State of Wisconsin

Court of Appeals

District IV

Appeal Nos. 2015AP122 CR & 2015AP123 CR

STATE of WISCONSIN,

Plaintiff-Respondent,

v.

ALINA CAMINITI and MATTHEW CAMINITI,

Defendants-Appellants.

BRIEF AND APPENDIX
OF DEFENDANTS-APPELLANTS

Appeal from the Judgments of Conviction entered May 8, 2014,
In the Circuit Court for Dane County,
The Honorable Ellen K Berz, Presiding,
In Circuit Court Case Nos. 11-CF-504 & 11-CF-505

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ISSUES PRESENTED FOR REVIEW

1. Did the Wisconsin statute forbidding child abuse, even as limited by the statutory affirmative defense of parental privilege, infringe upon the fundamental right of parents to make decisions about how to raise their children in that it criminalizes spanking that causes even minor pain or bruising?

The circuit court held it did not.

2. Did the Wisconsin statute forbidding child abuse, even as limited by the statutory affirmative defense of parental privilege, infringe upon the sincerely held religious beliefs of the Defendants?

The circuit court held it did not.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is requested by the appellants because of the potential for questions regarding the likely impact of the Court's opinion. Publication will be appropriate because the Court's opinion will provide substantial guidance to circuit courts and the legislature.

CONSTITUTIONAL PROVISIONS INVOLVED

The Free Exercise Clause of the First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . . " U.S. Const. amend. I.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: "No state shall . . . deprive any person of life, liberty, or property,

without due process of law. . . .” U.S. Const. amend. XIV.

Article I, §18 of the Wisconsin Constitution provides: “The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; …nor shall any control of, or interference with, the rights of conscience be permitted”.

RELEVANT STATUTES

Wis. Stat. §948.03(2)(b): “Whoever intentionally causes bodily harm to a child is guilty of a Class H felony.”

Wis. Stat. §939.22(4): “"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.”

Wis. Stat. §939.45(5): “The fact that an actor’s conduct is privileged, although otherwise criminal, is a defense to prosecution for any crime based on that conduct.”

Wis. Stat. §939.45(5)(b): [A parent’s discipline of a child is privileged] “[w]hen the actor's conduct is reasonable discipline of a child by a person responsible for the child's welfare. Reasonable discipline may involve only such force as a reasonable person believes is necessary. It is never reasonable discipline to use force which is intended to cause great bodily harm or death or creates an unreasonable risk of great bodily harm or death.”

STATEMENT OF THE CASE

Following a jury trial that concluded on March 7, 2014, Matt Caminiti was convicted of four counts of intentionally causing bodily harm to the couple's two young children, and his wife, Alina Caminiti was convicted of three counts of intentionally causing bodily harm to their two children, all in violation of Wis. Stat. §948.03(2)(b), a Class H felony. (A 34-37.) At their May 2, 2014, sentencing hearing, the trial court noted:

> The children sustained no permanent disability or disfigurement. At most, they sustained slight bruises that faded after a day or two. The children sustained no emotional scarring that is even perceptible by experts in the field of child abuse, Dane County Department of Human Services. By all accounts, these are happy, healthy, well-adjusted children.
>
> ***
>
> Matthew's and Alina's punishment of their children was intended with the purpose of raising happy, healthy, well-adjusted children and was done in a very conscious, measured way, even though that way was clearly misguided and dangerous.

(R 135, p 36, 37.)[1] The Court withheld sentence and placed Mr. and Ms. Caminiti on probation for 18 months. (R 135, p 43)

The conduct for which the Caminitis were convicted consisted of spanking their very young children with a wooden spoon or a dowel (hereinafter referred to as "rod spanking"). It was uncontested that the discipline was based on the sincere religious beliefs of the Caminitis. (R 56, p 8; A-9.) The Caminitis are members of an Evangelical church in which one of the tenets of faith is that children should be disciplined with a rod. (R 41, ¶2.)

The basis of this belief is their belief that the words of the Bible are words from God and must be taken literally; this literalism creates an obligation to obey every

[1] The cases against Alina and Matthew were originally brought as separate cases, with separate case number, but were tried together. Identical pretrial motions were brought resulting in identical rulings. The cases have been ordered consolidated on appeal. To avoid confusion, reference is made to the record in Alina's case which is identical in all material respects to the record in Matthew's case but numbered slightly differently.

instruction found in Scripture. (R 41, ¶¶4, 5.) The Caminitis believe that one critical theme found in the Bible is the importance of the family and of instructing the children to love, fear, and obey the Lord. They cite Deuteronomy 6:5-7:

> You shall love the Lord your God with all your heart and with all your soul and with all your might. These words, which I am commanding you today, shall be on your heart. You shall teach them diligently to your sons and shall talk of them when you sit in your house and when you walk by the way and when you lie down and when you rise up.

(R 41, ¶¶ 12, 13.)

They understand Scripture to require that parents take every opportunity to instruct their children according to the needs of the moment, by teaching, explaining, being an example, reproving, or disciplining (Deuteronomy 4:9; Psalm 78:5; Proverbs 3:12; Luke 1:17; Ephesians 6:4). After careful, clear teaching and training has been given to the child, if the child refuses to listen and obey, the Scriptures

instruct parents to use a rod for correction. (R 41, ¶¶ 15-17.)

In the context of pretrial motions, Matt Caminiti explained the beliefs that he and Alina hold in regard to religion vis-à-vis child discipline:

> The Bible is very specific in requiring the use of a rod in disciplining a child. With respect to the word "rod" in Proverbs as it applies to striking a person, Proverbs 26:3 makes it clear that a literal rod is being talked about when it says, *A whip is for the horse, a bridle for the donkey, and a rod for the back of fools.* If *whip* and *bridle* are literal, so is *rod*.

There are [four other] texts that specifically refer to using a rod in the discipline of a child:

- *He who spares his rod hates his son, but he who loves him disciplines him diligently.* Proverbs 13:24;

- *Foolishness is bound up in the heart of a child; the rod of discipline will remove it far from him*. Proverbs 22:15;

- *Do not hold back discipline from the child, although you strike him with the rod, he will not die. You shall strike him with the rod, and*

deliver his soul from Sheol. Proverbs 23:13-14;

- *The rod and reproof give wisdom, but a child who gets his own way brings shame to his mother.* Proverbs 29:15

(R 41, ¶¶ 18-20.)

Matthew Caminiti (who is a graduate of Emmaus Bible College, with a major in Bible Exposition and Theology, and an elder in the church) further explained that their religion teaches that discipline of children is required to begin at an early age:

> The Bible also makes it clear that it is necessary for a parent to discipline a child at a young age, early in the child's life. A proverb that speaks to this most clearly is "*He who spares his rod hates his son, but he who loves him disciplines him* ***diligently***." Proverbs 13:24 (emphasis added). The word "diligently" is translated in the following versions in a manner that indicates that parents are to discipline their children early on. As such, this proverb is teaching that parents who spare the rod *until too late in life* hate their sons.

- English Standard Version: *"Whoever spares the rod hates his son, but he who loves him is diligent to discipline him."* Note, Or *who loves him disciplines him* <u>*early*</u> (emphasis

added).

- The NET Bible: *"The one who spares his rod hates his child, but the one who loves his child is diligent in disciplining him."* Note 85 indicates that the Hebrew word [for 'diligent'] can mean "to do something early" such that the verse could mean "to be early or prompt in disciplining."

- King James Bible (Cambridge Edition): *"He that spareth his rod hateth his son: but he that loveth him chasteneth him betimes."* The word *betimes* means "soon, in good time, early."

- God's Word Translation (1995): *"Whoever refuses to spank his son hates him, but whoever loves his son disciplines him from early on."*

- King James 2000 Bible: *"He that spares his rod hates his son: but he that loves him chastens him early."*

- American King James Version: *"He that spares his rod hates his son: but he that loves him chastens him betimes."*
- American Standard Version: *"He that spareth his rod hateth his son; but he that loveth him chasteneth him betimes."*

- Douay-Rheims Bible: *"He that spareth the*

rod hateth his son: but he that loveth him correcteth him betimes."

- Darby Bible Translation: *"He that spareth his rod hateth his son; but he that loveth him chasteneth him betimes."*

- English Revised Version: *"He that spareth his rod hateth his son; but he that loveth him chasteneth him betimes."*

- Webster's Bible Translation: *"He that spareth his rod hateth his son; but he that loveth him chasteneth him betimes."*

… ***Gill's Exposition of the Entire Bible*** …explains that "chasteneth him betimes" means "*chastening him in the morning of his infancy."*

(R 41,¶¶ 3, 21-24.)

Matt explained that, for example, where Proverbs 19:18 says, *"Discipline your son while there is hope, and do not desire his death,"* they understand that to mean that a child can become set and hardened in his foolish and selfish ways, so it is essential to take advantage of every

opportunity to offset this by beginning training early. He points to ***Barnes' Notes on the Bible*** which says, "While there is hope – While is still young, and capable of being reformed," and ***Gill's Exposition of the Entire Bible*** which says that chastening of the child needs to happen "while in a state of infancy, childhood, and youth." (R 41,¶¶ 24-29.)

He also noted that Proverbs 22:6 says, *"Train up a child in the way he should go, even when he is old he will not depart from it."* The Caminitis understand this Biblical teaching to mean that as early as a parent recognizes a child asserting a contrary disposition, he or she should take whatever training action he sees as reasonable and necessary to turn him from that path. (R 41,¶¶ 30-33.)

Another example Matt gave was Proverbs 22:15, which says *"Foolishness is bound up in the heart of a child; the*

rod of discipline will remove it far from him." The Caminitis understand this passage of the Bible to mean that foolishness is fixed, fastened tight, in the depths of a child's being, and so, as soon as a parent sees foolishness expressed, at whatever age, he or she deals with it reasonably, but surely. Foolishness is not to be taken lightly. As support for this understanding, he cited to ***Gill's Exposition of the Entire Bible*** which says that foolishness "is naturally in the heart of man; it is in the heart of a child, it is in him from his infancy." (R 41,¶34-36.)

The unrebutted evidence was that the Caminitis' religious belief imposes an absolute duty on them as parents to raise their children to love, know, fear, and obey God, and that they sincerely believe that this duty can only be implemented by a program of teaching and

discipline that includes spanking their children with a rod when the occasion calls for it. (R 41,¶¶ 37, 38.) Because of their belief that the Bible is literally the Word of God, they cannot ignore the places in Scripture where the word "rod" is used in connection with child discipline by imposing an alternative metaphorical meaning upon the word. (R 41,¶ 39.) They believe that if they were to do so, it would place them at odds with the Scriptures that instruct to accept the binding authority of all of Scripture. (Joshua 1:7,8; Psalm 119:6,13,86,128, 151,160,172; Proverbs 30:5,6; Matthew 4:4; 5:18; Luke 16:17,31; John 10:35; 2Timothy 3:16). (R 41,¶ 40.)

Obedience to civil authority is also a requirement of the Caminitis' religion. Romans 13:1-7 teaches them that "every person is to be in subjection to governing authorities." (R 41,¶ 44.) Thus they find themselves on the

horns of a dilemma, in that their religion requires that they follow both civil law and the teachings of the Bible, and the Bible requires them to teach their children, and in part, that teaching requires the use of the rod at an early age. To the extent that application of the Wisconsin child abuse law does not permit them to discipline their children in that manner, that prohibition places them in direct conflict with their religious beliefs. (R 41,¶¶ 45, 46.)

To the extent that Wisconsin law does not permit them to include rod spanking of their young children as part of their upbringing, then in obeying that law, they are disobeying the Scriptures. (R 41, ¶¶ 41, 46.) To forego rod spanking means that they will have failed in their responsibility to raise their children in the way that they need to be raised, and according to Proverbs 23:14, their children will be spiritually dead. (R 41,¶ 43.) In the

religion of which the Caminitis are adherents, spiritual death is the worst possible consequence imaginable – it is separation from God. (R 41, ¶ 11.)

The Defendants brought pretrial motions asserting that the application of the child abuse statute violated their right to freedom of religion protected by the First Amendment to the United States Constitution and freedom of conscience, protected by Article One, Section 18 of the Wisconsin Constitution. (R 26, 33.) They also asserted that the application of the statute impermissibly infringed upon their fundamental right to parent, in violation of the Fourteenth Amendment to the United States Constitution. (R 45.) Both motions were denied.[2]

The Court ruled that the Defendants did have a sincerely held religious belief, but that belief was not

[2] The Defendants also challenged the statute as unconstitutionally vague. That motion was denied; its denial is not challenged on appeal.

burdened by the prosecution under the child abuse statute when considered in conjunction with the statutory reasonable discipline affirmative defense. (R 56, p 8; A-9.) The court also found that the state has a compelling interest in protecting children, and that interest could not be met by a less restrictive statute. (R 56, p 9; A-10.) The court denied the motion to dismiss based upon the deprivation of the liberty interest in raising a family by reference to its denial of the motion to dismiss based on infringement on religion. (R 56, p 10; A-11.)

ARGUMENT

I. The Standard of Review and Burden of Proof.

The constitutionality of a statute is a question of law that the Court of Appeals reviews independently, while "benefitting from the analyses of the circuit court." ***League***

of Women Voters of Wisconsin Educ. Network, Inc. v. Walker, 2014 WI 97, ¶ 14, 357 Wis. 2d 360, 369, 851 N.W.2d 302, 307.

As to the claim based on freedom of religion/conscience, the Court should apply the compelling state interest/least restrictive alternative test to its review. Under this analysis:

> the challenger carries the burden to prove: (1) that he or she has a sincerely held religious belief, (2) that is burdened by application of the state law at issue. Upon such proof, the burden shifts to the State to prove: (3) that the law is based on a compelling state interest, (4) which cannot be served by a less restrictive alternative.

State v. Miller, 202 Wis.2d 56, 66, 549 N.W.2d 235 (1996). In articulating this standard, the ***Miller*** Court noted that freedom of conscience receives higher protection under the Wisconsin Constitution than does freedom of religion under the U.S. constitution, and, while noting that the U.S. Supreme Court has abandoned the use of the compelling state interest test where laws of general applicability

burden religious freedom, it concluded that "the guarantees of our state constitution will best be furthered through continued use of the compelling interest/least restrictive alternative analysis of free conscience claims and [we] see no need to depart from this time-tested standard." ***Miller,*** 202 Wis.2d 66, 549 N.W.2d 235.[3]

Because the trial court found the Caminitis religious belief was not burdened by application of the child abuse statute, it did not require the State to prove that the compelling state interest of preventing harm to

[3] However, the compelling interest test is still used in some federal analyses, as the Religious Freedom Restoration Act of 1993 (RFRA) prohibits the "Government [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the Government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§ 2000bb–1(a), (b). As amended by the Religious Land Use and Institutionalized Persons Act of 2000, RFRA covers "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." § 2000cc–5(7)(A).

children could not be accomplished with a less restrictive statute. Nonetheless, it found:

> The compelling state interest in the physical protection and welfare of children cannot be served by less restrictive alternatives. The intent element and the affirmative defense of reasonable parental discipline amply served to limit the bounds of the government's reach.

(R 56, p 10; A-11.) Defendants assign this as error for reasons that are discussed below, among them, a failure to require the State to meet its burden.

As to the challenge based on the liberty interest in making parenting decisions, where state legislation or action taken under color of state law infringes upon a liberty interest deemed fundamental under the Fourteenth Amendment, it is "presumptively unconstitutional." ***Harris v. McRae***, 448 U.S. 297 (1980). Where legislation impinges upon these fundamental aspects of liberty (including the right to marry, to bear children, to direct the education and upbringing of one's children, to use

contraception, and to maintain bodily integrity), the government must justify such infringement by using the traditional strict scrutiny standard. ***County of Sacramento v. Lewis,*** 523 U.S. 833, 846–47 (1998). This requires that the government show that the infringing statute is designed to address a compelling government objective and is drafted as narrowly as possible to achieve that objective. *Id*.

Wisconsin case law concurs that this is the proper test: "[W]here the statutory scheme impinges upon a fundamental liberty, [courts] will not invalidate it on substantive due process grounds [if] it is narrowly tailored to a compelling government interest." ***State v. Olson***, 2006 WI App 32, ¶ 4, 290 Wis.2d 202, 712 N.W.2d 61.

The trial court did not articulate what elements of proof it used when it considered the Defendants' challenge based on the infringement of their liberty

interest in parenting. Although, in presenting their motion to dismiss, the Defendants proffered several examples of child abuse statutes that serve the same state interest of protecting children from injury while not intruding upon parental decisions, neither the State nor the court explained why these less restrictive alternatives were not viable for Wisconsin, and thus failed to adhere to the proper method of analysis.

II. Parents Have a Fundamental Liberty Interest in Directing the Upbringing of Their Children Which is Protected by the Substantive Due Process Clause of the Fourteenth Amendment.

The United States Supreme Court has repeatedly recognized that the relationship between parent and child is constitutionally protected. See, e.g., ***Quilloin v. Walcott***, 434 U.S. 246, 255 (1978); ***Wisconsin v. Yoder***, 406 U.S. 205, 231-233 (1972); ***Stanley v. Illinois***, 405 U.S. 645, 651 (1972); ***Meyer v. Nebraska***, 262 U.S. 390, 399-401 (1923). The Court

described this constitutional protection as the "liberty of parents and guardians to direct the upbringing and education of children under their control." ***Yoder,*** 406 U.S. at 233; ***Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary,*** 268 U.S. 510, 535 (1925). "[F]reedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." ***Cleveland Board of Education v. LaFleur***, 414, U.S. 632, 639-640 (1974). "It is cardinal … that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." ***Prince v. Massachusetts***, 321 U.S. 158, 166 (1944). Further, the Court recognized "[t]he rights of children to exercise their religion, and of parents to give them religious training and to encourage them in the practice of religious belief, as against preponderant sentiment and assertion of state power voicing it." ***Id***.

The right to familial relationship is analyzed under substantive due process protection:

> An individual's substantive and procedural due process rights are rooted in the Fourteenth Amendment to the United States Constitution, and Article I, Section 1 of the Wisconsin Constitution. *The right to substantive due process addresses the content of what government may do to people under the guise of the law. An individual's substantive due process rights protect against a state action that is arbitrary, wrong, or oppressive, without regard for whether the state implemented fair procedures when applying the action.*

State v. Wood, 2010 WI 17, ¶ 17, 323 Wis. 2d 321 (2010) (emphasis added, internal quotations and citations omitted).

III. This Liberty Interest Protects the Parents' Right to Direct the Upbringing of Their Children, Including Teaching and Discipline.

The Supreme Court has held that "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our

society." ***Ginsberg v. New York***, 390 U.S. 629, 639 (1968). The fundamental liberty interests of a parent in the companionship, care, custody, and management of his or her child compel the utmost respect. ***Kovacs v. Cooper***, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring). The interest in question here, that of parents to raise, teach, and discipline their children, warrants deference and, absent a powerful countervailing interest, protection. ***Stanley v. Illinois***, 405 U.S. 645, 651 (1972). See also, ***Kenosha County Dep't of Human Services v. Jodie W.***, 2006 WI 93, 293 Wis. 2d 530, 716 N.W.2d 845 (holding that the mother, Jodie, had a fundamental liberty interest in parenting her son).

Imposing discipline is an inherent part of caring for children, since a parent may not be able to care properly for, or exercise control over, an unruly child without the ability to impose discipline. ***Ingraham v. Wright***, 430 U.S. 651, 661(1977).

The presumption that parents, not the State, know how to properly discipline their own children, is axiomatic in constitutional jurisprudence:

> [o]ur jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations." . . . The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

Parham v. J.R., 442 U.S. 584, 602 (1979) (internal citations omitted).

The right of parents to discipline their children is the "oldest of the fundamental liberty interests recognized by [the United States Supreme] Court." ***Troxel v. Granville,*** 530 U.S. 57, 65 (2000); ***In re RGB***, 123 Haw. 1, 229 P. 3d 1066, 1121 (2010). This right to discipline includes the right to use reasonable corporal punishment.

Doe v. Lang, 327 F.3d 492, 523 (7th Cir. 2003); ***Lang v. Starke County Office of Family and Children***, 861 N.E. 2d 366, 378 (Ind. App. 2007). This is a fundamental constitutional right not dependent upon legislative recognition by statute**.** ***City of Boerne v. Flores***, 521 U.S. 507, 545 (1997). In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act which is the deprivation of liberty triggering the protections of the Due Process Clause. ***DeShaney v. Winnebago County Department of Social Services,*** 489 U.S. 198, 200 (1989).

The Supreme Court has recognized historical and contemporary approval of reasonable corporal punishment in public schools. ***Ingraham v. Wright***, 430 U.S. 651, 663 (1977). See also, ***Arkansas Dep't of Human Services v. Caldwell***, 39 Ark. App. 14, 832 S.W.2d 510 (Ark. App. 1992) (assistant principal paddled three students with three "licks" with a wooden paddle which

left them sore and crying and bruised after 24 hours; that was not excessive or abusive punishment); ***Lander v. Seaver,*** 32 Vt. 114, 76 Am. Dec. 156 (Vt. 1859) (schoolmaster has the right to inflict reasonable corporeal punishment). The ***Ingraham*** Court noted that "the use of corporal punishment in this country as a means of disciplining schoolchildren dates back to the colonial period." 430 U.S. at 663. The Court also noted the "background of historical and contemporary approval of reasonable corporal punishment." ***Id.*** In justifying the use corporal punishment, the ***Ingraham*** Court found that the child's interest in personal security or the child's right to be free from unjustified intrusions did not outweigh the need for maintaining discipline. ***Id.*** at 676.

In ***Doe v. Heck***, 327 F.3d 492, 523 (7th Cir. 2003) the Seventh Circuit held, regardless of "one's view of corporal punishment," a parent's "liberty interest in directing the upbringing and education of their children includes

the right to discipline them by using reasonable, nonexcessive corporal punishment."

See also , ***In re Welfare of P.L.C.***, 384 N.W.2d 222, 226 (Minn. App. 1986) (finding that corporal discipline--hair and arm pulling--without evidence of injury was not a "grave reason" justifying denial of a right to custody); ***Johnson v. Smith***, 374 N.W.2d 317, 320 (Minn. App. 1985) (occasional spankings--spanked on the buttocks with a wooden spoon--are insufficient to constitute danger for child-custody modification where there was no evidence that the child had been hurt, physically or mentally, and the child stated that he did not fear the parent). No teacher should feel himself at liberty to administer chastisement to a child in an amount greater than allowed a parent. ***Lander v. Seaver***, 32 Vt. at 123 (citing a note to Blackstone).

Thus the parental right to impose discipline is among the inalienable rights protected from infringement

by the state. ***State v. Thompson,*** 2006 Ohio 582, 2006 Ohio App. LEXIS 533 (Ohio App. 2006). See also, ***Washington v. Glucksberg,*** 521 U.S. 702, 720-22 (1997) (the Court should protect unenumerated rights if they are "objectively, deeply rooted in this Nation's history and tradition."); ***Moore v. City of East Cleveland, Ohio,*** 431 U.S. 494, 500-06 (1977) (plurality opinion) (noting that history and tradition protect the extended family); ***Griswold v. Connecticut,*** 381 U.S. 479, 501 (1965) (Harlan, J., concurring) (noting that limits on substantive due process protection come from "respect for the teachings of history [and] solid recognition of the basic values that underlie our society"), *citing* ***Adamson v. California,*** 332 U.S. 46, 59 (1947) (Frankfurter, J., concurring).

IV. The Court Erred in its Analysis of the Caminitis' Right to Discipline Their Children.

As noted, the trial court found that no less restrictive alternative than Wisconsin's law as currently written would protect children from abuse. It did so without analysis, without acknowledging that the burden on this issue fell to the State, and without explaining how this conclusion squares with the fact that there are less restrictive alternatives that protect children without infringing on the rights of parents to make decisions about discipline absent interference from the government.

Courts of other states (Maine, Ohio, Hawaii, Iowa, and Vermont) have found this fundamental liberty interest includes the right of parents "to direct the upbringing and education of children," including the use of reasonable or moderate physical force to control behavior. ***State v. Wilder***, 2000 ME 32, ¶ 20, 748 A.2d 444. See also, ***State v. Ivey***, 98 Ohio App.3d 249, 648 N.E.2d

519, 526 (1994); ***State v. Deleon***, 72 Haw. 241, 813 P.2d 1382 (1991); ***Lander v. Seaver,*** 32 Vt. 114, 122 (1859) ("[T]he law suffers no intrusion upon the authority of the parent, and the privacy of domestic life, unless in extreme cases of cruelty and injustice."); ***State v. Adaranijo,*** 2003 Ohio 3822, ¶ 12, 792 N.E.2d 1138 (Ohio App., 2003) ("[A] child does not have any legally protected interest that is invaded by proper and reasonable parental discipline. Thus, as any corporal punishment necessarily involves some physical harm, the harm required to constitute domestic violence must be greater than a slap. To rise above parental discipline and become domestic violence, the parent's act must create a risk of death, serious injury, or substantial pain."); ***State v. Arnold,*** 543 N.W.2d 600, 603 (Iowa 1996) ("the control and proper discipline of a child by the parent may justify acts which would otherwise constitute assault and battery.").

In short, it is not appropriate for the state to interject itself into the determination of when, why and under what circumstances a parent may decide that the use of discipline is necessary, nor may it intrude at all upon the familial relationship when a parent has used only moderate physical force in the form of corporal punishment. The state's involvement is constitutionally mandated to be limited to prohibiting only those instances where parental discipline is not reasonable because it is physically harmful to the child.

This demarcation is exemplified in the Model Penal Code which, in the section entitled "Use of Force by Persons with Special Responsibility for Care, Discipline or Safety of Others" dispenses with language about "reasonableness" of discipline in favor of language which simply prohibits the use of excessive physical force by a parent:

> The use of force …is justifiable if:….

> 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
>
> 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....

Model Penal Code § 3.08(1) (1981). The comment to the Model Penal Code supports such an approach:

> The formulation also differs from the Restatement [of Torts] in not explicitly demanding that the force be reasonable. It was believed that so long as a parent uses moderate force for permissible purposes, the criminal law should not provide for review of the reasonableness of the parent's judgment. Of course, even if a statute includes language about necessity or reasonableness or both, it would be extraordinary for a parent using moderate force for a permissible purpose to be prosecuted because of misjudgment. Thus the less stringent language of the Model Code is unlikely to make a great practical difference, but it does more accurately reflect the latitude that is actually given to judgments of parents in disciplining their children.

Model Penal Code § 3.08, cmt. (1981).

The Model Code's use of force prohibition serves the laudable goal of criminalizing any conduct that causes actual injury to children without allowing the government to intrude more than is necessary upon the parents'

constitutional rights to make their own decision about when a child needs to be disciplined. In contrast, consider the relevant portions of the Wisconsin standard jury instruction on parental discipline privilege:

> The law allows a parent to use reasonable force to discipline that child. Reasonable force is that force which a reasonable person would believe is necessary.
>
> *****
>
> In determining whether the discipline was or was not reasonable, you should consider the age, sex, physical and mental condition and disposition of the child, the conduct of the child, the nature of the discipline, and all the surrounding circumstances.

WIS-JI CRIMINAL 950 (emphasis added)[4]

In other words, Wisconsin law allows prosecution of a parent using mild or moderate force for a permissible purpose, a prosecution which the Model Penal Code refers to as "extraordinary," because a parent's "misjudgment" about whether a child needs to be disciplined using

[4] This instruction was given to the jury in this case. (R 134, p 46)

moderate force should never subject the parent to criminal liability.

Wisconsin law directs juries to consider, among other things, whether the parent's decision to discipline the child was reasonable. A jury's inquiry into a parent's reason for spanking violates the Constitution. Some parents would spank a child for cursing; others would not. Some would spank a child for lying; others would not. It is no valid concern of the State or of jurors whether or not spanking for cursing, or lying, or sneaking a cookie before dinner, or skipping piano practice is "necessary." The only legitimate concern is if the child is spanked too hard, causing injury.

This valid concern could be addressed equally well in a less restrictive law by eliminating "physical pain" from the definition of bodily harm, and requiring actual injury before discipline becomes criminal. See e.g., Or. Rev. Stat. §§163.205; 161.015(7); 16 Pa. Cons. Stat. §§2703,

2701; W. Va. Code §§61-8D-3, 61-8B-1(9); Wyo. Stat. §§6-2-503, 14-3-202(a)(ii)(B). In closing argument, the prosecution stressed the minimal amount of the physical pain that would be sufficient to find Defendants guilty of child abuse: "Ouch, injury, right? Red mark, bruise, owie." (R 134, p 77.)[5]

Attacking the Defendants' reasons for spanking was an important part of the prosecution in this case. This is demonstrated by the remarks of the prosecutor during closing argument when she noted that Defendants' daughter was spanked "because she was either getting angry or not listening" (R 134, p 77), to teach her "to fear, respect and listen to" her parents (R 134, p 80), and for crying (R 134, p 79).

[5] The copy of the transcript for March 7, 2014, Day Four of jury trial, inexplicably has two differing sets of page numbers, one on the bottom center of each page; the other off in the right hand margin. Reference herein is made to the page number on the right because that corresponds to the page numbers in the transcript's table of contents.

The prosecution denigrated the Defendants' reasons for disciplining their children:

> It has no bearing on what the parent is feeling, … what's in the best interest of child. Well, who's making the determination what the best interest of the child is? The parent. And if the parent's idea of the best interest of the child is to start striking them with a wooden object, spoon, a spoon, at two months old, then that's not the person who should be making the determination what the best interest of the child is.

(R 134, p 138)

Constitutionally speaking, that is the cart before the horse. The question should be simply: was the child injured? And if not, then yes, the parents must be assumed to know, better than the State, better than "the community," and better than the jury, what is best for their children. Asking a jury to evaluate whether the reason for discipline was appropriate to invoke a spanking intrudes directly into an area which the State is constitutionally prohibited from intruding: whether or not the parent was justified in disciplining the child for certain conduct.

A statement made by Judge Berz makes this clear. She first acknowledged that the infliction of pain is not always criminal, but is sometimes the way children learn, saying, "Pain teaches us to not put a hand onto a hot stove burner, measured pain through reasonable discipline, as in spanking a three-year-old child." She also said, "Conduct of a parent in intentionally spanking the child for trying to grab a pot of boiling water would not be covered by this statute because that measured response is clearly reasonable parental discipline." (R 56 p 6; A-7.) To Judge Berz, the danger of a hot stove is clear, and spanking a child in order to protect her from that stove is permissible. To the Caminitis, the danger of spiritual death is equally clear, and spanking their children to save them from spiritual death is an equally measured response. The Caminitis' world view is not shared by everyone, but to them, spiritual death (which lasts an eternity) is a far greater danger to their children than a

pot of boiling water. The child abuse statute takes from them the ability to decide from what they seek to protect their children by allowing the State to judge whether the reason that discipline was administered was reasonable. It is not for the court to say that the "religious beliefs [of the litigants] are mistaken or insubstantial." ***Burwell v. Hobby Lobby Stores, Inc.***, __ U.S. ___, 134 S.Ct. 2751, 2779, 189 L.Ed.2d 675 (2014).

The compelling interest of the State in safeguarding children could be met by a more narrowly drawn statute that that does not criminalize corporal punishment that makes use of moderate force that does not create substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress is unlawful. To allow other considerations to become part of the analysis elevates the social norms of the majority (who presumably are not Evangelical Christians, do not take the Bible literally, and do not fear spiritual death more than a

hot stove) to the level of law, unconstitutionally overriding the fundamental and inalienable right of parents to use corporal punishment to teach their children right from wrong.

It is not the Defendants' burden to persuade this Court of the efficacy of the less restrictive alternatives they have presented here; to the contrary, it was the burden of the State to demonstrate, if it could, why an inquiry into the reason for discipline, or the necessity of the discipline, or the sex of the child, or the age of the child, or any factor other than the amount of force used in the spanking, necessary to protect its compelling interest.

V. The Familial Relations in this Case Are Also Protected By The First Amendment.

The rights delineated above that are available to every parent in America derive from the Fourteenth Amendment and have been analyzed accordingly. In this

particular case, the Defendants assert that the liberty interest in maintaining familial relationships without undue interference by the State is also protected under the First Amendment, because the parental discipline of children is Biblically mandated according to the Defendants' religion. To the extent that these Defendants' family relationships are intruded upon by the application of the child abuse law, such application represents an unconstitutional burden upon religion and upon freedom of conscience, in violation of the state and federal constitutions.

VI. Because It Criminalizes the Infliction Of Any Pain, the Child Abuse Statute Unconstitutionally Burdens the Right Of Evangelical Christians to Practice An Essential Aspect of Their Religion

The "exercise of religion" involves "not only belief and profession but the performance of (or abstention from) physical acts" that are "engaged in for religious

reasons." ***Employment Div., Dept. of Human Resources of Ore. v. Smith***, 494 U.S. 872, 877 (1990). As has been explained, the act of rod spanking was engaged in not only for parental reasons, but also for religious reasons.

A. The Essence of the Religious Belief that Requires Rod Spanking

According to Dr. Randall Balmer,[6] a religious history professor at Yale Divinity School, Evangelical Protestantism refers at its root to the first four books of the New Testament, Matthew, Mark, Luke and John, written by the evangelists. (A-44.) In the sixteenth century, after Martin Luther's Protestant Reformation, there were two bedrock principles of evangelical religion: that the Bible (also called Scripture) alone is the source of authority for

[6] Dr. Balmer testified in person in the case of another defendant. The admission of his testimony from that case was stipulated to in the case of Alina and Matthew Caminiti, and the transcript of his testimony was received in evidence at the October 2, 2012, hearing on the Defendants' motions to dismiss. (R 55.) For the convenience of the Court and opposing counsel, that transcript has been included in the Appendix.

believers and the importance of "the priesthood of all believers," meaning that each individual is responsible for herself or himself directly to God, without the intermediary of clergy or priests. (A-45.) An evangelical believes the Bible is God's revelation to humanity, and the writings in the Bible must be understood in their plainest, most literal sense. (A-47.)

Christian fundamentalism arose in the United States, starting among conservative Presbyterian theologians at Princeton Theological Seminary in the late 19th century. The movement's purpose was to reaffirm key theological tenets. Mark A. Noll, *A History of Christianity in the United States and Canada* (1992) pp 376-86. The first formulation of fundamentalist beliefs is traced to the *General Assembly of the Presbyterian Church*, which, in 1910, distilled these beliefs into what became known as the "five fundamentals":

- The inspiration of the Bible and the inerrancy of scripture as a result of this,
- The virgin birth of Christ,
- The belief that Christ's death was the atonement for sin,
- The bodily resurrection of Christ, and
- The historical reality of Christ's miracles.

In fundamental Christianity, the Bible is believed to have been divinely inspired. A literal Biblical interpretation is associated with the fundamentalist and evangelical approach to Scripture and is extensively embraced by conservative Christians. *Beyond Biblical Literalism and Inerrancy: Conservative Protestants and the Hermeneutic Interpretation of Scripture*, John Bartkowski, Sociology of Religion, 57, 1996. Biblical literalists believe that, except where a passage is clearly intended as allegory, poetry, or some other metaphorical genre, the Bible must be interpreted as the literal statements of the Author.

For example, fundamentalists treat the Genesis account of creation as historical truth. Where the Bible

describes supernatural interventions of God in history, and Jesus's miracles, these, too, are taken as historical accounts of actual events. *Lewis on Miracles*, Art Lindsley, Knowing & Doing; Teaching Quarterly for Discipleship of Heart and Mind: C.S. LEWIS INSTITUTE, Fall 2004.

Those who are not well educated in the concept of Biblical literality find hypocrisy inherent in this position because they see that not even the most rock-ribbed fundamentalist takes literally every admonition in the Bible: an eye for an eye, for example. However, disregarding certain types rules found in the Old Testament is part of the cohesive interpretation of the Bible. According to New Testament theology, parts of the Old Testament relating to sins, such as animal sacrifices (Exodus 29:36) and dietary concerns, while intended literally when they were written, are not binding on modern Christians; this is related to the view that Christ sanctifies and fulfills the Law for the person. The death of

Jesus is considered the fulfillment of those old laws; often cited for this proposition is Matthew 5:17: "Do not think that I have come to abolish the Law or the Prophets; I have not come to abolish them but to fulfill them. (NIV Gospel of Matthew 5:17)."

According to Dr. Balmer, Christian fundamentalism is a type of evangelicalism, affirming the conservative doctrines of the faith, including the inerrancy of scripture which is its touchstone belief and conviction. (A-51, 55.) That concept includes the following beliefs: that the Bible is without error, the authenticity of miracles, and that Jesus died for the sins of humanity. (A-52.) Belief that rod spanking of young children is Biblically mandated is consistent with fundamentalist and evangelical belief. (A-63.) When a Bible-believing fundamentalist Christian identifies what he or she believes to be an unqualified commandment from God in Scripture and has to decide whether to obey it or not, what is at stake in that decision

is no less than whether he or she will spend eternity in heaven or hell. (A-64-65.)

The religious beliefs of the Caminitis should be understood as part of the larger backdrop of the Christian fundamentalist community. The court found that the Caminitis religious beliefs were not burdened by the application of the child abuse statute, saying, "The Defendants would have to show that refraining from physically abusing their children would be a burden on their religious expression. Their religious belief, however, as testified to, does not encompass abuse." (R 56, p 8, A-9)

This demonstrates a misunderstanding of the Defendants' position: they are not seeking leave to abuse their children. They simply seek a narrower interpretation the child abuse statute, and specifically of the definitions of bodily harm and reasonable discipline. Their religious beliefs would be accommodated by an interpretation that does not criminalize transitory, mild or moderate pain

that is administered in a loving relationship for the good of the child.

B. Federally Protected Freedom of Religion

The protections of the Free Exercise Clause of the First Amendment are applicable if the challenged law discriminates against certain religious beliefs or if it regulates or prohibits conduct because the conduct is undertaken for religious reasons. ***Board of Ed. of Westside Community Schools v. Mergens,*** 496 U.S. 226, 248 (1990) (plurality opinion); ***Wallace v. Jaffree,*** 472 U.S. 38, 56 (1985). The language of the Supreme Court on this point is telling, for the importance it attaches to religious freedom:

> At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons. Indeed, it was "historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause."

***Church of Lukumi Babalu Aye v. City of Hialeah*,** 508 U.S. 520, 532 (1993) (internal citations omitted).

Where a religion holds a set of beliefs, even if those beliefs are not given widespread recognition in society, adherents cannot be prosecuted for following their beliefs. Not only can there be no law that is specifically aimed at the religion, but also, laws of general application cannot be interpreted in such a way as to discriminate against a sincerely held religious belief. This was made clear in ***Fowler v. Rhode Island***. There, an ordinance forbade religious public address in a park. When a group of Jehovah's Witness assembled for a religious meeting and were addressed by a minister, the minister was arrested for violating the ordinance. The facts of the case showed that a Catholic mass or a Protestant church service could have been conducted without violating the ordinance, and

the Supreme Court ruled that this distinction was fatal to Rhode Island's case for "it plainly shows that a religious service of Jehovah's Witnesses is treated differently than a religious service of other sects. That amounts to the state preferring some religious groups over this one." ***Fowler v. Rhode Island***, 345 U.S. 67, 69 (1953).

The Court continued:

> [I]t is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment. Nor is it in the competence of courts under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings. Sermons are as much a part of a religious service as prayers.

Id. at 70.

So too, the use of corporal punishment of children under certain circumstances as part of a program of raising children in the faith of the Aleitheia Bible Church is a religious practice, and as a result, it cannot be condemned or criminalized under the First and Fourteen

Amendments. Some religions would not preach that corporal punishment of children is part of the path to behaving as God wants; nonetheless, it is a violation of the First Amendment to criminalize the speech of those who do so believe. As the ***Fowler*** Court instructs, to say that the practices of raising a family by the rules of one religion are immune from regulation, while the practices of another are subject to regulation, is "merely an indirect way of preferring one religion over another." *Id*. The Free Exercise Clause, "forbids subtle departures from neutrality," ***Gillette v. United States***, 401 U.S. 437, 452 (1971), and "covert suppression of particular religious beliefs." ***Church of Lukumi***, 508 U.S. at 534.

In 1972, members of the Old Order of Amish living in Green County, Wisconsin were convicted of violating the compulsory education law as a result of keeping their children out of high school. Although they sent their

children to public school for elementary school, the Amish asserted that the values that they wanted to teach their teenage children were not to be found in the public high school curriculum. The Amish challenged their convictions, asserting that the law requiring them to keep their children in school until they were 16 years old was an unconstitutional burden on their religious beliefs. The United States Supreme Court agreed, finding that the Amish had supported their claim that enforcement of the compulsory formal education requirement after the eighth grade would gravely endanger, if not destroy, the free exercise of their religious beliefs. ***Wisconsin v. Yoder***, 406 U.S. 205 (1972).

In ***Yoder***, the Court, although recognizing the State's interest in the compulsory education of youth, also considered the evidence that had been presented regarding the overall tenets of the Amish faith and found:

> that respondents believed, in accordance with the tenets of Old Order Amish communities generally, that their children's attendance at high school, public or private, was contrary to the Amish religion and way of life. They believed that by sending their children to high school, they would not only expose themselves to the danger of the censure of the church community, but… also endanger their own salvation and that of their children.

Id. at 209.

Chief Justice Burger wrote, "Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence. This concept of life aloof from the world and its values is central to their faith." *Id.*

In much the same way, using a rod for a brief spanking to turn children from their "foolishness" is central to the Caminitis' beliefs.

C. The Wisconsin Constitution Prohibits Regulation of Matters Of Conscience.

In Wisconsin, there was a traffic safety law that required all slow-moving vehicles to display a fluorescent orange triangle on the back of the vehicle. Wis. Stat. §347.245. Members of the Old Amish Order challenged their convictions under this law, asserting that display of the symbol violated aspects of their faith. ***State v. Miller***, 202 Wis.2d 56, 549 N.W. 2d 235 (1996). Calling religious freedom a "vital liberty," the Wisconsin Supreme Court agreed.

The Court began its analysis by reaffirming its understanding that

> the portions of Art. I, § 18, dealing with the freedom of conscience, operate as a perpetual bar to the state, ... from the infringement, control, or interference with the individual rights

> of every person.... They presuppose the voluntary exercise of such rights by any person or body of persons who may desire, and by implication guaranty protection in the freedom of such exercise.

Id. at 65, citing ***State ex rel. Weiss v. District Board***, 76 Wis. 177, 210–11, 44 N.W. 967 (1890). The Court also opined that the Wisconsin Constitution contains "a more-complete bar to any preference for, or discrimination against, any religious sect, organization or society than any other state in the Union." ***Id***.

Analyzing the claim under the Wisconsin Constitution, the Court ruled that a law which is challenged as violating freedom of exercise of religion and freedom of conscience under Art. I, § 18 is judged under the compelling interest/least restrictive means test. ***Id***. at 69. Under such an analysis, the challenger must first

prove: (1) that he or she has a sincerely held religious belief, and (2) that the belief is burdened by application of the state law. Then the burden shifts to the State to prove that the law is based on a compelling state interest which cannot be served by a less restrictive alternative. *Id*. at 66.

It was conceded that the Amish beliefs were sincerely held, that the law burdened those beliefs, and the State's interest in traffic safety was compelling; the case turned on the fourth factor, whether the state could show that its interests could not be met by alternative means that would be less restrictive of the religious beliefs of the Amish. The state asserted that only its symbol would suffice, although alternatives used by the Amish were equally visible to motorists, because only its symbol was universally recognizable. The Court concluded that the state failed to establish that this was so, or that there

would be fewer accidents if the Amish used the triangle symbol.

Therefore, the Court found that the "statutory burden placed by the State upon the sincerely held religious beliefs of the Respondents therefore cannot be justified" and held that the traffic statute, as applied to the Amish, violated the guarantee of freedom of conscience found in Article I, section 18 of the Wisconsin Constitution. ***Id***. at 73.

Like the statutes under which the Defendant is being prosecuted now, the statute in ***Miller*** was one of general application, a law that was not ostensibly intended to restrict any religious freedoms. Here, as in ***Miller***, the effect of the laws as applied to the Defendants is to restrict their sincerely held religious beliefs. The Defendants have clearly been persecuted for the exercise

of sincerely held religious beliefs (the idea of spanking a baby with a spoon being abhorrent to many), and under the Wisconsin Constitution, this is unlawful.

D. The Court Failed to Require the State to Meet its Burden of Proof.

The Defendants practiced corporal punishment as part of sincerely held religious beliefs. They have been burdened by the application of the child abuse statute, and have been found guilty of multiple felonies, *in spite of the fact that their children were not actually injured.* It bears repeating that the trial judge summed up the discipline for which they were convicted as:

> The children sustained no permanent disability or disfigurement. At most, they sustained slight bruises that faded after a day or two. The children sustained no emotional scarring that is even perceptible by experts in the field of child abuse, Dane County Department of Human Services. By all accounts, these are happy, healthy, well-adjusted children.

(R 135, p 36)

As a result of the application of the child abuse law, the Caminitis have been required to temporarily abandon a tenet of tenet faith – a court-ordered condition of their probation requires that they not use any physical discipline. (R 135, p 43).

Because the court found the Defendants were not burdened by the application of §948.03(2)(b), it did not require the State to prove that there is no alternative, less restrictive means by which it can meet its legitimate interest. (The Defendants do not question the premise that the law serves a compelling state interest, as long as that interest is narrowly defined as protecting children from actual bodily injury, not from every minor pain.)

The State would be hard put to do so, inasmuch as the law is presently written in such a way as to criminalize

infliction of "physical pain or injury, illness, or any impairment of physical condition." See, ***State v. Higgs***, 230 Wis.2d 1, 14–15, 601 N.W.2d 653 (Ct.App.1999) (burning or stinging in eyes sufficient to demonstrate bodily harm). Disallowing the State to convict one of child abuse for simply having caused transient pain (which results from any spanking) would be a less restrictive alternative that would still protect the children from injury.

The State has a compelling interest in protecting children from harm, but not all pain is harmful. Pain can be a natural and essential element of learning; for example, it is pain that teaches us not to put a hand onto a hot stove burner. If the statute were drafted more narrowly, to require the State to prove not only the infliction of pain, but also that a child suffered harm, then

the child abuse statute be narrowly drafted to achieve the protection in which it has a legitimate interest.

The affirmative defense of parental privilege to use reasonable discipline found in § 939.45(5) does not cure the constitutional infirmity. Three factors are used to determine if discipline is reasonable: "(1) the use of force must be reasonably necessary; (2) the amount and nature of the force used must be reasonable; and (3) the force used must not be known to cause, or create a substantial risk of, great bodily harm or death." ***State v. Kimberly B.,*** 2005 WI App 115, ¶ 30, 283 Wis.2d 731, 699 N.W.2d 641. The first and second prongs of this test allow a juror to exercise viewpoint discrimination and to reject the religious beliefs that underlie the discipline.

Religion is not necessarily "reasonable" or rational for that matter – religion is based on faith. Thus the law

permits a juror to find that a defendant acted on the basis of a sincere religious belief but that such a belief was not reasonable or did not rise to the level of necessity simply because the juror does not share or understand the religious belief. Requiring religious beliefs to pass a reasonableness test violates both the First Amendment and Article I, Section 18; requiring actions compelled by religious beliefs, as long as those actions as not actually harmful, to pass a test of what the majority of society finds to be reasonable, similarly violates those constitutional provisions.

Use of a reasonable person standard allows a jury to impose the standard that the majority of society would consider reasonable on a person whose faith does not conform to the beliefs of the majority of society. This runs counter to the constitutional protection for religious

beliefs. The jury is instructed that the standard is "**what a person of ordinary intelligence and prudence would have believed in the defendant's position** under the circumstances that existed at the time of the alleged offense." ***State v. Williams***, 2006 WI App 212, ¶29, 296 Wis.2d 834, 723 N.W.2d 719. A person of ordinary intelligence and prudence means, more or less, an average person. And that average person may not share or appreciate the views of a Muslim or a Roman Catholic or an evangelical Christian as to when discipline is necessary or what discipline is necessary. "In the realm of religious faith, … sharp differences arise. [T]he tenets of one man may seem the rankest error to his neighbor…. The essential characteristic of these [religious] liberties is, that under their shield many types of life, character, opinion

and belief can develop unmolested and unobstructed" ***Cantwell v. Connecticut***, 310 U.S. 296, 310 (1940).

In this case, the acts that were found to be child abuse were a manifestation of religious beliefs. And those beliefs cannot be judged by the standard of what a person of ordinary intelligence and prudence believes to be reasonable. Thus, the child abuse law, and the affirmative defense of privilege based on discipline (1) burden the religious beliefs of those to whom corporal punishment is an essential element of child raising, (2) do not serve a compelling state interest to the extent that, and (3) are not the least restrictive means of achieving the State's interest in protecting children from injury because they regulate the infliction of discipline that is painful but not harmful.

Defendants are forced to guess at the exact state interest because the State was not required to articulate it

clearly. Much of the evidence at trial was aimed at condemning all use of corporal punishment, but this is not a legitimate society interest. Spanking is not illegal. Ninety-four per cent of parents of toddlers reported using corporal punishment in the previous twelve months; thirty-five per cent hit infants. Strauss, M. (2000), "Corporal Punishment and Primary Prevention of Physical Abuse," *Child Abuse and Neglect, 24,* (9), pp. 1109-1114. Twenty-eight per cent of American parents of two to four-year-old children and twenty-eight per cent of parents of five to eight-year-olds reported using an object to spank the bottoms of their children (Gallup Survey).

Thus more than one in four parents admits to using an object to hit their children in the name of discipline. Gershoff, E. (2002) "Corporal Punishment by Parents and Associated Child Behaviours and Experiences: A Meta-analytic and Theoretical Review," *Psychological Bulletin, 183* (4). pp. 602-611. Society is divided on whether

spanking, with or without an object, is the best way to discipline children, but statistically speaking, most parents in America have spanked their children, and a large percentage has done so with an object.

Corporal punishment of children persists: roughly fifty percent of the parents of toddlers and over sixty-five percent of the parents of preschoolers in the United States use corporal punishment as a regular method of disciplining their children. Rebecca R. S. Socolar et al., *A Longitudinal Study of Parental Discipline of Children*, 100 S. MED. J. 472, 474 (2007); Michael Regalado et al., *Parents' Discipline of Young Children: Results From the National Survey of Early Childhood Health*, 113 PEDIATRICS 1952, 1954 (2004). One sociologist has found that spanking by parents in America is so prevalent it is "a universal norm in America: "It is probably safe to say that all children in America are spanked at some point in their lives. . . . Were we speaking statistically, we would surely describe those

parents who do not spank their children as *deviants*." Steven L. Nock , *Comments on "Is Spanking Universal"*, 8 Va. J. SOC. POL'Y & L. 61, 62 (2001)(emphasis in the original). See also, Clifton P. Flynn, *Regional Differences in Attitudes Toward Corporal Punishment*, 56 J. MARRIAGE & FAM. 314, 314 (1994) ("The data indicate that the vast majority of Americans favor the physical punishment of children. In 1986, a National Opinion Research Center survey found that 84% of Americans either agreed or strongly agreed that it is sometimes necessary to discipline a child with a good, hard spanking.")(internal quotation and citation omitted).

Given this, the only valid state interest can be in protecting children from injury – all spankings cause pain, and those spankings are legal, so something more severe is required in order to just criminalizing the actions of parents who are disciplining children.

CONCLUSION

The child abuse statute burdens the religious practice of the Caminitis and invades their constitutionally protected relationship with their children. Such an invasion is permissible only if the law could not be drafted more narrowly to achieve its purpose. The State has failed to prove that is the case. The convictions should be reversed.

Dated this Wednesday, May 20, 2015,

Respectfully Submitted,

Alina and Matthew Caminiti,

Defendants-Appellants, By

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§ 809.19(8) CERTIFICATION

I hereby certify, as required by Wis. Stat. § 809.19(8)(d), that this brief and appendix meet the requirements in Wis. Stat. 809.19(8)(b) and (c). Specifically, the brief is prepared with proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text.

The combined length of the Statement of the Case, Argument, and Conclusion of this brief does not exceed 11,000 words. The length of the brief is 10,116 words.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that: I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that: This electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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State of Wisconsin

Court of Appeals

District IV

Appeal Nos. 2015AP122 CR & 2015AP123 CR

STATE of WISCONSIN,

Plaintiff-Respondent,

v.

Matthew Caminiti and Alina Caminiti,

Defendants-Appellants.

APPENDIX OF DEFENDANTS-APPELLANTS

Appeal from the May 8, 2014, Judgment of Conviction
Entered in the Circuit Court for Dane County,
The Honorable Ellen K. Berz, Presiding,
In Circuit Court Case Nos. 11-CF-504 and 11-CF-505

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(13)

I hereby certify that: I have submitted an electronic copy of this appendix, which complies with the requirements of s. 809.19(13). I further certify that: This electronic appendix is identical in content to the printed form of the appendix filed as of this date. A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

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By:

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Attorney for Defendants-Appellants

RULE 809.19(3)(b)CERTIFICATE

I hereby certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

THE JEFF SCOTT OLSON LAW FIRM, S.C.
By:

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Jeff Scott Olson
Attorney for Defendants-Appellants

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