⁹ *Id.*

In Florida, statutes provide that corporal discipline is excessive or abusive when it results in injuries such as temporary disfigurement, or significant bruises or welts.¹³⁰ Moreover, the injury or harm must be “*likely* to cause the child’s physical, mental, or emotional health to be significantly impaired.”¹³¹ The harm must cause substantial impairment to the child’s ability to function within a normal range of behavior and performance to constitute mental injury.¹³² Otherwise, corporal punishment is not considered abuse in Florida.¹³³

The legislature in Pennsylvania has also codified the privilege,¹³⁴ which follows the Model Penal Code standard.¹³⁵ Pennsylvania requires a true parental purpose for justifiable discipline, but forbids extreme force even where the parent has good intentions.¹³⁶ The parent’s actions are “not legally justified simply because he may sincerely believe that the best way of safeguarding or promoting a child’s welfare is to inflict cruel and patently excessive punishment.”¹³⁷ Additionally, courts must also consider the degree of force used, as well as the age, and physical and mental condition of the child.¹³⁸

New York too codified the common law parental privilege, using the language of the Restatement that Indiana

¹³⁰ *J.C. v. Dep’t of Children and Families*, 773 So.2d 1220, 1221 (Fla. Dist. Ct. App. 2000).

¹³¹ *Id.* at 1222.

¹³² *Id.*

¹³³ *Id.* at 1221.

¹³⁴ *Pennsylvania v. Ogin*, 540 A.2d 549, 554 (Pa. Super. 1988).

¹³⁵ MODEL PENAL CODE § 3.08 (1981):

The use of force upon or toward the person of another is justifiable if: (1) the actor is the parent or guardian or other person similarly responsible for the general care and supervision of a minor or a person acting at the request of such parent, guardian, or other responsible person and: (a) the force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his misconduct; and (b) the force used is not designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation.

¹³⁶ *Ogin*, 540 A.2d at 554.

¹³⁷ *Id.*

¹³⁸ *Id.*

recently adopted.¹³⁹ However, New York slightly modified the privilege through the statutory proscription of excessive corporal punishment.¹⁴⁰ In the New York statute, the privilege only allows a parent to use physical force against a child “to the extent that he reasonably believes it necessary to maintain discipline or to promote the welfare of such person.”¹⁴¹ Importantly, in *Matter of Rodney C.*,¹⁴² the New York Family Court stated that the standard of reasonableness is constantly evolving and that courts have difficulty articulating “dimensions of reasonable parental use of physical force.”¹⁴³

3. Potentially Progressive Jurisdictions

While the states have various nuanced ways of handling corporal punishment and the defense of parental privilege, Minnesota is the only state that scholars once thought banned corporal punishment entirely.¹⁴⁴ The ban required a reading of four separate statutory provisions together.¹⁴⁵ Such a reading suggested that corporal punishment of children was assault, not a defense to assault.¹⁴⁶ Unfortunately, a recent unpublished decision indicates that the parental discipline privilege is still a valid defense in Minnesota.¹⁴⁷

Additionally, in 2007, Sally Lieber, a California Assemblywoman, prepared a bill for introduction to the California legislature that would ban all spanking of children under four years old.¹⁴⁸ Parents who violated the new law would have been subject to misdemeanor charges, punishable

¹³⁹ *Matter of Rodney C.*, 398 N.Y.S.2d 511, 514 (N.Y. Fam. Ct. 1977).

¹⁴⁰ *Id.* at 515.

¹⁴¹ *Id.*

¹⁴² *Rodney C.*, 398 N.Y.S.2d 511 (N.Y. Fam. Ct. 1977).

¹⁴³ *Id.* at 515.

¹⁴⁴ See Bitensky, *supra* note 67, at 386-88.

¹⁴⁵ *Id.*

¹⁴⁶ Pollard, *supra* note 46, at 565 n.3.

¹⁴⁷ See *In re Welfare of Minor Children of J.B.B.*, No. CO-00-1606, 2001 WL 243221 at *3-*4 (Minn. Ct. App. 2001); see also Pollard, *supra* note 58, at 565 n.3.

¹⁴⁸ Fuselier, *supra* note 55, at 83.

by fine or imprisonment.¹⁴⁹ The bill was the first of its kind in the United States.¹⁵⁰ However, Lieber never introduced the bill and has since abandoned it.¹⁵¹

III. Indiana Law on Violence Against Children

Although not codified by the Indiana legislature, Indiana courts have construed the parental privilege as arising out of the general legal authority statute.¹⁵² The legal authority statute states: “A person is justified in conduct otherwise prohibited if he has legal authority to do so.”¹⁵³ Thus, parents are justified in committing what would otherwise be criminal battery against their children because courts construe the statute as giving parents the necessary legal authority – the parental discipline privilege.¹⁵⁴

Indiana courts have always recognized the parental discipline privilege,¹⁵⁵ but judicial treatment of child abuse has evolved extensively since the late nineteenth century.¹⁵⁶ Despite Indiana’s evolution towards more parent-friendly jurisprudence,¹⁵⁷ its legislature has codified several provisions relevant to the discipline and battery of children.¹⁵⁸ Those provisions purport to protect children without prohibiting parents from using physical discipline, but also operate to allow intervention when discipline becomes abuse.¹⁵⁹

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 91.

¹⁵¹ *Id.* at 91-93.

¹⁵² *Smith v. State*, 489 N.E.2d 140, 141 (Ind. Ct. App. 1986) (“The defense of legal authority has been construed to include reasonable parental discipline which would otherwise constitute battery.”).

¹⁵³ IND. CODE § 35-41-3-1 (2006).

¹⁵⁴ *Willis*, 888 N.E.2d at 182 (explaining that the defense of parental privilege is a complete defense and a legal justification for an otherwise criminal act).

¹⁵⁵ *Hinkle v. State*, 26 N.E. 777, 788 (Ind. 1891) (discussing that parents have the right to administer probable and reasonable punishment without being guilty of assault and battery).

¹⁵⁶ *See infra* Part III.A.

¹⁵⁷ *See infra* Part III.A.

¹⁵⁸ *See, e.g.*, IND. CODE § 31-34-1-15 (2006); IND. CODE § 31-34-12-4 (2006); IND. CODE § 35-42-2-1 (2006).

¹⁵⁹ *See infra* Part III.B.

Additionally, the Indiana courts have specified the parameters for convictions and affirmances in cases that invoke those statutory provisions, such as when parents abuse their children and claim the acts were privileged discipline.¹⁶⁰

A. The Evolution of Child Abuse Prosecutions

In the last century, Indiana courts' treatment of battery prosecutions stemming from child abuse has undergone a great deal of change.¹⁶¹ Although Indiana initially took a hard line against child abuse and battery,¹⁶² it has evolved toward allowing parents to use a heightened level of violence in disciplining their children.¹⁶³ Significantly, the courts have made it increasingly permissible for parents to engage in blatant battery against their children, and it is now more likely that courts will view the crime as privileged.¹⁶⁴

For instance, in the 1891 case of *Hinkle v. State*,¹⁶⁵ the father of a twelve-year-old girl fastened her to a sewing machine with a chain attached to her ankle.¹⁶⁶ She remained there all day, except for meals.¹⁶⁷ The father maintained that the child was incorrigible and restraining her was a means of

¹⁶⁰ See *infra* Part III.C.

¹⁶¹ See, e.g., *Hinkle v. State*, 26 N.E. 777, 778 (Ind. 1891) (convicting a father of battery where his child sustained no physical injury); *Hunter v. State*, 360 N.E.2d 588, 592 (Ind. Ct. App. 1977) (convicting parents for cruelty to a child, an offense that no longer exists); *Willis v. State*, 888 N.E.2d 177, 184 (Ind. 2008) (overturning a battery conviction where the child had visible marks from the beating).

¹⁶² *Hinkle*, 26 N.E. at 778 (convicting a father of battery for chaining his daughter up, despite her lack of physical injury).

¹⁶³ Compare *Hornbeck v. State*, 45 N.E. 620, 620 (Ind. Ct. App. 1896) (finding a father guilty of battery for striking his son with a buggy whip) with *Willis*, 888 N.E.2d at 184 (finding a mother not guilty of battery after she struck her son with a belt or extension cord).

¹⁶⁴ Compare *Hinkle*, 26 N.E. at 778 (refusing to allow a claim of privilege where a father chained his daughter up, but she was not physically injured) with *Willis*, 888 N.E.2d at 184, (allowing a claim of privilege where a mother battered her son, and he was visibly injured).

¹⁶⁵ *Hinkle*, 26 N.E. 777 (Ind. 1891).

¹⁶⁶ *Id.* at 778.

¹⁶⁷ *Id.*

punishment to encourage her obedience.¹⁶⁸ The Indiana Supreme Court held that the punishment was unreasonable and unlawful.¹⁶⁹ It affirmed the assault and battery convictions, despite the fact that the child was not injured.¹⁷⁰ Although the court acknowledged that the father had a right to administer punishment without being guilty of a crime, it determined that he behaved unreasonably, calling his acts “cruel and inhumane treatment.”¹⁷¹ Thus, in the late nineteenth century, a parent merely utilizing an unacceptable form of punishment was enough for the court to uphold the battery conviction.¹⁷² The Indiana Court of Appeals reaffirmed this position five years later in *Hornbeck v. State*¹⁷³ where it utilized the same language as *Hinkle* to uphold a father’s battery conviction after he struck his disobedient son thirteen times with a buggy whip.¹⁷⁴

By 1977, Indiana law had changed.¹⁷⁵ In *Hunter*, the Indiana Court of Appeals upheld a conviction for “cruelty to a child” against two parents who repeatedly engaged in acts of violence against their five-year-old son, including kicking him, throwing hot water in his face, whipping him with a frying pan, leaving him on the porch all night, and spanking him with a belt.¹⁷⁶ To obtain a conviction for this crime, the State had to prove that a parent, guardian, or custodian abused, abandoned, neglected, or was cruel to a child.¹⁷⁷ Significantly, assault and battery¹⁷⁸ was not a lesser-included offense

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Hornbeck v. State*, 45 N.E. 620 (Ind. Ct. App. 1896).

¹⁷⁴ *Id.*

¹⁷⁵ *Hunter v. State*, 360 N.E.2d 588, 592 (Ind. Ct. App. 1977) (describing the cruelty to a child statute).

¹⁷⁶ *Id.* at 593.

¹⁷⁷ *Id.*

¹⁷⁸ Assault and battery was, at that time, a singular offense, codified then at IND. CODE § 35-1-54-4 (10-403). It stated, “Whoever in a rude, insolent or angry manner, unlawfully touches another, is guilty of an assault and battery...” *Hunter*, 360 N.E.2d at 603 n.3.

because it required touching, while the cruelty statute did not.¹⁷⁹ Thus, cruelty to a child, and assault and battery statutes both existed to hold parents accountable for abuses against their children, but it was possible to violate one without violating the other.¹⁸⁰

In 1986, the Indiana Court of Appeals in *Smith v. State*¹⁸¹ began to acknowledge privileged discipline.¹⁸² In *Smith*, the father of a fifteen-year-old girl who received poor grades whipped his daughter with a belt approximately fifteen times while she braced herself against a dresser.¹⁸³ The beating caused lacerations to her face and contusions on her buttocks, arms, legs, and shoulder.¹⁸⁴ The court found the discipline unreasonable and beyond the bounds of parental legal authority, based on the duration and intensity of the beating, and the injuries the child sustained.¹⁸⁵ It stated: “A parent must not only avoid inflicting serious bodily injury upon his child, but must also avoid any physical punishment which is excessive or cruel.”¹⁸⁶ Later that year, the same court noted that the statutory law did not *create* a parental right to use corporal punishment when disciplining children, but it acknowledged that the common law recognized the right for parents, schoolteachers, and persons *in loco parentis*.¹⁸⁷

Currently, Indiana law finds such corporal punishment statutorily permissible¹⁸⁸ and courts construe the statute as legal authority for the defense of privilege.¹⁸⁹ Further, the modern application of the Restatement added a reasonableness

¹⁷⁹ *Id.* at 603.

¹⁸⁰ *Id.*

¹⁸¹ *Smith v. State*, 489 N.E.2d 140 (Ind. Ct. App. 1986).

¹⁸² *Id.* at 142.

¹⁸³ *Id.* at 141.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 142.

¹⁸⁷ *Dayton v. State*, 501 N.E.2d 482, 485 (Ind. Ct. App. 1986). *In loco parentis* is defined as: “Of, relating to, or acting as a temporary guardian or caretaker of a child, taking on all or some of the responsibilities of a parent.” BLACK’S LAW DICTIONARY 803 (8th ed. 2004).

¹⁸⁸ IND. CODE § 31-34-1-15 (2006).

¹⁸⁹ IND. CODE § 35-41-3-1 (2006).

determination,¹⁹⁰ which provides parents wide latitude in making disciplinary decisions. Thus, the law in Indiana has drastically shifted from protecting the rights of children to protecting the rights of parents.

B. Applicable Provisions of the Indiana Code

The Indiana Code defines Class B misdemeanor battery as occurring when a person “knowingly or intentionally touches another person in a rude, insolent, or angry manner.”¹⁹¹ However, the offense is a Class A misdemeanor if it results in bodily injury to another person.¹⁹² Furthermore, battery is considered a Class D felony if it results in bodily injury to “a person less than fourteen (14) years of age and is committed by a person at least eighteen (18) years of age.”¹⁹³ The statutory definition of bodily injury is “any impairment of physical condition, including physical pain.”¹⁹⁴ Therefore, if an adult parent intentionally and angrily touches a child younger than fourteen years old and as a result that child suffers physical pain, a court should theoretically convict that parent of a Class D felony.

However, the Indiana Code specifically gives parents the right to use reasonable corporal punishment as a means of disciplining children.¹⁹⁵ The legislature placed no limits, other than reasonableness, on that right.¹⁹⁶ Additionally, it did not define at what point corporal punishment rises to the level of battery.¹⁹⁷ The legislature did, nevertheless, adopt two provisions that create a rebuttable presumption for the circumstances under which a “child is in need of services”

¹⁹⁰ RESTATEMENT (SECOND) OF TORTS § 147 (1965).

¹⁹¹ IND. CODE § 35-42-2-1 (2006).

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ IND. CODE § 35-41-1-4 (2006).

¹⁹⁵ IND. CODE § 31-34-1-15 (2006) (“This chapter does not do any of the following: (1) Limit the right of a parent, guardian, or custodian of a child to use reasonable corporal punishment when disciplining the child . . .”).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

(CHINS).¹⁹⁸ Based upon this rebuttable presumption, a child is in need of services when a parent's "act or omission"¹⁹⁹ causes injury to the child at a time when the child is under that parent's care, custody, or control, and the child would not have suffered the injury if not for the parent.²⁰⁰ Thus, if a parent injures a child as a direct result of discipline, a court may adjudicate that child a CHINS,²⁰¹ and the State can intervene to provide services to the family.²⁰²

However, because these statutes operate independently, a child can be adjudicated a CHINS because of the parent's battery, but a court may not convict the parent of battery.²⁰³ In that situation, the Department of Child Services (DCS) could provide services to the family,²⁰⁴ and the parent

¹⁹⁸ IND. CODE §§ 31-34-12-4 to 4.5 (2006); *see also* IND. CODE §§ 31-34-1-1 to 14 (2006) (listing all the circumstances under which a child is a CHINS).

¹⁹⁹ IND. CODE § 31-34-12-4 (2006).

²⁰⁰ IND. CODE § 31-34-12-4 (2006):

A rebuttable presumption is raised that the child is in need of services because of an act or omission of the child's parent, guardian, or custodian if the state introduces competent evidence of probative value that: (1) the child has been injured; (2) at the time the child was injured, the parent, guardian, or custodian: (A) had the care, custody, or control of the child; or (B) had legal responsibility for the care, custody, or control of the child; and (3) the injury would not ordinarily be sustained except for the act or omission of a parent, guardian, or custodian.

²⁰¹ *See* IND. CODE §§ 31-34-11-1 to 3 (2006). In order for a child to be a CHINS, a court must enter a judgment of the adjudication after making the appropriate findings at a hearing.

²⁰² *See* IND. CODE § 31-25-2-11 (2006). DCS is the primary public agency responsible for: (1) providing protection services to prevent further abuse or neglect of the child; (2) providing for, coordinating, and monitoring the provision of services to ensure the safety of the child; and (3) making reasonable efforts to provide family services designed to prevent a child's removal from the parent or guardian.

²⁰³ *See* IND. CODE § 31-34-1 (2006) (failing to require parental conviction in order for a child to be a CHINS); *see also* IND. CODE § 35-42-2-1(a)(2)-(5) (2006) (failing to require that a child be adjudicated a CHINS in order to find guilt for battery on a child).

²⁰⁴ INDIANA DEPARTMENT OF CHILD SERVICES CHILD WELFARE MANUAL CH. 4 § 26: DETERMINING SERVICE LEVELS AND TRANSITION TO ONGOING

would receive no other formal sanctions for the injurious behavior.²⁰⁵ In this instance, the parental discipline privilege operates to shield the parent from criminal conviction.²⁰⁶ Although the parent has essentially committed felony battery, no legal consequences, nevertheless, attach to the offense.

C. Convicting and Affirming

The courts have established some parameters to assist the fact finder in making decisions regarding battery cases.²⁰⁷ For instance, “[t]he State does not have to prove that the victim suffered physical pain in order to prove that there was bodily injury.”²⁰⁸ Therefore, the State can obtain a battery conviction in a case in which a child did not suffer pain

SERVICES (2009), available at http://www.in.gov/dcs/files/4.26_Determining_Service_LevelsF.pdf (describing when the State should or should not engage families in services).

²⁰⁵ Currently in Indiana, criminal prosecution and the involvement of DCS are the only formal repercussions for battery on a child. Therefore, if the State does not pursue criminal charges and DCS chooses not to get involved, the parent suffers no legal consequences. *See* IND. CODE § 35-42-2-1 (2006) (defining battery as a criminal offense); *see also* IND. CODE §§ 31-25-2-7 and 11 (2006) (stating that DCS is the primary body with the duty and authority to provide child protection services and other services to families of children victimized children).

²⁰⁶ *Willis v. State*, 888 N.E.2d 177, 182 (Ind. 2008) (“The defense of parental privilege, like self-defense, is a complete defense. That is to say a valid claim of parental privilege is a legal justification for an otherwise criminal act.”).

²⁰⁷ *See, e.g.*, *Johnson v. State*, 804 N.E.2d 255, 257 (Ind. Ct. App. 2004) (citing *Tucker v. State*, 725 N.E.2d 894, 897-98 (Ind. Ct. App. 2000) (asserting that the State does not have to prove physical pain as an element of bodily injury); *Cooper v. State*, 831 N.E.2d 1247, 1251-52 (Ind. Ct. App. 2005) (stating that juries decide the reasonableness of discipline and if facts constitute battery, also declaring that the State must prove that the parent was not legally authorized to commit the offense); *Willis v. State*, 866 N.E.2d 374, 376 (Ind. Ct. App. 2007) (stating that convictions stand where evidence gives the basis for a reasonable fact finder to find the offense occurred).

²⁰⁸ *Johnson*, 804 N.E.2d at 257 (citing *Tucker v. State*, 725 N.E.2d 894, 897-98 (Ind. Ct. App. 2000)).

because that is not dispositive of whether the child was injured.²⁰⁹

Historically, regarding cases of parental discipline, juries have had discretion to determine when discipline has exceeded the bounds of reasonableness.²¹⁰ Juries also generally determine whether the facts of a case evidence unlawful battery.²¹¹ In cases involving the parental privilege to discipline children, the State must prove beyond a reasonable doubt both the elements of the offense and that the parent did not have legal authority to commit the offense.²¹² Legal authority has limits and courts may convict parents of battery if they exceed the authority to discipline.²¹³ Thus, the State must prove that a battery did occur and that the discipline was unreasonable or unauthorized.²¹⁴

On appeal from a criminal battery conviction, courts of appeal will consider “only the probative evidence and the reasonable inferences that may be drawn therefrom in support of the verdict. A claim of insufficient evidence will prevail only if no reasonable fact finder could have found the defendant guilty beyond a reasonable doubt.”²¹⁵ Therefore, if the evidence provides a sufficient basis for a reasonable judge or jury to find that a battery occurred, the conviction will stand.²¹⁶

Further, the courts of appeal must give substantial deference to the decisions of the trial courts because trial courts are in the best position to determine what discipline was reasonable under the circumstances and if the parental privilege should apply.²¹⁷ Courts of appeal do not reweigh the

²⁰⁹ See IND. CODE § 35-41-1-4 (2006) (including, but not requiring, physical pain as an element of bodily injury, as physical impairments do not necessitate pain).

²¹⁰ *Cooper v. State*, 831 N.E.2d 1247, 1251 (Ind. Ct. App. 2005).

²¹¹ *Id.*

²¹² *Cooper*, 831 N.E.2d at 1252.

²¹³ *Willis v. State*, 866 N.E.2d 374, 376 (Ind. Ct. App. 2007).

²¹⁴ *Willis v. State*, 888 N.E.2d 177, 182 (Ind. 2008).

²¹⁵ *Willis*, 866 N.E.2d at 376.

²¹⁶ *Id.*

²¹⁷ *Id.*

evidence when considering its sufficiency²¹⁸ or judge the credibility of witnesses.²¹⁹ Instead, they must “respect the jury’s exclusive province to weigh conflicting evidence.”²²⁰ Therefore, if a defendant appeals a battery conviction and the appellate court finds that the evidence supported the conviction beyond a reasonable doubt, the court will affirm the conviction.

IV. Overview of *Willis v. State*

Sophia Willis was a single mother with an eleven-year-old son, J.J.²²¹ In February 2006, J.J.’s teacher caught him giving a classmate clothes J.J. had stolen from his mother.²²² J.J.’s teacher met with Willis, who identified the clothing as hers.²²³ J.J. denied taking the clothes and lied to his mother to cover his guilt.²²⁴ After sending J.J. to a relative’s home for two days, Willis provided J.J. with an opportunity to admit his guilt, which he refused to do.²²⁵ Willis subsequently struck J.J. five to seven times with either a belt or extension cord as a means of punishment.²²⁶ J.J. attempted to avoid the lashes, resulting in the implement making contact with his arms and thigh, leaving multiple bruises.²²⁷ The following day at school, J.J. complained of pain and told the school nurse he was afraid of his mother.²²⁸ The school nurse contacted Child Protective Services, who notified the Indianapolis Police Department.²²⁹

The Indianapolis Police Department arrested Sophia Willis and the Marion County Prosecutor charged her with a

²¹⁸ *Id.*

²¹⁹ *McHenry v. State*, 820 N.E.2d 124, 126 (Ind. 2005).

²²⁰ *Id.*

²²¹ *Willis v. State*, 888 N.E.2d 177, 179 (Ind. 2008).

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Willis v. State*, 888 N.E.2d 177, 179 (Ind. 2008). Evidence as to whether it was a belt or an extension cord conflicted, but the trial court determined that it was irrelevant.

²²⁷ *Id.*

²²⁸ *Willis v. State*, 866 N.E.2d 374, 375 (Ind. Ct. App. 2007).

²²⁹ *Willis v. State*, 888 N.E.2d 177, 179 (Ind. 2008).

Class D felony battery.²³⁰ The trial court found her guilty at a bench trial.²³¹ The trial judge emphasized that J.J. had disciplinary issues and acknowledged that Willis was a single mother attempting to raise a rebellious son.²³² The court noted that the law was uncertain and complex in this area.²³³ The trial judge stated that she did not know where to draw the line, but, based on the statute, Willis's offense rose to the level of a Class D felony.²³⁴ However, the trial judge exercised her statutorily-authorized discretion²³⁵ to reduce Willis's conviction to a Class A misdemeanor and suspend the sentence.²³⁶ Willis appealed.²³⁷

The Indiana Court of Appeals subsequently held that sufficient evidence supported Willis's battery conviction.²³⁸ The court of appeals reasoned that Willis committed all of the elements of the battery because she knowingly and intentionally touched J.J. in an angry manner, and J.J. suffered pain and bruising as a result.²³⁹ The court sympathized with the fact that Willis was a single parent and doing her best, but refused to condone her choice of discipline.²⁴⁰ The court stated: "[T]here are limits to [the right to use reasonable corporal punishment to discipline a child] and parents may be found guilty of, among other things, battery, if they exceed their disciplinary authority."²⁴¹ The court acknowledged, however, that it was a close case.²⁴² Similar to the trial court, it

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.* at 179-80.

²³³ *Id.* The trial judge stated that this area of the law was tough because she knew Willis's intent was not to do the wrong thing.

²³⁴ *Willis v. State*, 888 N.E.2d 177, 179-80 (Ind. 2008).

²³⁵ IND. CODE § 35-50-2-7(b) (2006). "[I]f a person has committed a Class D felony, the court may enter a judgment of conviction of a Class A misdemeanor and sentence accordingly."

²³⁶ *Id.* at 180.

²³⁷ *Id.*

²³⁸ *Willis v. State*, 866 N.E.2d 374, 376 (Ind. Ct. App. 2007).

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

also noted that there was “precious little Indiana caselaw providing guidance as to what constitutes proper and reasonable parental discipline of children, and there are no bright-line rules.”²⁴³ Mainly, it declined to find error in the conviction because Willis’s argument of justification was a request to reweigh the evidence.²⁴⁴ Willis appealed to the Indiana Supreme Court.²⁴⁵

The Indiana Supreme Court referred to the fundamental liberty interest of parents to direct the upbringing of children, which includes “the use of reasonable or moderate physical force to control behavior.”²⁴⁶ It discussed how courts must balance the liberty interest against the State’s compelling interest in protecting the welfare of children.²⁴⁷ Willis argued the parental privilege defense.²⁴⁸ Although both the common law and case law recognized such a defense, the supreme court had not addressed it previously.²⁴⁹ The court determined that the Model Penal Code provision regarding legal authority²⁵⁰ was unhelpful;²⁵¹ instead, it adopted and applied the Restatement as a guideline to identify permissible parental discipline.²⁵² The Restatement provides: “A parent is privileged to apply reasonable force or to impose such reasonable confinement upon his child as he reasonably believes to be necessary for its proper control, training, or education.”²⁵³ The court delineated and applied the factors in the Restatement²⁵⁴ to determine the reasonableness of punishment.²⁵⁵ It further cautioned that the list of factors was

²⁴³ *Willis v. State*, 866 N.E.2d 374, 376 (Ind. Ct. App. 2007).

²⁴⁴ *Id.*

²⁴⁵ *Willis v. State*, 888 N.E.2d 177, 180 (Ind. 2008).

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 181.

²⁵⁰ MODEL PENAL CODE § 3.08 (1981).

²⁵¹ *Willis v. State*, 888 N.E.2d 177, 181-82 (Ind. 2008).

²⁵² *Id.*

²⁵³ RESTATEMENT (SECOND) OF TORTS § 147 (1965).

²⁵⁴ RESTATEMENT (SECOND) OF TORTS § 150 (1965).

²⁵⁵ *Willis v. State*, 888 N.E.2d 177, 182 (Ind. 2008).

not exhaustive and should be balanced and weighed on a case-by-case basis.²⁵⁶

Based on the *Willis* holding, in order to sustain a battery conviction, the State must prove beyond a reasonable doubt either that the parent's force was unreasonable or that the parent's belief that the force was necessary was unreasonable.²⁵⁷ Further, there is no privilege where a less severe means of compelling obedience is equally as effective.²⁵⁸

Moreover, the court determined that the State did not disprove the parental privilege defense beyond a reasonable doubt and that Willis had already engaged in progressive forms of punishment with J.J. prior to resorting to physical violence to discipline him.²⁵⁹ J.J.'s bruises were neither serious nor permanent, which the court viewed as evidence that the punishment was not unreasonable.²⁶⁰ It also found that J.J.'s punishment was not particularly degrading and was proportionate to his offense.²⁶¹ Ultimately, the court held that Willis properly exercised her legal authority to beat her son as a means of discipline and set aside her conviction.²⁶²

Subsequently, DCS substantiated abuse and/or neglect on Sophia Willis²⁶³ and filed a CHINS action on J.J.²⁶⁴ J.J. was ultimately sent to live with his father in Georgia;²⁶⁵

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 183-84.

²⁶⁰ *Willis v. State*, 888 N.E.2d 177, 184 (Ind. 2008).

²⁶¹ *Id.* at 183.

²⁶² *Id.* at 184.

²⁶³ E-mail from Judge James W. Payne, Agency Director, Indiana Department of Child Services (Feb. 14, 2008, 14:59 EST) (on file with author). Judge Payne could not confirm which allegations DCS substantiated on Sophia Willis due to confidentiality requirements, but he indicated that the filing of CHINS confirms DCS did substantiate their investigation.

²⁶⁴ Oral Argument, *Willis v. State*, 888 N.E.2d 177 (Sep. 6, 2007 09:45 EST), available at <http://indianacourts.org/apps/webcasts/> (search "Willis").

²⁶⁵ *Id.*

although it is unclear whether DCS or one of J.J.'s parents facilitated the move.²⁶⁶ Furthermore, it is unknown whether DCS, prior to J.J.'s change in custody, attempted to provide Sophia Willis with any services to improve her parenting skills and teach her alternative forms of discipline.²⁶⁷ However, the DCS Agency Director, Judge James W. Payne, confirmed that Sophia Willis's criminal case did not influence DCS's determinations or involvement.²⁶⁸ He stated that the two systems are separate legal processes and require a different burden of proof.²⁶⁹ Although the DCS and criminal approaches are coordinated efforts, they have such divergent viewpoints as to make them "totally independent."²⁷⁰

V. Ramifications of *Willis v. State*

Indiana is just now beginning to see how *Willis* will affect future criminal battery prosecutions as they relate to corporal punishment.²⁷¹ Because the *Willis* decision is so recent, the implications of the new policy are merely speculative. As such, any change in law or policy will invariably bring about change in the affected realm. Additionally, it is not yet apparent exactly how *Willis* will affect subsequent decisions involving the parental discipline privilege, particularly because the scope of the privilege is unclear.

Further, *Willis* was a judicial decision, not a legislative mandate, which increases the uncertainty about the effect of *Willis* on criminal and juvenile cases. As Justice Sullivan dissented in *Willis*: "Given the commitment of time and

²⁶⁶ E-mail from Judge James W. Payne, Agency Director, Indiana Department of Child Services (Feb. 14, 2008, 14:59 EST) (on file with author). Judge Payne was unable to confirm who facilitated the change in custody from Sophia Willis to J.J.'s father due to confidentiality restraints.

²⁶⁷ *Id.* Judge Payne was unable to confirm if DCS provided Sophia Willis with any services as a ramification of the CHINS filing due to confidentiality restraints.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ See *Mathew v. State*, 892 N.E.2d 695 (Ind. Ct. App. 2008). *Mathew* is the first related appellate decision in Indiana post-*Willis*.

resources that the legislative and executive branches have devoted to this subject for the last two decades and more, I believe that such a policy change should be made by the legislative and executive branches, not the judiciary.”²⁷² Perhaps if the legislature had established this new policy statutorily, it would be clearer, more easily applied, and more predictable. Unfortunately, because Indiana judicially enacted its new policy on child abuse prosecutions, the extent of its effect is purely speculative.

One potential consequence of *Willis* is that Indiana will see a decrease in prosecutions or convictions for child battery offenses that stem from corporal punishment. Knowing that *Willis* dictates acquittal, when cases similar to *Willis* arise, it is possible that prosecutors will not waste time or resources bringing charges against abusive parents. However, when the State does charge parents for discipline-related battery, it is equally possible that judges will feel compelled to acquit based on the *Willis* standard of reasonableness.²⁷³ Therefore, the unfortunate consequence that arises in either situation is that many cases of true abuse may fall through the cracks. Because the line of reasonableness is somewhat subjective, the system may reject cases that do not fall clearly on the end of the unreasonableness spectrum. Thus, a conviction after *Willis* is unlikely. Consequently, the child is twice victimized: once by a parent and once by a justice system that looks the other way while the parent perpetrates the abuse.

The most useful exposition of this point is the New York case of *Matter of Rodney C.*²⁷⁴ New York’s treatment of the parental discipline privilege is similar to the post-*Willis* Indiana law.²⁷⁵ In *Matter of Rodney C.*, seven-year-old Rodney C. suffered from emotional difficulties and received special education.²⁷⁶ The evidence indicated that his mother

²⁷² *Willis*, 888 N.E.2d at 184 (Sullivan, J. dissenting).

²⁷³ See *supra* Part IV.

²⁷⁴ *Matter of Rodney C.*, 398 N.Y.S.2d 511 (N.Y. Fam. Ct. 1977).

²⁷⁵ See *supra* text accompanying notes 133-135.

²⁷⁶ *Rodney C.*, 398 N.Y.S.2d at 514-16.

beat him with a bush's branch until it broke.²⁷⁷ Rodney C. suffered twenty-six marks that crisscrossed his back and accumulated dried blood by the following day.²⁷⁸ Additionally, similar faded marks, likely from previous instances of abuse, crossed his back.²⁷⁹ The new wounds on his back were still visible three days after the beating.²⁸⁰ Rodney C. also had horizontal abrasions on his legs and both arms, and a bruise on his left temple.²⁸¹ Although the court noted, "[d]iscipline' has been used as a shield for maltreatment of children,"²⁸² and that this beating constituted unprivileged excessive punishment, it also found that it was not so excessive as to be life threatening or cause permanent disfigurement.²⁸³ As a result, the court held that Rodney C. was not an abused child.²⁸⁴ By failing to hold Rodney C.'s mother accountable for abuse, the court did little to deter future excessive punishment. In the future, similar situations are likely to occur in Indiana. Parents will continue to excessively discipline and injure their children knowing that the State will not prosecute the abuse.

Although the court intended *Willis* to create a standard for courts to apply in parental privilege cases, the unfortunate consequence may be that corporal punishment and child battery will go unpunished more frequently because *Willis* does not clarify how courts and juries should implement the new policy. Laypersons uneducated about legal standards have only their own notions of what constitutes reasonable discipline.²⁸⁵ Courts might be required to instruct juries on the factors to balance in deciding the reasonableness of

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 514.

²⁸⁰ *Matter of Rodney C.*, 398 N.Y.S.2d 511, 516 (N.Y. Fam. Ct. 1977).

²⁸¹ *Id.* at 514.

²⁸² *Id.* at 515 n.2.

²⁸³ *Id.* at 516.

²⁸⁴ *Id.*

²⁸⁵ *Willis v. State*, 888 N.E.2d 177 (Ind. 2008). Nowhere in the opinion did the Supreme Court indicate how the new test would apply in jury trials or how juries would learn of the new treatment of the parental privilege.

discipline.²⁸⁶ Attorneys might have to argue each Restatement factor²⁸⁷ as added elements for the jury to decide. Further, it is possible that jury members may disregard the judge's instructions on the new test and apply their own standards of reasonableness. Thus, the application of *Willis* in jury trials is unclear – creating another reason for the State to decline taking corporal punishment cases to trial.

If the frequency of prosecutions and convictions decreases, the prevalence of child abuse may increase, because the threat of criminal sanctions will no longer exist. If parents become aware that child abuse is a privileged crime, they may be less concerned with the consequences of their actions. Thus, they may not act reasonably when disciplining children and such discipline may escalate into abuse more frequently, becoming exceedingly dangerous.

The only potential deterrent in that case is the involvement of DCS. Justice Sullivan may have been correct when he said: “The Court increases the quantum of effort that the State will be required to expend in its efforts to protect children from abuse.”²⁸⁸ DCS will continue to assess each case on its own merits and set of facts and will continue to make decisions consistent with the CHINS statute, which “in part refers to child safety and family autonomy.”²⁸⁹ However, an increase in child abuse will easily drain the resources of DCS, rendering them less effectual in protecting children. If DCS does not have adequate resources, it will leave many children unprotected and parents unsanctioned, which does nothing to decrease the instances of child abuse in Indiana. Thus, *Willis*

²⁸⁶ See Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 42 IND. L. REV. __, __, (2009) (indicating that the Restatement factors would seem helpful via jury instructions, but the trend is moving away from using language from appellate opinions in jury instructions).

²⁸⁷ RESTATEMENT (SECOND) OF TORTS § 150 (1965).

²⁸⁸ *Willis*, 888 N.E.2d at 184 (Sullivan, J., dissenting).

²⁸⁹ E-mail from Judge James W. Payne, Agency Director, Indiana Department of Child Services (Feb. 14, 2008, 14:59 EST) (on file with author).

may have unintentionally exacerbated the already exacting problem of child abuse in Indiana.

Alternatively, courts may ignore *Willis*'s mandate. For example, in August 2008, the Indiana Court of Appeals decided *Mathew v. State*.²⁹⁰ In that case, Mathew's children were engaged in an altercation between themselves.²⁹¹ Mathew then hit her twelve-year-old daughter, J.M., on her arm and legs with a closed fist.²⁹² J.M. attempted to get away from her mother, but Mathew followed, where she continued to hit J.M. approximately ten times with her hand and also struck J.M. with a belt.²⁹³ J.M. covered herself with a blanket, which Mathew attempted to pull off to get a better shot at striking J.M. with the belt.²⁹⁴ J.M. sustained a bruise on her arm, welts on her legs, and scratches on her back.²⁹⁵ The trial court found Mathew guilty of Class D felony battery. Mathew appealed.²⁹⁶

At trial, Mathew asserted the parental privilege defense and the court applied the *Willis* test.²⁹⁷ The majority held that the discipline was not reasonable and that the evidence was sufficient to support the conviction.²⁹⁸ Chief Judge Baker agreed with the holding in principle, but dissented in the opinion.²⁹⁹ Although Chief Judge Baker agreed with Justice Sullivan's dissenting opinion in *Willis*,³⁰⁰ he also believed that *Willis* compelled the court to reverse Mathew's conviction because the facts were similar to those in *Willis* and the reasonableness factors balanced in a similar manner.³⁰¹ Baker maintained that the fact finder should be the body evaluating

²⁹⁰ *Mathew v. State*, 892 N.E.2d 695 (Ind. Ct. App. 2008).

²⁹¹ *Id.* at 697.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Mathew v. State*, 892 N.E.2d 695, 697 (Ind. Ct. App. 2008).

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 698-99.

²⁹⁸ *Id.* at 699.

²⁹⁹ *Mathew v. State*, 892 N.E.2d 695, 699 (Ind. Ct. App. 2008) (Baker, J., dissenting).

³⁰⁰ *Id.* at 701.

³⁰¹ *Id.* at 701-02.

the reasonableness of parents' actions, but *Willis* mandated a different procedure.³⁰² He stated, "I am uncomfortable with an appellate court second-guessing that conclusion as a matter of law. That said, it is evident that our Supreme Court has instructed us to do precisely that."³⁰³

Based on Chief Judge Baker's analysis, it appears that although the court purported to apply the *Willis* standard, it did not; otherwise it would have reversed Mathew's conviction.³⁰⁴ Thus, the majority either ignored *Willis*'s mandate or applied it incorrectly. The *Mathew* case illustrates the possibility that, in spite of *Willis*, courts may continue to convict parents when it seems justified or fail to consistently apply *Willis* to the facts of other cases. In either instance, *Willis* seems to be more problematic than useful, rendering it poor policy and a move in the wrong direction for Indiana child abuse law.

Additionally, it is possible that the Indiana Court of Appeals will try to pull back from *Willis*, to demonstrate to the Indiana Supreme Court that it decided the case incorrectly. Chief Judge Baker's dissent in *Mathew* makes it clear that he was not a proponent of the *Willis* decision.³⁰⁵ The recently decided case of *McReynolds v. State*³⁰⁶ may be evidence that the court of appeals will not be so quick to apply the parental privilege. In *McReynolds*, the roommate of a seven-year-old boy's mother beat the boy with a belt, and a wooden clothes hanger with metal prongs, at least five times because the child wet his pants and lied about it.³⁰⁷ The boy suffered severe bruising and bleeding to his buttocks, which required two days of hospitalization and bandaging for more than a week.³⁰⁸ McReynolds appealed his conviction for Class D felony battery, asserting the parental discipline privilege.³⁰⁹

³⁰² *Id.*

³⁰³ *Id.* at 702.

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *McReynolds v. State*, 901 N.E.2d 1149 (Ind. Ct. App. 2009).

³⁰⁷ *Id.* at 1151.

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 1152.

The court held that he could not assert the parental privilege because he was not a parent or a person *in loco parentis*.³¹⁰ It further held that, even if the privilege applied, the discipline was unreasonable.³¹¹ The court stated that the discipline was “disproportionate to the offense, unnecessarily degrading, and could even result in permanent scarring and long-term emotional trauma.”³¹² The facts are not entirely comparable to those in *Willis*, as the child is younger, the beating more severe, and the injuries much worse.³¹³ Nonetheless, the Indiana Court of Appeals clearly will not always hold that the parental privilege is a valid defense, or find that discipline is reasonable in every case. This is a good sign that it will not allow *Willis* to serve as a justification for child abuse, even if the Indiana Supreme Court does. Ultimately, the Indiana Supreme Court has the final say, which leaves open the question of how far the court will extend the parental discipline privilege after *Willis* and how much abuse Indiana will condone.

VI. Recommendations for Change

It is common knowledge that the utility-not to mention the simple humanity-of corporal punishment as a parental tool is the subject of considerable controversy within American society. Nevertheless, it is equally obvious that the permissibility of corporal punishment reflects a societal judgment that falls well within the parameters of legitimate and constitutional legislative policy-making.³¹⁴

The legislature clearly recognizes the rights of children to be free from abuse in the form of physical discipline by statutorily proscribing corporal punishment and eradicating the parental discipline privilege. Further, if the judiciary can

³¹⁰ *Id.* at 1154

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.* at 1151.; *cf.* *Willis v. State*, 888 N.E.2d 177, 178 (Ind. 2008).

³¹⁴ *State v. Matavale*, 166 P.3d 322, 342 (Haw. 2007).

make policy as it did in *Willis*,³¹⁵ it is also capable of changing that policy and advocating for better protection of children. Indiana should affirm its commitment to protect children from parental abuse³¹⁶ by acting to eradicate corporal punishment and save children from its detrimental effects.

A. Legislative Action

The Indiana legislature, which has already acted to ensure the protection of children,³¹⁷ should also prevent the potential damage done by the Indiana Supreme Court in *Willis*. The legislature is capable of overriding the policy set out in *Willis*, which the judiciary is subsequently bound to enforce.³¹⁸ As Chief Judge Baker noted in his *Mathew* dissent, sixteen nations³¹⁹ have legislatively banned all corporal punishment, and the United Nations recommends the adoption of that approach.³²⁰ “That the State of Indiana is headed so squarely in the opposite direction without a directive from the legislature to do so is troubling, to say the least.”³²¹ The legislature has three potential options for changing the future of corporal punishment in Indiana; all are an improvement on *Willis*.

³¹⁵ *Willis*, 888 N.E.2d at 182.

³¹⁶ Indiana Department of Child Services, <http://www.in.gov/dcs> (last visited Feb. 14, 2009) (Mission: “The Indiana Department of Child Services (DCS) protects children from abuse and neglect. DCS does this by partnering with families and communities to provide safe, nurturing, and stable homes.”).

³¹⁷ See, e.g., IND. CODE § 31-34-12-4 (2006); IND. CODE § 35-42-2-1 (2006) (creating the rebuttable presumption that a child is a CHINS and making battery against a child a felony offense).

³¹⁸ *In re Paternity of Seifert*, 605 N.E.2d 1202, 1206 (Ind. Ct. App. 1993) (stating the judiciary is bound to construe and enforce statutory law).

³¹⁹ The number of nations that have legislatively banned all corporal punishment has increased from sixteen to twenty-four since Chief Judge Baker’s dissenting opinion in *Willis*. See Global Initiative to End All Corporal Punishment of Children, Countdown to Universal Prohibition, <http://endcorporalpunishment.org/pages/progress/countdown.html> (last visited Sept. 14, 2009).

³²⁰ *Mathew v. State*, 892 N.E.2d 695, 702 n.3 (Ind. Ct. App. 2008) (Baker, J. dissenting).

³²¹ *Id.*

First, if Indiana is going to insist on permitting some level of corporal punishment, the legislature should at least adopt a statute that clarifies the parental discipline privilege and the limits of forceful discipline, which should include criminal sanctions for violations. As it stands, *Willis* seems to have confounded the problem, not clarified it.³²² A statute that balances the rights of children but recognizes the right of parents to physically discipline would provide clarification as to the permissible limits of corporal punishment.³²³ In her article on the parental privilege, Kandice K. Johnson, professor of law and author of a frequently cited article on corporal punishment, proposes just such a statute.³²⁴ The language of the statute provides:

The use of physical force upon a child, that would otherwise constitute a criminal offense, is justifiable under the following conditions: Force that does not result in physical injury used by a parent for the purpose of discipline, control, or restraint of a child, but only to the extent that such force does not place the child at substantial risk of either death, serious physical or emotional injury, or gross degradation.³²⁵

This statute does not require the fact finder to consider the subjective elements of reasonableness or necessity, and it recognizes the nonphysical consequences of corporal punishment, such as emotional injury.³²⁶ Thus, it provides for the well-being of children and for parental autonomy in

³²² Associated Press, Indiana Editorial, *Children at Risk*, Evansville Courier & Press, June 30, 2008 available at <http://www.courierpress.com/news/2008/jun/30/indiana-editorial-by-the-associated-press/> (“It seems that the issue of corporal punishment has been muddied rather than clarified.”).

³²³ See Johnson, *supra* note 54, at 470-474.

³²⁴ *Id.* at 471.

³²⁵ *Id.*

³²⁶ *Id.* at 472.

discipline.³²⁷ The limits of corporal punishment and the parental privilege are much clearer in such a statute than what *Willis* dictated. As such, both children and parents in Indiana would benefit from enactment of a similar statutory provision.

Second, the Indiana legislature could adopt a ban on all forms of corporal punishment, without criminal sanction, and provide for intensive education, as in the Swedish model.³²⁸ “An obvious means of preventing corporal punishment of children is to educate people that such punishment is unacceptable.”³²⁹ In both Ireland and Sweden, strong educational campaigns regarding the impermissibility of corporal punishment and teaching other disciplinary tactics have resulted in a reduction of the number of adults who think corporal punishment is acceptable and in those who actually utilize it.³³⁰ Therefore, a ban without criminal sanction, but with an initiative for educational programming, could potentially be as effective as criminalizing corporal punishment. Further, such education would be beneficial even without a statutory prohibition.

Accordingly, “[p]romotion of positive discipline can be built into other health promotion, education, and early childhood development programmes.”³³¹ The American Academy of Pediatrics recommends that physicians encourage and assist parents in developing methods other than spanking in response to children’s undesirable behaviors.³³² Alternative forms of discipline exist that are equally or more effective than corporal punishment.³³³ For instance, suggestions include focusing on “anticipatory guidance, behavior modification, improved parent-child communication skills, and effective

³²⁷ *Id.*

³²⁸ See Olson, *supra* note 60, at 454.

³²⁹ Bitensky, *supra* note 67, at 440.

³³⁰ *Id.* at 440-41.

³³¹ Global Initiative to End All Corporal Punishment of Children, *supra* note 58.

³³² American Academy of Pediatrics, *supra* note 25.

³³³ GILES-SIMS ET AL., *supra* note 20, at 175; see also Orentlicher, *supra* note 27, at 160-166.

limit-setting.”³³⁴ The American Academy of Pediatrics also suggests promoting optimal parent-child relationships and reinforcing positive behaviors, rewarding desirable or effective behaviors, reducing and eliminating undesirable behavior, time-out or removal of privileges, and verbal reprimands.³³⁵ Instituting a ban on physical discipline and educating parents about these alternatives has the potential to benefit children by preventing the physical and psychological harm of corporal punishment. It would also benefit children by giving parents the opportunity to utilize better and more effective forms of correction and control. Furthermore, implementation of alternative forms of punishment would promote positive growth and development of children and better overall parenting.

The third and most preferable approach would be for the legislature to proscribe all corporal punishment statutorily with criminal sanctions. The Indiana legislature should adopt a statute that criminalizes corporal punishment and subjects violators to the same penalties as those imposed for battery on adults.³³⁶ Such a statute would recognize that violence against children is as reprehensible as violence against adults, requiring similar sanctions. Susan H. Bitensky, professor of law and author of numerous works on corporal punishment and children’s rights, proposes a potential statute in her article on corporal punishment.³³⁷ The statute would read:

(1)(a) Corporal punishment is defined as the use of physical force with the intention of causing a child to experience bodily pain so as to correct, control, or punish the child’s behavior. (b) Any person who uses corporal punishment on a child shall be guilty of the crime of battery provided that such physical force would be a battery if used on an adult. (2)

³³⁴ Orentlicher, *supra* note 27, at 164-65.

³³⁵ American Academy of Pediatrics, *supra* note 25.

³³⁶ See Bitensky, *supra* note 67, at 442-52.

³³⁷ *Id.* at 443.

The penalties for conviction pursuant to subsection (1) shall be the same as those for conviction under any other criminal battery provision(s) or, in lieu thereof in appropriate cases, shall be a posttrial or postplea diversion program. (3) Nothing stated in subsections (1) or (2) herein shall preclude or limit further prosecution under any other applicable laws for the use of corporal punishment described in subsection (1).³³⁸

This statute successfully removes control, correction, and punishment from available defenses.³³⁹ It also includes intent as an element because intent is an element of battery.³⁴⁰ Most importantly, this statute saves children from the detrimental effects of corporal punishment and makes it apparent that physical discipline is never permissible; its limits are unambiguous and easy for courts and juries to apply.³⁴¹ Furthermore, the deterrent effect of criminal sanction should serve to prevent many potential violations.

Thus, Indiana should follow the lead of twenty-four other countries and ban all corporal punishment via prohibitive legislation.³⁴² Combined with an educational initiative, the criminalization of corporal punishment would be the most beneficial course of action for Indiana's children.

³³⁸ *Id.* at 443-44.

³³⁹ *Id.* at 448.

³⁴⁰ *Id.*

³⁴¹ *Id.* at 445-48.

³⁴² Global Initiative to End All Corporal Punishment of Children, Countdown to Universal Prohibition, <http://endcorporalpunishment.org/pages/progress/countdown.html> (last visited Feb. 15, 2009). The following states have legislatively prohibited all corporal punishment in the home, schools, penal systems, and alternative care settings: Austria, Bulgaria, Costa Rica, Croatia, Cyprus, Denmark, Finland, Germany, Greece, Hungary, Iceland, Israel, Latvia, Netherlands, New Zealand, Norway, Portugal, the Republic of Moldova, Romania, Spain, Sweden, Ukraine, Uruguay, and Venezuela.

B. Judicial Action

The Indiana Supreme Court decided *Willis* incorrectly. Sophia Willis battered her son and, accordingly, the court should have upheld her conviction. Further, the new policy the court delineated for deciding parental discipline cases is unclear and unworkable. The Indiana Supreme Court should, therefore, reverse the decision in *Willis* and follow the United States Supreme Court in deferring to the results of social science evidence as it relates to children.³⁴³ Moreover, because the evidence shows that corporal punishment is detrimental to children and that more effective forms of punishment exist,³⁴⁴ the court should ban corporal punishment in Indiana by judicial enactment.

Mathew and *McReynolds* are proof that *Willis* was not the last parental discipline case to come before Indiana appellate courts. Thus, the Indiana Supreme Court will likely have an opportunity to examine the important social science data on corporal punishment, reverse *Willis*, and ban corporal punishment. Indiana can then join the ranks of Italy and Nepal as having banned corporal punishment via Supreme Court ruling.³⁴⁵ Also, by demonstrating a willingness to consider the social science evidence, the court would illustrate its commitment to the psychological well-being of children and their positive development. Further, “[o]nce corporal punishment has been banned, it is virtually never reinstated.”³⁴⁶ Thus, a judicial prohibition would likely be a

³⁴³ See *Roper v. Simmons*, 543 U.S. 551, 569-79 (2005). The Court utilized various scientific studies in order to make an informed decision about whether the death penalty should apply to juveniles. Subsequently, the Court held that executing juveniles or adults who were juveniles when they committed their crimes violated the Eighth and Fourteenth Amendments.

³⁴⁴ See, e.g., Strauss et al., *supra* note 17, at 761 (discussing a study finding that corporal punishment may lead to anti-social behavior, depression, alienation, aggression, masochism, and physical assault on future spouse and children); GILES-SIMS ET AL., *supra* note 20, at 175; Orentlicher, *supra* note 27, at 160-66.

³⁴⁵ Bitensky, *supra* note 67, at 380-86 (discussing the case in which Italy’s Supreme Court of Cassation issued a ruling that prohibited corporal punishment of children).

³⁴⁶ Pollard, *supra* note 46, at 586.

permanent victory for Indiana's children and a statement by the court that it does not value parental rights more than children's rights.

Significantly, if the Indiana legislature or the Indiana Supreme Court were to prohibit corporal punishment, it would set a precedent in the United States.³⁴⁷ If even one state takes the initiative to institute the ban, perhaps others will follow a similar approach, particularly if the ban is successful. California and Minnesota have both already made inroads to banning corporal punishment.³⁴⁸ Although the Department of Child Services Agency Director Judge James W. Payne has acknowledged that conservatism keeps innovation out of Indiana³⁴⁹ that does not mean that Indiana must remain stagnant in its efforts to protect children. Indiana can set the standard for innovative tactics and lead the movement for the nation. The United States has already seen progress in a growing number of bans on corporal punishment in other settings.³⁵⁰ "We are thus slowly moving away from the tradition of rearing by fear and pain, though it is still the predominant form of child discipline in America. Changes in the law would expedite the process of moving toward gentler, more enlightened child-rearing methods."³⁵¹ While Indiana law can often be oppressive, as in *Willis*, it can also be progressive.³⁵² A statutory or judicial ban on corporal punishment would be progressive. It is the change that Indiana needs in order to move away from condoning child abuse and to reiterate its commitment to protecting children.

³⁴⁷ See *supra* Part II.B-C.

³⁴⁸ See *supra* Part II.C.3.

³⁴⁹ Jennifer Ann Drobac, *Jazzing Up Family Law: The First Annual Midwest Family Law Conference*, 42 IND. L. REV. 533, 537 (2009).

³⁵⁰ Pollard, *supra* note 46, at 586 (discussing the progression of corporal punishment bans in schools, foster homes, and alternative care settings).

³⁵¹ *Id.* at 587.

³⁵² Drobac, *supra* note 349, at 535 (discussing the oppressive and progressive nature of Indiana law).

Conclusion

The United States, as a nation, and individual states, have fallen behind the world's other industrialized nations in protecting children's rights, in part by not becoming a signatory to the Convention on the Rights of the Child. Additionally, Indiana can thrust the United States into the forefront of the international human rights campaign by leading a national movement towards eradicating corporal punishment and respecting the value of this nation's children. Instead, the Indiana Supreme Court, in *Willis*, created a setback for its state and the nation.

In essence, the Indiana Supreme Court had an opportunity to stand up for the rights of Indiana's children, and it failed to do so. It disrespected the dignity and worth of children in favor of protecting the rights of parents to use physical discipline against their children. *Willis* provided Indiana with an opportunity to set a new precedent in the United States by acknowledging the pertinent scientific evidence and outlawing corporal punishment. Unfortunately, Indiana has effectively given parents a license to abuse their children without criminal sanction. The likely result is that the victimization of children will increase because parents will not suffer the burden of criminal repercussions for their abusive behavior. Unless the court reverses *Willis* or the legislature acts independently to contravene the *Willis* decision, Indiana's children will become the forgotten victims of a system more concerned with parental rights than the well-being and dignity of children.