'A GOOD SMACK NEVER HURT ANYBODY'

By Joel R. **Brandes**

MALTREATMENT of children has been justified for many centuries by the belief that severe physical punishment was necessary, either to maintain discipline, to transmit educational ideas, to please certain gods or to expel evil spirits. [FN1]

The Common Law

Parents have the common law right to use physical force upon their children, [FN2] although they do not have an unlimited right to do so. At common law a standard of reasonableness evolved, so that the use of parental physical force had to be measured against this standard to determine if it is excessive. [FN3]

It had been said that the common law right of a parent to use physical force is privileged only when it is used for the, "training or education of the child or for the preservation of discipline." [FN4] When a child does not have the capacity to understand or appreciate the correction, the value of the training, education or discipline is lost upon him and, therefore, the parental privilege of the use of physical force is negated.

In an English case in which a father whipped his two-and-one-half-year-old baby daughter with six to 12 strokes of a one inch strap, the court found that, although a father might correct a child, the physical force the father used upon his daughter was beyond her capacity to understand and, therefore, the corporal punishment was not privileged. [FN5]

In New York, the common law parental right allowing the use of physical force upon children has been codified in the defense of justification in Penal Law 35.10(1). A parent is allowed to use physical force on a child, which would otherwise constitute an offense, that is not criminal "to the extent that he reasonably believes it necessary to maintain discipline or to promote the welfare of such person"; this has been codified in our neglect statutes by 1012(f) of the Family Court Act, which defines "neglect." Under Family Court Act 1012(f)(I)(b) a parent of a child less than 18 is guilty of neglect if he unreasonably inflicts or allows to be inflicted harm, or substantial risk thereof, including the infliction of excessive corporal punishment. [FN6]

FCA 1012 provides, in part:

(f) "Neglected child" means a child less than 18 years of age;

(i) whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care; ...

(B) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporal punishment.

Surprisingly, there are very few reported neglect cases dealing with excessive corporal punishment. Determining whether a particular case of corporal punishment is

reasonable under our neglect statute and not excessive requires a full assessment of the parent's behavior and the surrounding circumstances. The factors that must be considered by the court in making such a determination were described in Matter of Rodney C., [FN7] where the Family Court stated that in determining reasonableness, the age, sex, physical and mental condition of the child have traditionally been factors to consider.

Moderate Means

Further, the means of punishment employed is a critical factor to be considered. Moderate means have long been equated with reasonableness. It noted that in an English case where a teacher struck a child on the head with the palm of her hand, deafening the child, the court found that while, "the blow struck was moderate in the sense that it was not a very violent blow as punishment, it was not moderate punishment." [FN8]A parent is not privileged, "to use a means to compel obedience if a less severe method appears likely to be equally effective." A punishment may not be unnecessarily degrading. Nor may it be of a character, "which is brutal, or might be regarded as beastly." [FN9] Nor may it be "protracted beyond the child's power of endurance." [FN10]

The court in Rodney C. stated that in assessing what is or is not reasonable corporal punishment, there must be a continuation of the principle that, "force applied primarily for any purpose other than proper training or education of the child or for the preservation of discipline is not privileged." Force "administered for the gratification of passion or rage" is excessive punishment.

Although it could not state precisely the standard of reasonable parental use of physical force, it pointed out that certain commissions and omissions clearly negate the parental privilege and constitute the infliction of excessive corporal punishment. While the Court discussed the fact that cultural diversity and ethnic background could be considered variables in determining what is and what is not reasonable corporal punishment, it noted that such a distinction had not been enunciated by the commentators nor had it been articulated in the cases. It pointed out that the Legislature enunciated that the purpose of Article 10 of the Family Court Act, the article on abuse and neglect, was "to establish procedures to help protect children from injury or mistreatment and to help safeguard their physical, mental and emotional well being." It noted that in R. v. Derriviere, [FN11] the court held that immigrants had to conform to the standard of behavior acceptable in England, and it was not a defense to a charge of assault to show that the standard of parental correction is harsher in the foreign natives country.

In Rodney C., the Family Court held that 26 marks on the back of a seven-year- old boy with emotional difficulties, which were visible three days after the beating was administered, were evidence of immoderate and unreasonable corporal punishment. The court also held that: "punishment administered to an 11-year- old boy who is undergoing [emotional] therapy; punishment that requires him to hold his ankles and keep his knees straight for variable lengths of time; and punishment that causes him to scream [and to vomit], is punishment beyond the child's endurance and a punishment beyond his capacity to understand as correction [and] a degrading punishment as well."

In Monroe v. Blum, [FN12] the court found excessive corporal punishment based on evidence of "striking the child with a plastic-covered bicycle cord, striking her with a belt and throwing milk on her."

In Maroney v. Perales, [FN13] a report of suspected child abuse, concerning petitioners and their daughter, was filed with the central register established for receiving child-abuse reports. The basis for the report was an incident of excessive corporal punishment administered by the father. The report was classified as "indicated." The Appellate Division found ample proof of excessive corporal punishment because it was undisputed that the father, with the acquiescence and consent of the mother, pushed his daughter several times, pulled her hair, slapped her face, kicked her leg, forced her to retreat into a closet and threw an alarm clock at the wall near her, and that these actions were motivated largely by anger.

Systematic Beatings

In Matter of the M. Children, [FN14] appellant had four minor children. At the time the investigation was commenced, the children resided with appellant and her paramour. The children were left alone at times and were repeatedly, systematically and seriously beaten. Appellant claimed that the children were beaten as punishment and in furtherance of their religious upbringing.

In view of the appellant's admissions before the Family Court, the Appellate Division had little difficulty affirming both the finding of neglect and the award of custody to the great aunt of the children. Appellant argued before the Appellant Division, that her right to beat her children was protected by subdivision 1 of 35.10 of the Penal Law, which permits a parent to use physical force in dealing with his or her infant children if he or she "reasonably believes it necessary to maintain discipline or to promote the welfare of such person" and by the First Amendment to the United States Constitution, which guarantees all persons freedom to practice their religion.

Appellant attempted to excuse the beatings given to the children by reason of the fact that she was an abused child. She also claimed, that although "in the eyes of the court [she] may have been an unfit person because of what the court indicated was a psychological impairment, significant mental disorders and religious fanaticism, ... many people are paranoid [sic] in today's society and still function."

Appellant's counsel suggested that the case presented "a problem of cultural diversity," which served to explain away the findings in a psychiatric report rendered to the Family Court after appellant and her paramour were examined. Counsel further argued that: "Any white psychiatrist may very often find most black men and women 'paranoid.' This is most often because they come from different cultures and the psychiatrist is unable to culturally empathize with the black patient and the experience inherent in being black in America today. Therefore perfect fully [sic] normal behavior in black culture may be perceived as an emotional disorder or paranoia by the psychiatrist from a different culture."

The Appellate Division found these arguments most disconcerting, especially in this case where the appellant admitted that she had mistreated her children and had categorically refused to seek help or to change her ways in any manner. It held that the standards applied by the psychiatrist who examined the appellant and her paramour, by

the Family Court and by it, were those standards that apply to our society in general and to the treatment that, as human beings, all parents must accord to their children.

As parens patriae, the court must require that uniform humane standards concerning the care and treatment of children are applied in every case. It decreed that subdivision 1 of 35.10 of the Penal Law, relied upon by appellant, was in no way intended to permit the cruel beating of children, nor were the freedoms guaranteed to us by the First Amendment intended to embrace such behavior in the name of religion. Accordingly, it agreed that under the circumstances of this case, the children had to be removed from the home and from the custody of their mother.

Conclusion

We believe that the time has come to repeal the parents defense of justification found in Penal Law 35.10 (1). There is no rational basis for its continuation in the 21st century as we can think of no set of circumstances that justifies beating a child.

FN(1) See Radbill, Samuel Z., A History of Child Abuse and Infanticide, The Battered Child, ed. Helfer, Roy E. and Kempse, C. Henry (1968).

FN(2) Restatement Second of Torts 147.

FN(3) Restatement Second of Torts 150.

FN(4) Restatement Second of Torts 151.

FN(5) R. v. Griffin, 11 Cox 402 (1869).

FN(6) Family Court Act 1012(f)(i)(B).

FN(7) 91 Misc.2d 677, 398 N.Y.S.2d 511 (Fam.Ct., Onondaga Co., 1977).

FN(8) Citing Ryan v. Fildes, 3 ALL E R 517, 520 (1938).

FN(9) Citing In Matter of Carl, 174 Misc. 985, 987, 22 N.Y.S.2d 782, 784 (1940).

FN(10) Citing R. v. Hopley, 2 F & F 202, 206 (1860).

FN(11) 53 Cr.App.Rep. 637 (C.A. 1969).

FN(12) 90 A.D.2d 572, 456 N.Y.S.2d 142, 144 (3rd Dept., 1982).

FN(13) 102 A.D.2d 487, 478 N.Y.S.2d 123 (3d Dept., 1984).

FN(14) 91 A.D.2d 612, 456 N.Y.S.2d 413 (2d Dept. 1982).

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