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THE AMERICAN LAW INSTITUTE

Restatement of the Law
Children and the Law

Tentative Draft No. 1

(April 6, 2018)

SUBJECTS COVERED

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The American Law Institute

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Restatement of the Law
Children and the Law

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The typical ALI Section is divided into three parts: black letter, Comment, and Reporter's Notes. In some instances there may also be a separate Statutory Note. Although each of these components is subject to review by the project's Advisers and Members Consultative Group and by the Council and Annual Meeting of the Institute, only the black letter and Comment are regarded as the work of the Institute. The Reporter's and Statutory Notes remain the work of the Reporter.

This project was initiated in 2015.

Earlier versions of § 2.10 can be found in Council Draft No. 2 (2017) and Preliminary Draft No. 2 (2016) (as § 2.1). Earlier versions of § 2.30 can be found in Council Draft No. 2 (2017), Preliminary Draft No. 3 (2017) (as § 2.07), and Preliminary Draft No. 2 (2016) (as §§ 3.0 and 3.1). Earlier versions of § 3.20 can be found in Council Draft No. 2 (2017) and Preliminary Draft No. 3 (2017). Earlier versions of § 3.24 can be found in Council Draft No. 1 (2016) (as § 2.5) and Preliminary Draft No. 1 (2016) (as § 3.04). An earlier version of § 3.26 can be found in Council Draft No. 2 (2017). Earlier versions of § 14-2 and §§ 14.20-14.23 can be found in Council Draft No. 1 (2016) and Preliminary Draft No. 1 (2016) (as § 1 and §§ 1.01-1.04).

Restatements (excerpt of the Revised Style Manual approved by the ALI Council in January 2015)

Restatements are primarily addressed to courts. They aim at clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands or might appropriately be stated by a court.

a. Nature of a Restatement. Webster's Third New International Dictionary defines the verb "restate" as "to state again *or* in a new form" [emphasis added]. This definition neatly captures the central tension between the two impulses at the heart of the Restatement process from the beginning, the impulse to recapitulate the law as it presently exists and the impulse to reformulate it, thereby rendering it clearer and more coherent while subtly transforming it in the process.

The law of the Restatements is generally common law, the law developed and articulated by judges in the course of deciding specific cases. For the most part Restatements thus assume a body of shared doctrine enabling courts to render their judgments in a consistent and reasonably predictable manner. In the view of the Institute's founders, however, the underlying principles of the common law had become obscured by the ever-growing mass of decisions in the many different jurisdictions, state and federal, within the United States. The 1923 report suggested that, in contrast, the Restatements were to be at once "analytical, critical and constructive." In seeing each subject clearly and as a whole, they would discern the underlying principles that gave it coherence and thus restore the unity of the common law as properly apprehended.

Unlike the episodic occasions for judicial formulations presented by particular cases, however, Restatements scan an entire legal field and render it intelligible by a precise use of legal terms to which a body reasonably representative of the legal profession, The American Law Institute, has ultimately agreed. Restatements—"analytical, critical and constructive"—accordingly resemble codifications more than mere compilations of the pronouncements of judges. The Institute's founders envisioned a Restatement's black-letter statement of legal rules as being "made with the care and precision of a well-drawn statute." They cautioned, however, that "a statutory form might be understood to imply a lack of flexibility in the application of the principle, a result which is not intended." Although Restatements are expected to aspire toward the precision of statutory language, they are also intended to reflect the flexibility and capacity for development and growth of the common law. They are therefore phrased not in the mandatory terms of a statute but in the descriptive terms of a judge announcing the law to be applied in a given case.

A Restatement thus assumes the perspective of a common-law court, attentive to and respectful of precedent, but not bound by precedent that is inappropriate or inconsistent with the law as a whole. Faced with such precedent, an Institute Reporter is not compelled to adhere to what Herbert Wechsler called "a preponderating balance of authority" but is instead expected to propose the better rule and provide the rationale for choosing it. A significant contribution of the Restatements has also been anticipation of the direction in which the law is tending and expression of that development in a manner consistent with previously established principles.

The Restatement process contains four principal elements. The first is to ascertain the nature of the majority rule. If most courts faced with an issue have resolved it in a particular way, that is obviously important to the inquiry. The second step is to ascertain trends in the law. If 30 jurisdictions have gone one way, but the 20 jurisdictions to look at the issue most recently went

the other way, or refined their prior adherence to the majority rule, that is obviously important as well. Perhaps the majority rule is now widely regarded as outmoded or undesirable. If Restatements were not to pay attention to trends, the ALI would be a roadblock to change, rather than a "law reform" organization. A third step is to determine what specific rule fits best with the broader body of law and therefore leads to more coherence in the law. And the fourth step is to ascertain the relative desirability of competing rules. Here social-science evidence and empirical analysis can be helpful.

A Restatement consists of an appropriate mix of these four elements, with the relative weighing of these considerations being art and not science. The Institute, however, needs to be clear about what it is doing. For example, if a Restatement declines to follow the majority rule, it should say so explicitly and explain why.

An excellent common-law judge is engaged in exactly the same sort of inquiry. In the words of Professor Wechsler, which are quoted on the wall of the conference room in the ALI headquarters in Philadelphia:

> We should feel obliged in our deliberations to give weight to all of the considerations that the courts, under a proper view of the judicial function, deem it right to weigh in theirs.

But in the quest to determine the best rule, what a Restatement can do that a busy common-law judge, however distinguished, cannot is engage the best minds in the profession over an extended period of time, with access to extensive research, testing rules against disparate fact patterns in many jurisdictions.

Like a Restatement, the common law is not static. But for both a Restatement and the common law the change is accretional. Wild swings are inconsistent with the work of both a common-law judge and a Restatement. And while views of which competing rules lead to more desirable outcomes should play a role in both inquiries, the choices generally are constrained by the need to find support in sources of law.

An unelected body like The American Law Institute has limited competence and no special authority to make major innovations in matters of public policy. Its authority derives rather from its competence in drafting precise and internally consistent articulations of law. The goals envisioned for the Restatement process by the Institute's founders remain pertinent today:

It will operate to produce agreement on the fundamental principles of the common law, give precision to use of legal terms, and make the law more uniform throughout the country. Such a restatement will also effect changes in the law, *which it is proper for an organization of lawyers to promote* and which make the law better adapted to the needs of life. [emphasis added]

Foreword

In 2002, The American Law Institute published *Principles of the Law of Family Dissolution*, the first ALI project dealing with family law. The *Principles*, as the title suggested, dealt primarily with property, support, and child custody issues surrounding divorce, as well as the dissolution of other family relationships. Other legal issues relating to children and families were not covered. In part to address this void, in 2015 The American Law Institute launched the Restatement of Children and the Law. The project has ambitious goals. As its proposal notes: "[S]everal themes have emerged in legal doctrine in recent years that can contribute to a regime that is both relatively coherent and compatible with contemporary values. These core themes include a contemporary articulation of the basis of parental authority, a modern definition of child welfare as a core goal of legal regulation, and a developmentally informed conception of children as legal persons." The Restatement will articulate and clarify these themes and thereby provide important and needed guidance to the courts.

I was delighted when we were able to recruit Professor Elizabeth S. Scott of Columbia Law School to be the Reporter. Buffie in turn assembled a great team of Associate Reporters: Professors Richard J. Bonnie of the University of Virginia School of Law, Emily Buss of the University of Chicago Law, Clare Huntington of Fordham University School of Law, Solangel Maldonado of Seton Hall University School of Law, and Dean David D. Meyer of Tulane University School of Law.

The Restatement will have four Parts: Children in Families, Children in School, Children in the Justice System, and Children in Society. The materials presented for approval at this Annual Meeting are five Sections of Children in Families (parents' duty to provide economic support, parental authority and responsibility for medical care, physical abuse, parental privilege to use reasonable corporal punishment, and medical neglect) and four Sections of Children in the Justice System dealing with the interrogation of juveniles.

Even though the project is coming to the Annual Meeting for approval for the first time, a great deal of terrific work on it has been done already. I am enormously grateful to the Reporters as well as to their dedicated Advisers and Members Consultative Group.

RICHARD L. REVESZ
Director
The American Law Institute

April 6, 2018

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REPORTERS' MEMORANDUM

To: Members of the American Law Institute

From: Richard Bonnie, Emily Buss, Clare Huntington, Solangel Maldonado, David Meyer, and Elizabeth Scott, Reporters on the Restatement of Children and the Law.

Date: March 23, 2018

Re: Restatement of Children and the Law Sections for Discussion on May 22, 2018.

We look forward to our first discussion at an Annual Meeting of several draft Sections of the new Restatement of Children and the Law. The materials that follow include the following: a draft of the Restatement table of contents; Part I, General Introduction; § 2.10 on parents' duty to provide economic support; § 2.30 on parental authority and responsibility for medical care; Introductory Note to Chapter 3 on state intervention for abuse and neglect; § 3.20 on physical abuse; § 3.24 on the parental privilege to use physical discipline as a defense to abuse; § 3.26 on medical neglect; Part III, General Introduction and §§ 14.20 to 14.23 on interrogation of juveniles, with an Introductory Note to those Sections.

A bit of background on how we have proceeded during this first stage may be helpful. The Restatement will have four Parts: Children in Families, Children in School, Children in the Justice System, and Children in Society. The Sections described above are ready for discussion at this Annual Meeting. We decided to work on these Sections in this first stage of our work because they are both important and manageable, and represent areas of doctrine that pose challenges that we will be dealing with in much of the project. As you can see, in producing draft Sections, we are not following the table of contents sequentially, but the table of contents allows you to see how these Sections fit into the Restatement as a whole. The order of Parts and of Chapters within the four Parts is relatively definite, but the Chapter and Section numbers cannot be finalized at this point, and effectively function as placeholders. Moreover, as we proceed in the project, some issues\topics may be amended, deleted, or added.

An important goal of Part I of the Restatement, dealing with the Children in Families, is to provide a contemporary rationale for parental rights that is grounded in children's welfare. This conception recognizes that parental rights continue to be robust under American law, but also provides a sound basis for limiting parental authority. As described in the Introduction to Part I, the modern rationale for parental rights is grounded in the conviction that the principle of family liberty, the goal of promoting child welfare, the limited ability of the state to intervene effectively, and the value of pluralism in our society all support substantial deference to parents' decisions about raising a child. At the same time, parental authority is limited by the state's interest in protecting the health and well-being of children and in promoting their development into productive, self-sufficient adults. Parents are not free to make choices that cause serious harm or substantially risk causing serious harm to their children.

Section 3.20, on physical abuse, reflects these principles. The authority to intervene in cases of physical abuse is limited to circumstances where the state has established that the care provided

by parents poses a serious physical threat to the child. Even when a parent's behavior may be suboptimal, state intervention is not authorized absent this heightened level of harm. This relatively high threshold recognizes that although abuse and neglect clearly harm children, state intervention can also harm families and children.

Section 3.24, the parental privilege to use reasonable corporal punishment to discipline a child, also reflects these principles. The state's interest in protecting children allows the state to set limits on the use of corporal punishment, but it also justifies deference to parental decisionmaking because such deference generally promotes child welfare. Further, many parents continue to use this form of discipline, especially low-income families and families of color. Preservation of parents' privilege to use reasonable corporal punishment protects these families from unnecessary and intrusive state intervention.

Section 2.30, on parental authority and responsibility for medical care, similarly embodies these principles. It recognizes broad parental authority to make medical decisions because broad authority generally furthers children's welfare, promotes pluralism, and avoids unwarranted state intervention. But it also limits parental authority to consent to nontherapeutic procedures that pose a substantial risk of serious harm to the child's health or that impinge on the child's constitutional rights. This Section also recognizes the parental duty to provide medical care when necessary to protect the child or others (including the public health) from serious harm. These limits apply even when the parent's decision is based on religious conscience.

Section 3.26, on medical neglect, should be read after § 2.30. It addresses state intervention through a criminal or civil child-protection proceeding when a parent fails to provide the child with necessary medical care. This Section also reflects the principles noted above. It recognizes the state's interest and responsibility to intervene, through a civil child-protection proceeding, when the parent fails to exercise a minimum degree of care necessary to avoid a substantial risk of serious harm to the child. It further recognizes the state's interest in punitive and deterrent action through a criminal proceeding in some cases, but only when the parent's conduct is, at minimum, reckless. This high threshold for state intervention protects children from harm but also respects family integrity and minimizes the risk that the state will impose dominant parenting norms on low-income families and on racial, ethnic, cultural, and religious minorities.

Section 2.10, on a parent's duty to provide reasonable economic support, is a brief restatement of the general principle that parents must, when financially able, provide for their children economically.

Part III deals with juvenile justice doctrine. In this area, modern courts increasingly have focused on differences between juvenile and adult offenders, often invoking research on adolescent development to guide legal decisionmaking. As the Introduction to this Part indicates, the Supreme Court has played an important role in promoting this developmental approach; in several opinions, the Court has determined that the immaturity of adolescents should inform the justice system response to juvenile offending.

The draft Sections on interrogation, §§14.20 to 14.23, reflect this trend, as will other Sections in this Part. The draft incorporates the rule announced by the Supreme Court in J.D.B. v. North

Carolina (2011), requiring courts to apply a "reasonable juvenile" standard in determining whether a juvenile is in police custody and must receive *Miranda* warnings prior to questioning. Further, we follow the approach of many contemporary courts in invoking developmental research as a guide to applying the traditional "totality of circumstances" legal standard for determining whether a juvenile's *Miranda* waiver was valid and his or her statement voluntary. Courts have found this research to be especially important in evaluating the waivers and statements of younger juveniles. Draft § 14.22 affords special protection by requiring the presence of counsel when a younger juvenile is interrogated. In general, the draft interrogation Sections seek to tame an area of doctrine that has probably generated a great deal of litigation. Our aim is to be evenhanded in describing the doctrine, but to capture a trend that promotes fairness for juveniles in the justice system. We look forward to your feedback.

Restatement of the Law
Children and the Law

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March 20, 2018

Children's authority to make decisions and act on their own behalf is circumscribed by the decisionmaking authority granted to parents and school officials. There are, however, certain contexts in which children can exercise greater control, particularly as they approach the relevant age line between childhood and adulthood. Children are also afforded special protections, not only those secured through parental and educational obligations, but through abuse and neglect, criminal, and child labor laws. Finally, children have legal obligations that are modified to reflect their immaturity.

PART I

CHILDREN IN FAMILIES

CHAPTER 1

Introduction

Part I of the Restatement addresses the regulation of the parent–child relationship under contemporary law, defining the scope of parental obligations and authority to make decisions about childrearing, as well as the scope and limits of state power to intervene in the family to promote the welfare of children. Parents have long enjoyed strong protection of the right to raise their children as they see fit without undue interference from the state. Early common-law courts granted so much deference to parents that parental rights could be understood as grounded in notions of property. Parental rights continue to enjoy robust legal and constitutional protection, but the legal basis of parental authority has evolved over time, and that authority is somewhat more limited today. The contemporary rationale for strong parental rights rejects any notion of children as their parents' property. The modern rationale is grounded instead in the conviction that the principle of family liberty, the goal of promoting child welfare, the limited ability of the state to intervene effectively, and the value of pluralism in our society all support substantial deference to parents' decisions about important issues, including education, discipline, medical treatment, and religious upbringing. Thus, modern law continues to respect family privacy and to constrain state intervention. At the same time, parental authority is limited by the state's interest in protecting the health and well-being of children and in promoting their development into productive self-sufficient adults. Parents are not free to make choices that substantially risk serious harm to their children. Parental authority is also limited in some contexts by the interests of society in educating children and in the interest of children, and particularly adolescents, in self-determination as legal persons. These issues are dealt with in Part II, Children in Schools, and Part IV, Children in Society.

It has long been recognized that parents have a constitutional liberty interest in the care and custody of their children that is protected under the Due Process Clause of the 14th Amendment. The U.S. Supreme Court first recognized the constitutional stature of parental rights in the 1920s in two opinions prohibiting states from unduly burdening the "liberty of parents . . . to direct the

upbringing and education of children under their control." Pierce v. Society of Sisters, 268 U.S. 510, 534-535 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). *Meyer* rejected a state law that prohibited elementary-school instruction in a foreign language, and *Pierce* found unconstitutional a statute requiring parents to send their children to a public school, and thus making it unlawful for a parent to send a child to a religious school. The Court has confirmed in more recent opinions that parental authority enjoys constitutional deference. Yoder v. Wisconsin; 406 U.S. 205 (1972); Troxel v. Granville, 530 U.S. 57 (2000). But the U.S. Supreme Court has also emphasized that this constitutional protection is limited. Prince v. Massachusetts, 321 U.S. 158 (1944) (upholding child-labor statute against claim that it violated parental rights); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (upholding mandatory vaccination statute). Under its parens patriae and police-power authority, the state can override parental authority when necessary to protect the health and welfare of children. In *Prince*, the Court upheld the application of a state statute prohibiting child labor, even though the claim was based not only on parental rights, but also on a parent's First Amendment Free Exercise right to inculcate children. In sum, the constitutional framework provides solid support for legal protection of parental rights, but limits those rights when deference to parental authority and family privacy threatens child welfare.

Another contemporary rationale for legal protection of parental authority is grounded in our societal commitment to respecting diversity among families and restricting state intervention that may be grounded in racial, cultural, or class bias. Parents living in poverty or in minority racial, ethnic, and religious communities may adopt child-rearing approaches that differ from mainstream practices and values but that do not pose a substantial risk of serious harm to their children. Limiting state intervention for child-protection purposes to parental conduct that threatens serious harm to children preserves the privacy of all families from unwarranted intrusion. In *Meyer* and *Pierce*, the U.S. Supreme Court struck down state laws that burdened the freedom of parents outside the religious and ethnic mainstream of the 1920s. The values protected by these opinions are just as important today. Respect for the diversity of families is a critically important principle that should, and typically does, guide courts and legislatures. Courts have resisted the impulse of regulators to impose majoritarian values on parents, on both constitutional and policy grounds. Parental rights function to restrain these regulatory impulses and allow families to flourish according to their own values and lifestyle choices, absent evidence of serious harm to the child.

Under contemporary law, deference to parental authority is also justified as a means of preserving the parent–child relationship, a relationship that is assumed to be essential to protecting the child's welfare in most families. Courts and legislatures assume that most parents love their children and are motivated to promote their interests, in part because parents' interests are usually aligned with those of their children. Parents typically know their children better than any third party, and thus usually are better positioned to make decisions on their children's behalf than outsiders and strangers. Further, parents bear significant responsibility to care for their children; those who fulfill their responsibilities in a satisfactory manner relieve the state and society of a substantial burden. It is assumed that legal respect for and deference toward parents and their important role encourages the satisfactory fulfillment of these responsibilities. Thus, Chapter 2 deals with parental responsibility and authority together because these two dimensions of legal parenthood are closely interwoven. Parents vary in their circumstances, values, beliefs, and commitments. Substantial discretion allows them the freedom to make decisions about their children's upbringing that further their personal and family goals. Developmental psychology underscores the importance of maintaining stable relationships between children and their primary caregivers; children's welfare is usually furthered by legal protection of these relationships. Increasingly, courts recognize that strengthening families, in part through deference to and support of parents, is important to promoting children's welfare. To be sure, parents' choices sometimes conflict with the welfare of their children, warranting the restriction of parents' authority. Additionally, some parents may perform their responsibilities so inadequately that some state intervention is warranted. But a default principle of substantial authority in parents generally supports children's most important relationships and promotes their welfare.

This contemporary rationale recognizes that parental rights and the state's interest in children's welfare are not necessarily in conflict or balanced against one another, the conventional assumption under traditional law. Instead, legal respect for parental authority is justified on the ground that children are usually better off when the state supports the parent–child relationship and allows parents substantial freedom to raise their children according to their own values and preferences.

This contemporary basis for deference to parental authority, in contrast to the traditional approach, is self-limiting. Parents' acts that threaten harm to their children are not shielded from state intervention under the rubric of parental rights. Under traditional law, parental rights were

not dependent on a child-welfare rationale, and parental authority often extended to choices that were harmful to children, particularly on issues of medical decisionmaking. Under the contemporary rationale, the exercise of authority that promotes only parents' interests and not the welfare of children is harder to justify. The child-welfare rationale for parental rights also clarifies that the protected relationship need not be based on biology. The relationship between the child and an adult who has been a child's long-term caretaker enjoys legal protection because the child's welfare is thereby promoted.

CHAPTER 2
PARENTAL AUTHORITY AND RESPONSIBILITIES

TOPIC 1. DUTY TO PROVIDE REASONABLE ECONOMIC SUPPORT

§ 2.10. Duty to Provide Reasonable Economic Support

(a) Parents must provide reasonable economic support to their minor children.

(b) A parent's obligation ends when the child is not enrolled in high school and reaches the age of majority or the child is emancipated, whichever comes first. If the child reaches the age of majority and is enrolled in high school, a parent's obligation ends when the child graduates high school or reaches age 21, whichever comes first.

Comment:

a. History and background. Every state imposes a duty of reasonable economic support on all parents, either through statute or case law. The common law recognized a duty of economic support but distinguished between fathers and mothers and marital and nonmarital children. Fathers owed a duty of economic support to marital children, but mothers did not. Mothers owed a duty of economic support to nonmarital children and fathers generally did not. The modern rule imposes a duty of support on all parents regardless of gender and marital status.

Illustration:

1. John and Gabriela are not married. When their child, Felipe, is born, John executes a voluntary acknowledgment of paternity and his name appears on the birth certificate. John owes Felipe a duty of economic support. Gabriela also owes Felipe a duty of economic support.

The gender of John and Gabriela and their marital status are both irrelevant to their duty of economic support. Once legal parentage is established, a legal parent owes a duty of reasonable economic support. Thus, in this Illustration, both John and Gabriela owe Felipe a duty of support.

b. Enforcement through the child-support system. With a minor exception discussed in this Comment, the duty of reasonable economic support is enforced through the child-support system. When a child lives with both parents, the state typically does not enforce the duty, and one parent cannot sue the other parent to enforce the duty. When a child lives with only one parent or with

another adult, the parent or other adult caring for the child may sue the nonresidential parent for child support. The state may also bring a child-support enforcement action on behalf of a parent if the parent assigns the right to receive child support to the state. The child-support system is discussed in detail in Chapter 3 of the Principles of the Law of Family Dissolution: Analysis and Recommendations. The black letter largely reflects the rules adopted in the Principles, with one minor exception discussed in Comment *d*.

A third party owed money for the care of a child may also enforce the duty of economic support.

Illustration:

2. Fifteen-year-old Ella undergoes an emergency appendectomy. The hospital sues the parents for nonpayment of the portion of the bill not covered by health insurance. The parents are liable for the nonpayment.

As this Illustration demonstrates, a parent's duty of support is owed to the child, but it can be enforced by a third party.

As discussed in the Sections on the child-welfare system, state intervention in cases of child neglect is justified partly by the parent's failure to provide economic support, although many states have included the ability to pay as part of the definition of child neglect. See § 3.25.

c. Reasonable economic support. A parent's duty extends only to reasonable support, which will vary with the family's circumstances. For a discussion of this principle, see § 3.04 of the Principles of the Law of Family Dissolution: Analysis and Recommendations. Assuming a parent can afford a necessary expense, the parent is obligated to pay for it.

Illustration:

3. Same facts as Illustration 2. Additionally, the parents did not consent to the medical procedure because they were unavailable. The parents can afford the bill from the hospital. The parents are liable for the nonpayment, because the procedure was medically necessary and the parents are financially capable of paying. Their lack of agreement to the procedure is irrelevant because of the medical necessity of the procedure.

d. Termination of duty. The duty of reasonable economic support continues until one of two conditions is met. First, the duty ends when the child is not enrolled in high school and reaches

the age of majority or is emancipated, as defined in [*cross-reference emancipation Section*], whichever comes first. Second, if the child is enrolled in high school and has not yet graduated, the duty ends when the child graduates or reaches age 21, whichever comes first. These rules are consistent with the statutory provisions in many states. The Principles of Family Dissolution end support for a high school student at age 20. The black letter in this Section adopts age 21 as the termination point. The slightly longer time period is justified by the importance of completing high school. In the modern economy, completing high school significantly improves a child's chance of attaining economic self-sufficiency.

e. Duty to support an adult child pursuing higher education or vocational training. If the parents are married, the court will not order the parents to pay for higher education or vocational training. If the parents are unmarried or divorced, however, a court may order, as part of a child-support proceeding, a parent to support an adult child in the pursuit of higher education or vocational training until the child reaches the age of 23. There are two justifications for this provision. First, when parents are married, it is likely that if they are financially able to do so, the parents will contribute to a child's post-secondary education or vocational training. This provision thus promotes parity between children in different family structures. Second, post-secondary education or vocational training is a key step toward financial security. Economic support from parents—if they are able to afford it—can be vital in helping a young person complete an education or training. Moreover, in many families, attaining the age of majority does not mean the child is functionally independent; instead, dependency often extends into early adulthood, with parents helping their adult children become self-supporting in myriad ways. Terminating support at age 23, which is the upper end of the ages adopted by those jurisdictions that impose an age limit, strikes a balance between ensuring parents have a reasonable end to their economic duty and helping young adults secure the economic support that can be critical to successfully completing a program of higher education or vocational training.

Parents are not obligated to cover the full cost of post-secondary education or training, but instead a court may order a parent to provide support commensurate with the parent's means. One factor that courts may consider in determining whether to make an award and how much to award is whether the parents, if they had remained together, would have helped pay for post-secondary education or vocational training and if so, to what extent.

Illustration:

4. Louise and Tyrone were divorced when their daughter, Ayala, was 15 years old. Ayala is now 18 and plans to attend college. Since Ayala's birth, both parents had discussed Ayala attending college. While they were still married, Louise and Tyrone paid half the college expenses of Ayala's older sister, including tuition and room and board. Louise and Tyrone currently have the financial means to pay for half of Ayala's college expenses. As part of a child-support proceeding, a court may order economic support for Ayala's college expenses. The amount of the award will approximate the amount of support given to Ayala's sister because this is the amount Louise and Tyrone likely would have paid if the marriage was still ongoing.

As noted above, the law assumes that parents who are living together will support their children. When parents end their relationship, the law recognizes that the family may need some assistance in enforcing the obligation of economic support and thus provides the option for a child-support order, which can include educational support. The educational-support order may include the cost of tuition as well as related expenses, such as room and board.

f. Duty to support a disabled adult child. A parent's duty of reasonable economic support continues if the child is mentally or physically disabled and cannot support himself or herself. In a child-support proceeding, a court may make such an award.

Illustration:

5. Pierre has had cerebral palsy since birth and is incapable of caring for himself. Pierre is now 24 and lives with only his father, Louis. In a child-support proceeding, a court may order Pierre's mother, Amy, to help pay for the care of Pierre.

The duty to support an adult disabled child is the continuation of a duty that began when the child was a minor.

A court may order the support of an adult disabled child only to the extent such support does not affect the adult child's eligibility for governmental benefits.

Illustration:

6. Same facts as Illustration 5, but Pierre also receives several forms of governmental benefits. In a child-support proceeding, the court may order the parents to

support Pierre economically, but only if it does not reduce the adult child's eligibility for governmental support.

The award is intended to supplement, not supplant, governmental support, and is ordered only when necessary.

If the disability arose after the child reached the age of majority, a court may still issue a support order. The court may take into consideration the later-arising nature of the disability, but whether the disability existed prior to majority is only one factor, not an absolute requirement to the imposition of an award.

g. Relationship of duty and access to the child. The duty of economic support is not tied to a right or ability to see a child.

Illustration:

7. Same facts as Illustration 2. Additionally, the parents have not seen the child for several years. The parents are liable for the nonpayment.

A parent's duty of reasonable economic support exists even if the parent does not maintain a relationship with the child.

h. Who owes the duty? Typically, only legal parents owe the duty of reasonable economic support. Section 3.03 of the Principles of the Law of Family Dissolution: Analysis and Recommendations describes the few narrow exceptions.

REPORTERS' NOTE

Comment a. History and background. For examples of state statutes imposing a duty of economic support, see ARIZ. REV. STAT. ANN. § 25-501 (2014); CAL. FAM. CODE § 3900 (West 1994); GA. CODE ANN. § 19-7-2 (2007); ME. STAT. tit. 19-A, § 1504 (1997); N.C. GEN. STAT. § 50-13.4 (2015); TEX. FAM. CODE ANN. § 151.001 (West 2007). These states express the obligation as freestanding; other states express the obligation in relation to child-support proceedings. See, e.g., MASS. GEN. LAWS CH. 208, § 28 (2012); MO. REV. STAT. § 452.340 (2011); 15 R.I. GEN. LAWS ANN. § 15-5-16.2 (West 2011). For examples of courts recognizing the duty of economic support, see Ex parte Univ. So. Ala., 541 So. 2d 535, 537 (Ala. 1989) (citations omitted) ("Parental support is a fundamental right of all minor children. It is a continued right, which cannot become stale until after the child reaches the age of majority. The right of support is inherent and cannot be waived, even by agreement."); McGee v. McGee, 262 S.W.3d 622, 626 (Ark. Ct. App. 2007) (citation omitted) ("Child support is an obligation owed to the child and, even in the absence

of a court order requiring a parent to support his or her minor child, a parent continues to have a legal and moral duty to do so."); People ex rel. S.M., 7 P.3d 1021, 1025 (Colo. App. 2000) (citations omitted) ("the inherent right to child support belongs to the child. Both parents have a legal duty to support the child."); Bales v. Bales, 801 N.E.2d 196, 199 (Ind. Ct. App. 2004) (citations omitted) ("[P]arents have a common law duty to support their children. This duty exists apart from any court order or statute.").

At common law, only fathers, not mothers, owed a duty of support to marital children. See 1 WILLIAM BLACKSTONE, COMMENTARIES *435 (describing the "natural obligation of the father to provide for his children," and contrasting this with a mother, who did not have such an obligation); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 161 (12th ed. 1986) (1873) ("The father is bound to support his minor children, if he be of ability, even though they have property of their own; but this obligation in such a case does not extend to the mother."). Blackstone located this duty as "a principle of natural law," arising both from "nature herself" and the parent's act of "bringing [a child] into the world" because it "would be in the highest manner injurious to their issue, if they only gave the children life, that they might afterwards see them perish." 1 WILLIAM BLACKSTONE, COMMENTARIES *435.

The rules were nearly reversed for nonmarital children. Unmarried mothers owed a duty of support to nonmarital children. See KENT, supra, at 178. An unmarried father's duty of support was not as clear. Blackstone noted that the duty of support was a general exception to the rule that a nonmarital child was not considered the child of the father and therefore had no legal rights. See id. at *446 ("though bastards are not looked upon as children to any civil purposes, yet the ties of nature, of which maintenance is one, are not so easily dissolved"). And Blackstone described the process by which an unmarried mother could seek support from the father and a court could order a father to pay. See id. Many courts held that, absent a statute authorizing such an action (which virtually all states had by the early 19th century), the common law did not impose a duty of support on unmarried fathers. For a discussion of these historical cases and the distinctions in the duty of support owed by fathers and mothers to marital and nonmarital children, see Kristin Collins, *When Fathers' Rights are Mothers' Duties: The Failure of Equal Protection* in Miller v. Albright, 109 YALE L.J. 1667 (2000).

In the modern era, it is unconstitutional for a state to distinguish between the support obligations of fathers and mothers and between the duty owed to marital and nonmarital children. In Gomez v. Perez, the U.S. Supreme Court struck down a Texas law requiring fathers to pay child support only to marital children but not to nonmarital children. See 409 U.S. 535 (1973). The Court held that the law violated the Equal Protection Clause of the Fourteenth Amendment. Every state now imposes the duty on all parents, regardless of gender and marital status. See, e.g., NEB. REV. STAT. § 43-1402 (2017) ("The father of a child whose paternity is established either by judicial proceedings or by acknowledgment . . . shall be liable for its support to the same extent and in the same manner as the father of a child born in lawful wedlock is liable for its support. The mother of a child shall also be liable for its support. The liability of each parent may be determined, enforced, and discharged in accordance with the methods hereinafter provided.").

Comment b. Enforcement through the child-support system. Illustration 2 is loosely based on Ex parte Univ. So. Ala., 541 So. 2d 535 (Ala. 1989). For a detailed discussion of the child-support system, see Principles of the Law of Family Dissolution: Analysis and Recommendations, Chapter 3 (AM. LAW INST. 2002). For a discussion of assigning child-support benefits to the state and many of the concomitant problems, see Laurie S. Kohn, *Engaging Men as Fathers: The Courts, the Law, and Father-Absence in Low-Income Families*, 35 CARDOZO L. REV. 511 (2013).

Comment c. Reasonable economic support. State statutes specify that the support need only be reasonable or consistent with the child's circumstances. See, e.g., ARIZ. REV. STAT. ANN. § 25-501 (2014) ("every person has the duty to provide all reasonable support for that person's natural and adopted minor, unemancipated children"); CAL. FAM. CODE § 3900 (West 1994) ("the father and mother of a minor child have an equal responsibility to support their child in the manner suitable to the child's circumstances"); HAW. REV. STAT. § 577-7(a) (1982) ("All parents and guardians shall provide, to the best of their abilities, for the . . . support . . . of their children."); IOWA CODE § 597.14 (2015) ("The reasonable and necessary expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately.").

Some states specify the obligations, including items such as rent and dentistry. See CONN. GEN. STAT. § 46b-37(b) (2001) ("it shall be the joint duty of each spouse to support his or her family, and both shall be liable for: (1) The reasonable and necessary services of a physician or dentist; (2) hospital expenses rendered the husband or wife or minor child while residing in the family of his or her parents; (3) the rental of any dwelling unit actually occupied by the husband and wife as a residence and reasonably necessary to them for that purpose; and (4) any article purchased by either which has in fact gone to the support of the family, or for the joint benefit of both.").

The vast majority of cases addressing a parent's duty of economic support arise in the context of child-support proceedings, which are governed by statutes setting forth the amount owed. This Section does not address these statutory child-support provisions. For further guidance, see Chapter 3 of the Principles of the Law of Family Dissolution: Analysis and Recommendations (AM. LAW INST. 2002). There is very little case law fleshing out the concept of reasonable expenses outside the child-support context. Illustration 3 is based on Ex parte Univ. So. Ala., 541 So. 2d 535 (Ala. 1989).

Comment d. Termination of duty. Apart from a continuing obligation to support an adult child in high school, discussed below, most states specify that a parent's obligation ends when the child reaches the age of majority or is emancipated, see, e.g., ARIZ. REV. STAT. ANN. § 25-501(A) (2014) ("every person has the duty to provide all reasonable support for that person's natural and adopted minor, unemancipated children"); MICH. COMP. LAWS § 722.3(3)(1) (2015) ("The parents are jointly and severally obligated to support a minor . . . unless a court of competent jurisdiction modifies or terminates the obligation or the minor is emancipated by operation of law"); 23 PA. STAT. AND CONS. STAT. ANN. § 4321(2) (West 1985) ("Parents are liable for the support of their children who are unemancipated and 18 years of age or younger."), or are silent on the end date

and instead refer to the duty to a "child," see, e.g., MONT. CODE ANN. § 40-6-211 (1997) ("The parent or parents of a child shall give the child support and education suitable to the child's circumstances."), or a "minor child," see, e.g., KAN. STAT. ANN. § 23-3001(a) (2012) ("the court shall make provisions for the support and education of the minor children"); MASS. GEN. LAWS ch. 208, § 28 (2012) ("Upon a judgment for divorce, the court may make such judgment as it considers expedient relative to the care, custody and maintenance of the minor children of the parties"). In some jurisdictions, the age of majority for child support is 21, regardless of the educational status of the child. See N.Y. FAM. CT. ACT § 413(1)(a) (McKinney 2011) ("the parents of a child under the age of twenty-one years are chargeable with the support of such child"); Miss. Code § 93-11-65(8)(a) (2013) ("The duty of support of a child terminates upon the emancipation of the child. Unless otherwise provided for in the underlying child support judgment, emancipation shall occur when the child: (i) Attains the age of twenty-one (21) years"); Nelson v. Nelson, 548 A.2d 109, 111 (D.C. 1988) ("[I]n the District of Columbia [] for purposes of child support, the age of majority is twenty-one.").

The vast majority of states impose an ongoing duty for students enrolled in high school, although states have adopted different termination ages for this support. Most states terminate the duty at age 19. See, e.g., CAL. FAM. CODE § 3901(a) (West 1994) ("The duty of support . . . continues as to an unmarried child who has attained the age of 18 years, is a full-time high school student, and who is not self-supporting, until the time the child completes the 12th grade or attains the age of 19 years, whichever occurs first."); DEL. CODE ANN. tit. 13, § 501(d) (1995) ("Both parents have a duty to support their child over 18 years of age if such child is a student in high school and is likely to graduate. This duty ends when the child receives a high school diploma or attains age 19, whichever event first occurs."). A few states extend the duty to a high school student until age 20. See, e.g., GA. CODE ANN. § 19-6-15(e) (2014) ("the court, in the exercise of sound discretion, may direct either or both parents to provide financial assistance to a child who has not previously married or become emancipated, who is enrolled in and attending a secondary school, and who has attained the age of majority before completing his or her secondary school education, provided that such financial assistance shall not be required after a child attains 20 years of age."); N.C. GEN. STAT. § 50-13.4(2) (2015) ("If the child is still in primary or secondary school when the child reaches age 18, support payments shall continue until the child graduates, otherwise ceases to attend school on a regular basis, fails to make satisfactory academic progress towards graduation, or reaches age 20, whichever comes first"). And a few states extend the duty to a high school student until age 21. See, e.g., MASS. GEN. LAWS ch. 208, § 28 (2012) ("The court may make appropriate orders of maintenance, support and education of any child who has attained age eighteen but who has not attained age twenty-one and who is domiciled in the home of a parent, and is principally dependent upon said parent for maintenance."); MO. REV. STAT. § 452.340(5) (2011) ("If when a child reaches age eighteen, the child is enrolled in and attending a secondary school program of instruction, the parental support obligation shall continue, if the child continues to attend and progresses toward completion of said program, until the child completes such program or reaches age twenty-one, whichever first occurs."). Finally, a few states do not specify

a termination age for supporting a high-school student. See, e.g., COLO. REV. STAT. § 14-10-115(13)(a)(III) (2014) ("If the child is still in high school or an equivalent program, support continues until the end of the month following graduation."); N.H. REV. STAT. ANN. § 461-A:14(IV) (2015) ("The amount of a child support obligation shall remain as stated in the order until the dependent child for whom support is ordered completes his or her high school education or reaches the age of 18 years, whichever is later"); TEX. FAM. CODE ANN. § 151.001(b) (West 2007) ("The duty of a parent to support his or her child exists while the child is an unemancipated minor and continues as long as the child is fully enrolled in a secondary school in a program leading toward a high school diploma."). As noted below, the high school enrollment age limit is 21 in most states; thus, even in the states that do not set an upper age limit for supporting a high school student, the obligation would typically end at 21. The ALI Principles of Family Dissolution set the end date at age 20. See Principles of the Law of Family Dissolution: Analysis and Recommendations § 3.24(1)(a) (AM. LAW INST. 2002).

The black letter extends longer than many states and is one year longer than the ALI Principles of Family Dissolution. The higher age cutoff is justified by the importance of a high school diploma, which is strongly correlated with future earnings. See Nat'l Ctr. Educ. Statistics, Annual Earnings of Young Adults ("In 2014, the median earnings of young adults with a bachelor's degree ($49,900) were 66 percent higher than the median earnings of young adult high school completers ($30,000). The median earnings of young adult high school completers were 20 percent higher than the median earnings of those without a high school credential ($25,000)."). The age 21 cutoff is consistent with the high school enrollment standards in most states. See Education Commission of the States, 50-State Analysis: School Attendance Age Limits, available at http://www.ecs.org/clearinghouse/01/07/04/10704.pdf (finding that 27 states set the maximum attendance age at 21, and 10 states either set no age limit or allow the local school district to determine the age limit).

Comment e. Duty to support an adult child pursuing higher education or vocational training. States are split on the duty of a parent to support an adult child pursuing higher education or vocational training. A minority of states have adopted a statute authorizing courts to order a parent to support a child through what is typically called an "educational support order." See, e.g., IND. CODE § 31-16-6-2(a) (2007) ("The child support order or an educational support order may also include, where appropriate: (1) amounts for the child's education in elementary and secondary schools and at postsecondary educational institutions"); IOWA CODE § 598.21F(1) (2006) ("The court may order a postsecondary education subsidy if good cause is shown."); MASS. GEN. LAWS ch. 208, § 28 (2012) ("The court may make appropriate orders of maintenance, support and education for any child who has attained age twenty-one but who has not attained age twenty-three, if such child is domiciled in the home of a parent, and is principally dependent upon said parent for maintenance due to the enrollment of such child in an educational program, excluding educational costs beyond an undergraduate degree."); OR. REV. STAT. § 107.108(2) (2005) ("A support order . . . may require either parent, or both of them, to provide for the support or maintenance of a child attending school."); OR. REV. STAT. § 107.108(1) (2005) (defining school

to include community college, four-year college, and vocational training and further defining child as an unmarried person under age 21); WASH. REV. CODE ANN. § 26.19.090(2) (West 1991) ("When considering whether to order support for postsecondary educational expenses, the court shall determine whether the child is in fact dependent and is relying upon the parents for the reasonable necessities of life. The court shall exercise its discretion when determining whether and for how long to award postsecondary educational support based upon consideration of factors that include but are not limited to the following: Age of the child; the child's needs; the expectations of the parties for their children when the parents were together; the child's prospects, desires, aptitudes, abilities or disabilities; the nature of the postsecondary education sought; and the parents' level of education, standard of living, and current and future resources. Also to be considered are the amount and type of support that the child would have been afforded if the parents had stayed together."). An outlier, Missouri contemplates this support as mandatory and part of the parent's duty, at least until the child reaches the age of 21. See MO. REV. STAT. § 452.340(5) (2011) ("If the child is enrolled in an institution of vocational or higher education not later than October first following graduation from a secondary school or completion of a graduation equivalence degree program and so long as the child enrolls for and completes at least twelve hours of credit each semester, not including the summer semester, at an institution of vocational or higher education and achieves grades sufficient to reenroll at such institution, the parental support obligation shall continue until the child completes his or her education, or until the child reaches the age of twenty-one, whichever first occurs.").

If an educational-support order is not contemplated by statute, many courts conclude that they lack authority to impose such an order. See, e.g., Ex parte Christopher, 145 So. 3d 60, 72 (Ala. 2013) ("Because the child-custody statute does not authorize a court in a divorce action to require a noncustodial parent to pay educational support for children over the age of 19, we reverse the judgment"); Bailey v. Bailey, 246 S.W.3d 895, 898 (Ky. Ct. App. 2007) (citations omitted) ("[A] parent is not legally obligated to pay the college expenses of an emancipated child. While [a father] may have a moral obligation to assist [his son] with his college expenses, he has no legal obligation to do so."). There are a few exceptions, with courts finding that even in the absence of an authorizing statute, the court can impose an educational-support order. See, e.g., Newburgh v. Arrigo, 443 A.2d 1031, 1038 (N.J. 1982) (citations omitted) ("Generally parents are not under a duty to support children after the age of majority. Nonetheless, in appropriate circumstances, the privilege of parenthood carries with it the duty to assure a necessary education for children. Frequently, the issue of that duty arises in the context of a divorce or separation proceeding where a child, after attaining majority, seeks contribution from a non-custodial parent for the cost of a college education. In those cases, courts have treated 'necessary education' as a flexible concept that can vary in different circumstances."); Risinger v. Risinger, 253 S.E.2d 652, 653 (S.C. 1979) (holding that the trial court could require a divorced husband to contribute money necessary to enable his adult child to attend four years of college where there was evidence that the adult child would benefit from college, had a demonstrated ability to succeed or at least make satisfactory grades, and could not otherwise go to school, and that the husband had the financial ability to help

pay). The black letter is consistent with the Principles of Family Dissolution, which do not contemplate a blanket rule extending the obligation to a student pursuing higher education or vocational training. Instead, the Principles permit a court to order such payments under a number of circumstances, including when the family likely would have provided economic support if it had remained intact. See Principles of the Law of Family Dissolution: Analysis and Recommendations § 3.04, Comment *j* (AM. LAW INST. 2002); see also WASH. REV. CODE ANN. § 26.19.090(2) (West 1991) (one factor for a court to consider in deciding whether to make an award is "the amount and type of support that the child would have been afforded if the parents had stayed together"); Koontz v. Scott, 60 N.E.3d 1080, 1083 (Ind. Ct. App. 2016) ("In determining whether to order parents to pay sums toward their child's college education, the trial court must consider whether and to what extent the parents, if still married, would have contributed to college expenses."). Illustration 4 is based on Koontz v. Scott, supra.

Educational expenses include tuition as well as related expenses. See 750 ILL. COMP. STAT. 5/513(a)(2) (2015) ("The educational expenses may include, but shall not be limited to, room, board, dues, tuition, transportation, books, fees, registration and application costs, medical expenses including medical insurance, dental expenses, and living expenses during the school year and periods of recess"). Some states limit the total amount of support, which is apportioned between the parents and the child, to the cost of attending an in-state public institution and only reasonable associated expenses. See IOWA CODE § 598.21F(2) (2006) ("The court shall determine the cost of postsecondary education based upon the cost of attending an in-state public institution for a course of instruction leading to an undergraduate degree and shall include the reasonable costs for only necessary postsecondary education expenses"; and further "[t]he child's expected contribution shall be deducted from the cost of postsecondary education and the court shall apportion responsibility for the remaining cost of postsecondary education to each parent. The amount paid by each parent shall not exceed thirty-three and one-third percent of the total cost of postsecondary education.").

The states that do authorize a court to order educational support often have no cutoff date for this support. See, e.g., 750 ILL. COMP. STAT. 5/513(a)(2) (2015) ("The court may also make provision for the educational expenses of the child or children of the parties, whether of minor or majority age, and an application for educational expenses may be made before or after the child has attained majority, or after the death of either parent."); IND. CODE § 31-16-6-2 (2007) (not specifying a date). When a statute does specify a cutoff date, it ranges from age 21 to 23. See, e.g., CONN. GEN. STAT. § 46b-56c(a) (2015) ("An educational support order may be entered with respect to any child who has not attained twenty-three years of age and shall terminate not later than the date on which the child attains twenty-three years of age."); MASS. GEN. LAWS ch. 208, § 28 (2012) ("The court may make appropriate orders of maintenance, support and education for any child who has attained age twenty-one but who has not attained age twenty-three, if such child is domiciled in the home of a parent, and is principally dependent upon said parent for maintenance due to the enrollment of such child in an educational program, excluding educational costs beyond

an undergraduate degree."); OR. REV. STAT. § 107.108 (2005) (authorizing an educational-support order for a child under the age of 21).

For statistics on the relationship between a college degree and future earnings, see Comment *d*. For a discussion of the prolonged functional dependency of young adults, well past age 18, see RICHARD J. BONNIE, CLARE STROUD & HEATHER BREINER, INSTIT. MED. & NAT'L RESEARCH COUNCIL, INVESTING IN THE HEALTH AND WELL-BEING OF YOUNG ADULTS (2014). That report identifies young adulthood—the period from age 18 to 26—as a critical time in a person's life. The report notes that "[f]rom a developmental standpoint, young adults are different, biologically and psychologically, from both adolescents and older adults in ways that affect their decision making, health, and behavior. From a social point of view, many of today's young adults confront major challenges in making a successful transition to adult roles in a rapidly changing and stressful world." See id. at xiii. The report offers multiple recommendations for supporting young adults in the transition to economic and social self-sufficiency, built on the recognition that in a modern society, this transition can take years to accomplish.

The black letter does not authorize a court to make an award for economic support of graduate studies or professional school. See MASS. GEN. LAWS ch. 208, § 28 (2012) ("The court may make appropriate orders of maintenance, support and education for any child . . . excluding educational costs beyond an undergraduate degree."); Allen v. Allen, 54 N.E.3d 344 (Ind. 2016) (interpreting the term "postsecondary" in the educational-support statutory provision to exclude graduate and professional school).

Comment f. Duty to support a disabled adult child. The black letter adopts the same basic standard as the Principles, which is discussed at length in § 3.24. See Principles of the Law of Family Dissolution: Analysis and Recommendations § 3.24 (AM. LAW INST. 2002).

The vast majority of states recognize a parent's ongoing duty to support an adult disabled child. See, e.g., CAL. FAM. CODE § 3910(a) (West 1994) ("The father and mother have an equal responsibility to maintain, to the extent of their ability, a child of whatever age who is incapacitated from earning a living and without sufficient means."); COLO. REV. STAT. § 14-10-115(13)(a)(II) (2014) ("If the child is mentally or physically disabled, the court or the delegate child support enforcement unit may order child support, including payments for medical expenses or insurance or both, to continue beyond the age of nineteen"); IND. CODE § 31-16-6-6(a) (2012) ("The duty to support a child under this chapter . . . ceases when the child becomes nineteen (19) years of age unless any of the following conditions occurs: . . . (2) The child is incapacitated. In this case the child support continues during the incapacity or until further order of the court."); VA. CODE ANN. § 20-60.3(5) (2015) ("the court may also order that support be paid or continue to be paid for any child over the age of 18 who is (a) severely and permanently mentally or physically disabled, and such disability existed prior to the child reaching the age of 18 or the age of 19 if the child met the requirements of clauses (i), (ii), and (iii); (b) unable to live independently and support himself; and (c) residing in the home of the parent seeking or receiving child support"); Holleyman v. Holleyman, 78 P.3d 921, 936 (Okla. 2003) ("Although the early common law did not extend to one's parental duty of support beyond a child's minority, the great majority of American

jurisdictions, in which the statutory law is silent, has recognized an exception where, as here, the child is unable to care for itself upon attaining majority. This view is rested on common-law developments.") (emphasis omitted); Nelson v. Nelson, 548 A.2d 109 (D.C. 1988) (holding that the parental duty of support for physically or mentally disabled children extends beyond the age of majority).

A small minority of states do not permit the imposition of an award for an adult disabled child. See, e.g., Lund v. Lund, 927 A.2d 1185, 1190 (Me. 2007) (finding that Maine law "contains no provision that states that a parent has a duty to continue to support a disabled child beyond her nineteenth birthday, or that a child, or a parent on behalf of the child, can seek to enforce such a duty against an obligor parent"); Hays v. Alexander, 114 So. 3d 704 (Miss. 2013) (finding no statutory authority for the continuation for the duty of support after a child reaches the age of majority, even for a disabled child).

A few states authorize a court to order ongoing support for an adult disabled child but only to age 21. See CONN. GEN. STAT. § 46b-84(c) (2015) ("The court may make appropriate orders of support of any child with intellectual disability . . . or a mental disability or physical disability . . . who resides with a parent and is principally dependent upon such parent for maintenance until such child attains the age of twenty-one."); N.H. REV. STAT. ANN. § 461-A:14(IV) (2015) ("If the parties have a child with disabilities, the court may initiate or continue the child support obligation after the child reaches the age of 18. No child support order for a child with disabilities . . . may continue after the child reaches age 21."); N.Y. Fam. Ct. Act § 415 (McKinney) ("Except as otherwise provided by law, the spouse or parent of a recipient of public assistance or care or of a person liable to become in need thereof or of a patient in an institution in the department of mental hygiene, if of sufficient ability, is responsible for the support of such person or patient, provided that a parent shall be responsible only for the support of his child or children who have not attained the age of twenty-one years.").

Of the states that authorize an award for an adult child with a disability, some states require, by statute or through case law, the existence of the disability prior to majority or emancipation. See, e.g., ARIZ. REV. STAT. ANN. § 25-320 (2014) (authorizing an award for a disabled adult child if, inter alia, "[t]he child's disability began before the child reached the age of majority"); FLA. STAT. § 743.07(2) (1999) ("This section shall not prohibit any court of competent jurisdiction from requiring support for a dependent person beyond the age of 18 years when such dependency is because of a mental or physical incapacity which began prior to such person reaching majority"); R.I. Gen. Laws Ann. § 15-5-16.2 (West) ("the court, in its discretion, may order child support, in the case of a child with a severe physical or mental impairment still living with or under the care of a parent, beyond the child's emancipation . . . . The onset of the disability must have occurred prior to the emancipation event."); NEV. REV. STAT. ANN. § 125B.110 (West) ("The handicap of the child must have occurred before the age of majority for this duty to apply."); In re Jacobson, 842 A.2d 77 (N.H. 2004) (interpreting New Hampshire's child-support provisions to prohibit an award for a child whose disability arose after reaching 18); Cohn v. Cohn, 934 P.2d 279, 281 (N.M. 1996) ("We join the majority of jurisdictions that hold

that parents have a common-law continuing duty to support a severely disabled child if, as in this case, the child was so disabled before reaching the age of majority."); Castle v. Castle, 473 N.E.2d 803, 806-807 (Ohio 1984) ("The common-law duty imposed on parents to support their minor children may be found by a court of domestic relations having jurisdiction of the matter to continue beyond the age of majority if the children are unable to support themselves because of mental or physical disabilities which existed before attaining the age of majority."); Koltay v. Koltay, 667 P.2d 1374, 1376 (Colo. 1983) ("If a child is physically or mentally incapable of self-support when he attains the age of majority, emancipation does not occur, and the duty of parental support continues for the duration of the child's disability.").

By contrast, some states that authorize an award for an adult child with a disability authorize a court to award the support regardless of when the disability arose. See, e.g., Haw. Rev. Stat. Ann. § 580-47 (West) ("Provision may be made for the support, maintenance, and education of an adult or minor child and for the support, maintenance, and education of an incompetent adult child whether or not the petition is made before or after the child has attained the age of majority."); Sininger v. Sininger, 479 A.2d 1354, 1358 (W. Va. 1984) ("[A] parent who has the means to do so, has a duty to support an incapacitated adult child whose disability commenced after she attained the age of majority."); see also Casdorph v. Casdorph, 460 S.E.2d 736, 742 (W. Va. 1995) (permitting an award for an adult child who became disabled after reaching the age of majority but only when the adult child had not been emancipated, as determined by an examination of several factors, including "1) whether the child continually resided in the home of one of his/her parents; 2) whether the child continually remained dependent on his/her parent(s) for financial support; and 3) whether the child has ever married"). This Section adopts the position of the Principles: the existence of the disability prior to the age of majority is one factor in the determination and is not a prerequisite for the imposition of an award. The black letter does not require the imposition of an award, it only permits the consideration of an award if the disability arose after majority or emancipation.

Comment g. Relationship of duty and access to the child. Illustration 7 is based on Ex parte Univ. So. Ala., 541 So. 2d 535 (Ala. 1989). The court held that "the determination of liability is based upon the question of whether the expense is necessary, not on the quality of the relationship between the father and the minor child." Id. at 538. The converse is also true: failure to pay child support, even if the parent has the financial ability to pay, does not justify a restriction on access to the child. These issues are discussed in greater detail in § 3.21 of the Principles of the Law of Family Dissolution: Analysis and Recommendations (AM. LAW INST. 2002).

Comment h. Who owes the duty? The Principles recognize a narrow exception to the general rule that only legal parents owe a duty of economic support, permitting a court to impose a support order on a person other than a legal parent if that person's conduct equitably estops him or her from denying the responsibility. This is discussed in further detail in § 3.03 of the Principles. See Principles of the Law of Family Dissolution: Analysis and Recommendations § 3.03 (AM. LAW INST. 2002). And some states impose a limited duty on stepparents during the duration of the marriage. See, e.g., DEL. CODE ANN. tit. 13, § 501(b) (1995) ("Where the parents

are unable to provide a minor child's minimum needs, a stepparent or a person who cohabits in the relationship of husband and wife with the parent of a minor child shall be under a duty to provide those needs. Such duty shall exist only while the child makes residence with such stepparent or person and the marriage or cohabitation continues.").

TOPIC 3. MEDICAL CARE

§ 2.30. Parental Authority and Responsibility for Medical Care

(1) Authority

(a) A parent or guardian has broad authority to make medical decisions for a child.

(b) A parent does not have authority to consent to medical procedures or treatments that provide no health benefit to the child and pose a substantial risk of serious harm to the child's physical or mental health.

(c) A parent does not have authority to consent to medical procedures or treatments that impinge on the child's constitutional rights to bodily integrity or reproductive privacy.

(2) Responsibility

(a) A parent, guardian, custodian, or temporary caregiver has a duty to provide necessary medical care for the child.

(b) Medical care is necessary if it is required to prevent serious harm or a substantial risk of serious harm to the child's physical or mental health or to the safety of others.

Cross-References:

Chapter 3. State Intervention for Abuse and Neglect; § 3.26 (Medical Neglect)

Chapter 19. Medical Decisionmaking by Minors

Comment:

a. History and rationale. The common law recognized broad parental authority over a child's upbringing, which included the authority to make medical decisions for a child. See Part 1, Introduction. This authority is not absolute. The state may override a parent's decision when necessary to protect the child from harm. Thus, while a parent has a right to make medical decisions for the child, the State also imposes an obligation on the parent to provide the child with necessary medical care.

Several rationales justify this parental authority and responsibility. First, a parent's constitutional right to direct a child's upbringing carries corresponding obligations that include the support and care of the child. Second, a parent is ordinarily in the best position to discover when the child needs medical care and to provide it, as parental affection typically motivates the parent to provide adequate care. Thus, parental authority to make medical decisions and the obligation to provide necessary medical care generally further the child's welfare. Third, in the absence of a medical emergency, a health-care provider must obtain informed consent from the patient or a guardian authorized to give consent prior to administering treatment. A child ordinarily lacks the ability and developmental capacity to seek medical care or make an informed medical decision and thus cannot provide informed consent. But see Chapter 19, § 19.01, Consent to Treatment by Mature Minor. In contrast, a parent generally possesses the ability, capacity, and motivation to make medical decisions that will advance the child's welfare and thus has the legal authority to make an informed decision for the child. Fourth, medical treatment often carries unavoidable risks and side effects, and health-care providers sometimes disagree about the best course of treatment. A parent is typically in a better position than the state to weigh and manage the risks and benefits of different treatments, especially when the treatment is prolonged or complex and its success requires parental involvement. Relatedly, many children will resist treatment that a parent opposes, which may reduce the treatment's likelihood of success. Fifth, parents have diverse views of what qualifies as appropriate treatment based on their cultural and religious values. Deference to the parent's medical decision respects the parent's constitutional right to raise the child in accordance with the parent's cultural and religious values without state interference, except when necessary to protect the child or others from harm. It also protects economically vulnerable families and racial, ethnic, cultural, and religious minorities against unwarranted state intervention that may undermine family integrity and cause the child harm. Thus, the law's recognition of parental authority and its corresponding obligations seek to protect family privacy and integrity while also protecting the health and welfare of children.

This Section addresses parental authority to make medical decisions for a child and the corresponding duty to provide necessary medical care. Chapter 3, § 3.26 (Medical Neglect) addresses state intervention through a civil child-protection proceeding or criminal proceeding when a parent or other obligated adult fails or refuses to provide necessary medical care. Chapter

19, Medical Decisionmaking by Minors, addresses the limits on a parent's authority to make decisions for a mature child.

b. Scope of parental authority. A parent's constitutionally protected right to direct the child's upbringing, see Part I, Introduction, includes authority to consent to necessary, ordinary, surgical, complementary and alternative, and elective medical care. Necessary medical care is care that is required to prevent serious harm or a substantial risk of serious harm to the child's physical or mental health or to the safety of others. See Comments *c* and *d*. Ordinary medical care includes routine procedures and treatments with well-established medical benefits and limited risks. See § 19.01, Comment *d*. Ordinary care may constitute necessary care if it is required to prevent serious harm or a substantial risk of serious harm to the child's physical or mental health or to the safety of others. See Comments *c* and *d*. Complementary and alternative medicine (CAM) is care that is not generally accepted by the mainstream health system, such as acupuncture, chiropractic, and homeopathic therapies, and is offered as a substitute for, or in conjunction with, conventional medical treatment. Elective medical care includes procedures or treatments that are either not necessary to the child's health, such as purely cosmetic procedures, or care that can be delayed without any adverse health consequences. A parent has authority to consent to elective and complementary and alternative treatments or therapies that do not pose a substantial risk of serious harm to the child's health.

Illustrations:

1. Pooja is 13 years old and suffers from migraine headaches. Her father has read that acupuncture may reduce the duration and frequency of migraines. He takes Pooja to an acupuncturist who evaluates Pooja's medical history and recommends acupuncture twice a week. Pooja's father has authority to consent to acupuncture therapy for Pooja. Although acupuncture is a complementary and alternative treatment, it does not pose a substantial risk of serious harm to Pooja.

2. Martin is 16 years old and is embarrassed by his tooth discoloration. His mother takes him to the dentist for an in-office tooth-whitening treatment, a purely cosmetic treatment that offers no health benefit but may cause tooth sensitivity and gum irritation. Martin's mother has authority to consent to the treatment. Although tooth-whitening is an elective treatment, it does not pose a substantial risk of serious harm to Martin.

A parent does not have authority to consent to procedures or treatments that provide no health benefit to a mature minor when the minor objects to such treatment even if the treatment does not pose a risk of harm to the minor's health. A court will not order that a procedure with no health benefits be undertaken against a mature minor's will. See § 19.01, Consent to Treatment by Mature Minor, Comment *e*.

Illustration:

3. Same facts as Illustration 2, but Martin objects to the tooth-whitening treatment. Martin is a mature minor. Martin's mother may not consent to the elective tooth-whitening treatment without Martin's assent.

A parent is ordinarily the child's guardian with authority to make medical decisions for the child. However, another person or agency may have authority to make medical decisions in cases in which the parent is deceased, the state has limited the parent's authority, or the parent has voluntarily transferred authority to make decisions about medical care for the child to another person or agency. For purposes of this Section, the term "parent" includes a legal guardian authorized to make medical decisions for a child.

Illustration:

4. Misha is 11 years old. Misha's mother died when she was five years old and Misha's aunt Silfida was appointed Misha's legal guardian. During a routine well-child exam, Dr. Lerhoff recommends a flu vaccine shot for Misha. Silfida has authority to consent to the flu shot. As Misha's legal guardian, Silfida has the same authority as a parent to consent to ordinary medical care.

In cases in which parents share decisionmaking responsibility, each parent has authority to make medical decisions for the child without the consent of another parent, except in cases involving the withdrawal or rejection of life-sustaining treatment. See Comment *c* (discussing withdrawal of life-sustaining treatment). For example, unless a court has deprived a parent of his or her decisionmaking authority, one parent may consent to medical treatment for the child over the objections of another parent, except in cases involving the withdrawal or rejection of life-sustaining treatment. In cases not involving the withdrawal of life-sustaining treatment, a health-

care provider need only obtain informed consent from one parent with authority to make medical decisions for the child.

A parent's broad authority to make medical decisions for a child does not include the authority to consent to procedures or treatments that provide no health benefit to the child and pose a substantial risk of serious harm to the child's health. Parental authority also does not extend to procedures or treatments that impinge on the child's constitutional rights to bodily integrity or the child's present or future reproductive privacy. These treatments and procedures include organ and tissue donation, abortion when the pregnant minor is mentally incompetent (see § 19.02, Comment *e*), sterilization (including long-acting contraceptives) of mentally incompetent minors, genital-normalizing surgery, female genital cutting, and mental-health therapies designed to alter a child's sexual orientation or gender identity. A parent lacks authority to consent to these procedures or treatments even when the parent and health-care provider agree on the course of treatment. Before administering these treatments, a healthcare provider must obtain authorization from a court. A health-care provider who provides treatment to the child without the requisite authorization may face civil and criminal liability.

Illustrations:

5. Seven-year old Zoe needs a kidney transplant. Her twin sister Zora is a perfect match. Their parents consent to the removal of Zora's kidney for the purpose of transplanting it to Zoe. The parents' consent to the kidney donation by Zora is legally insufficient. The donation offers no medical benefit to Zora and poses a substantial risk of serious harm to her health. Court authorization is required before a doctor may remove Zora's kidney.

6. Ruth is 12 years old and is severely developmentally disabled. She lacks the capacity to understand her physical maturation, including menstruation, or the relationship between sexual intercourse and conception. She also lacks the capacity to practice any form of birth control. If she were to become pregnant, her health would be at serious risk due to her inability to understand her condition and communicate about her symptoms. Ruth's parents and her doctor agree that sterilization surgery is necessary to protect her physical and mental health. The parents' consent to the surgery is legally insufficient. Sterilization would irreversibly destroy Ruth's fundamental reproductive rights. Court authorization is required before a doctor may perform the surgery.

The rationales that warrant broad parental authority to make medical decisions for a child, see Comment *a*, are weaker in cases in which a parent seeks a procedure that poses a substantial risk of harm or infringes on a fundamental right but offers no medical benefit to the child. Ordinarily, the law presumes that a parent's interests and the child's best interests are aligned, and that parental authority furthers the child's welfare. However, as courts have recognized in cases in which a parent seeks to sterilize a developmentally disabled child or have a child be an organ donor, the parent's own interests may conflict with those of the child. In the organ-donation context, the intended recipient of the donated organ is usually a close family member, oftentimes the donor child's sibling, and the parent's interest in saving the life of that family member makes it difficult, if not impossible, for the parent to prioritize the interests of the potential donor child. In cases involving sterilization of a developmentally disabled child, the burden of caring for the incompetent child and that child's potential offspring may lead parents to consent to a procedure that infringes on the child's fundamental reproductive rights. In these cases, a court must appoint a guardian to represent the child's interest in an adversarial hearing. The court may not authorize the nontherapeutic procedure unless it is shown to be in the child's best interests, independent of the interests of the parents or society.

The reasons necessitating judicial oversight in cases involving sterilization of a child or organ donation by a child warrant similar oversight in cases in which a parent seeks to consent to genital-normalizing surgery on an intersex child. The court must appoint a guardian to represent the child in adversarial hearing and may not authorize the surgery unless the proponents of the procedure establish that is in the child's best interests, independent of the interests of the parents.

Illustration:

7. Two-year-old Kelly was born with atypical genitalia and has both a penis and small vaginal opening. Although Kelly is a healthy child and the intersex condition does not pose any health risks, Kelly's doctors recommend surgery to remove the male genitalia and make Kelly's anatomy fit a female gender assignment. The doctors inform the parents that Kelly may require multiple surgeries and may be rendered infertile as a result of the surgeries. Kelly's parents consent to the surgery. The parents' consent is legally insufficient. The surgery offers no medical benefit and poses a substantial risk of serious harm to Kelly's physical and mental health. Moreover, it impinges on Kelly's fundamental

right to bodily integrity and reproductive privacy. Court authorization is required before a doctor may perform the surgery.

Under this Section, a physician who performs nontherapeutic surgery on an intersex child's genitalia is subject to civil and criminal liability. This position is in accordance with federal and state law prohibiting excision or infibulation of the genitals of a female child unless medically necessary. Both female genital cutting and nontherapeutic genital-normalizing surgery violate the child's fundamental right to bodily integrity and pose a substantial risk of serious harm to the child's physical and mental health. As such, a parent lacks authority to consent to these procedures.

A parent does not have authority to consent to mental-health therapies designed to alter a child's sexual orientation or gender identity. Such therapies offer no health benefit to a child and pose a substantial risk of serious harm to the child's physical and mental health. This position is in accordance with the states and numerous municipalities that prohibit such therapies.

c. Duty to provide necessary care—serious harm or substantial risk of serious harm to the child. A parent's broad authority to make medical decisions for a child is limited by the duty to provide medical care that is necessary to prevent serious harm or a substantial risk of serious harm to the child's physical or mental health or, as discussed in Comment *d*, to the safety of others. The requirement of serious harm covers a wide range of injuries and conditions, including fractures, second- or third-degree burns, internal injuries, any condition that poses a substantial risk of death, and any condition which, if not treated, may result in protracted disability, temporary or permanent disfigurement, impairment of physical or mental functions, severe developmental delay, or intellectual disability. Serious harm also includes severe anxiety, depression, withdrawal, or aggressive behavior, and diagnosable mood or thought disorders that substantially impair judgment, behavior, or ability to function within a normal range for the child's age, culture, and environment. The parental duty to provide necessary medical care applies even when the parent's medical decision, including the decision not to provide medical treatment, is based on religious beliefs. See Comment *e*. See also Chapter 3, § 3.26 (Medical Neglect), Comment *i*.

Illustrations:

8. Nina is a nine-year-old child who suffers from epileptic seizures. Nina's doctors prescribe anti-seizure medications but they cause significant side effects. Nina's mother discontinues Nina's medications and puts her on a ketogenic diet (a high-fat, low-

carbohydrate diet) that reduces the frequency of the seizures significantly. Nina's doctor concludes that the seizures, which last a few seconds, do not pose a risk of harm to Nina's physical or mental health. However, the doctor recommends combining the diet with medication as medication may completely control the seizures. Nina's mother refuses the anti-seizure medications. A court may not override the mother's decision because the seizures do not create a substantial risk of serious harm to Nina's health or the safety of others.

9. Twelve-year-old Camilo suffers from continual epileptic seizures and has suffered serious physical and mental impairment as a result of the seizures. His doctors prescribe anti-seizure medications. Without medication, Camilo is at substantial risk of further brain impairment and physical harm. Camilo's parents refuse the anti-seizure medication. A court may override the parents' decision because the decision has caused Camilo serious harm and their refusal to provide treatment places Camilo at substantial risk of further serious harm.

10. Jin is 12 years old. He suffers from hallucinations and has expressed suicidal inclinations. He told his teacher that he watched a video on how to cut his wrists and drew a picture in art class of a young boy bleeding from his wrists. He also told his art teacher that he will not be around for his 13th birthday. Jin's parents refuse to consent to any diagnostic tests or to allow him to meet with a mental-health professional. Jin attempts suicide by jumping out a window and sustains a spinal fracture. A court may override the parents' decision because their failure to seek mental-health treatment for Jin placed him at substantial risk of serious harm.

The fact that a parent is not legally required to provide medical care unless it is necessary to prevent a substantial risk of serious harm does not mean that medical care is not recommended. A parent will ordinarily provide medical care for a child even when not legally required to do so because affection for the child and a sense of moral responsibility spur the parent to act to further the child's well-being. See Part I, Introduction; see also Comment *a*. Many parents seek medical care when a child has a cold, toothache, or other minor ailment that does not place the child at substantial risk of serious harm. If the parent does not seek medical care, however, and the decision does not cause serious harm or create a substantial risk of serious harm to the child or to the safety

of others, the law defers to a parent's decision, even if the state and medical authority believe that a different decision would better serve the child's best interests.

In certain cases, a court must defer to a parent's medical decision even when it creates a substantial risk of serious harm to the child's health. A parent's decision is entitled to deference when licensed medical doctors disagree about the diagnosis or appropriate course of treatment and there is substantial medical support for the parent's choice of treatment. There is medical support for the parent's decision when it is based on an acceptable standard of care or practice in the medical profession sufficient to shield the recommending doctor from liability for negligent diagnosis or treatment. If the recommending doctor could not be subject to malpractice liability based on his or her diagnosis or treatment, the court should defer to the parent's selection of that treatment even if it is not recommended by the majority of doctors.

Illustration:

11. Jasmine is nine years old and is experiencing severe gastrointestinal pain and low energy that impairs her ability to walk or participate in daily activities. A licensed doctor diagnoses Jasmine with mitochondrial disease, a genetic condition with complex and disputed diagnostic criteria. Another licensed doctor disagrees with the diagnosis of mitochondrial disease and diagnoses Jasmine's symptoms as psychiatric in nature and prescribes inpatient psychiatric care. There is medical support for each of the conflicting diagnoses. Jasmine's parents agree with the first doctor's diagnosis and consent to treat Jasmine for mitochondrial disease. They reject the second doctor's diagnosis and refuse to consent to inpatient psychiatric treatment. A court will defer to the parents' decision.

A parent's decision is also entitled to deference when the state's preferred treatment poses significant risks to the child's health and does not have a high probability of success. This deference is justified by a parent's constitutional liberty interest in the care and custody of the child and the reasons discussed in Comment *a*. In assessing whether it must defer to a parent's decision, a court must consider the child's preferences, if appropriate, based on the child's age and maturity. See Chapter 19, Topic 1, Medical Decisions by Mature Minors.

Illustrations:

12. Ricardo is a three-year-old child with an aggressive form of pediatric cancer. His doctors recommend intensive chemotherapy treatment for six months. The treatment has a five percent probability of success and poses a high risk of severe and potentially permanent side effects, including kidney failure, neurological problems, and fatal infections. There is also a chance that the recommended treatment itself will kill Ricardo. Without treatment, however, Ricardo will most likely die within six months. Ricardo's parents refuse to consent to the treatment. A court may not override the parents' decision. The recommended treatment has a low probability of success and poses significant risks to Ricardo's life and health.

13. Six-year-old Shamika has sickle-cell anemia. She has suffered two strokes and there is an 80 percent chance that she will suffer another one. A stroke may cause physical disability, developmental delays, blindness, and even death. Shamika's doctors recommend periodic blood transfusions, which prevent recurrent strokes in 90 percent of sickle-cell patients and pose minimal risks. Shamika's mother refuses to consent to the transfusions. A court may override the mother's decision. The proposed treatment has a high likelihood of success and poses minimal risks to Shamika's health.

A parent's broad authority to make medical decisions for a child does not include the authority to refuse or withdraw life-sustaining treatment except when the child's health-care providers conclude that treatment is futile and support the parent's decision to reject treatment. In those cases, a parent may refuse treatment or consent to the withdrawal or withholding of treatment without court authorization. However, when the child's health-care providers do not support the parent's decision, a parent has no authority to withdraw or refuse life-sustaining treatment for a child without court authorization. Cf. § 19.01, Consent to Treatment by Mature Minor, Comment *f*.

Illustration:

14. Damien is a 12-year-old boy suffering from a serious genetic disease that will end his life in the next two years. Damien has been in the hospital for six months and needs a ventilator to enable him to breathe. Damien's parents wish to withdraw the ventilator even though he will die. Damien's doctors disagree with the parents' decision because

Damien is not terminal and he is alert and can sense his surroundings. The parents lack authority to consent to withdrawal of the life-sustaining ventilator without court authorization.

A health-care provider may not withdraw life-sustaining treatment from a child without the authorization of the parents with authority to make medical decisions. In cases in which a parent with authority to make medical decisions for the child objects to the withdrawal or withholding of life-sustaining treatment, a health-care provider may not withdraw or withhold such treatment even though another parent has provided informed consent to do so. In such cases, a health-care provider must seek court authorization before withdrawing or withholding treatment. As in cases involving organ donation by a child or sterilization of a child, when the parents or health-care providers disagree on whether to withdraw or withhold life-sustaining treatment from a child, the court must appoint a guardian to represent the child's interests in a hearing. A court may not authorize the withdrawal or withholding of life-sustaining treatment unless the party or parties seeking such an order establish by clear and convincing evidence that the order is in the child's best interests.

d. Duty to provide necessary care—substantial risk of serious harm to others. A court may override a parent's medical decision for a child if the decision creates a substantial risk of serious harm to the safety of others. While a court may override a parent's decision even when it threatens the safety of only one individual, cases involving a substantial risk of serious harm to the safety of others typically arise when a parent refuses to vaccinate the child despite an epidemic of a communicable disease and creates a risk to public health. Every state has enacted compulsory vaccination laws requiring proof that a child has received all the statutorily required immunizations before the child may enroll in school. A main purpose of these laws is to protect the public from communicable diseases. A parent has no constitutional right to refuse to vaccinate a child even if the parent's objection is grounded in religious conscience. Courts, including the U.S. Supreme Court, have uniformly held that the "right to practice religion freely does not include liberty to expose the community or the child to communicable disease." Prince v. Massachusetts, 321 U.S. 158, 166-167 (1944). Under this Section, a parent must comply with a compulsory vaccination requirement, unless the state has enacted a statutory exemption explicitly providing otherwise. The vast majority of states have enacted religious exemptions to vaccination, and a significant minority have enacted philosophical exemptions. Even then, there is no exemption from compulsory vaccination laws when the failure or refusal to vaccinate the child creates a substantial risk of

serious harm to the public health, as in cases in which public health officials determine that there is an epidemic.

e. Religious beliefs. A parent lacks authority to consent to nontherapeutic treatments or procedures that pose a substantial risk of serious harm to the child or that impinge on the child's constitutional rights to bodily integrity or reproductive privacy, even when the treatment or procedure is required by the parent's religious beliefs. See § 3.26, Medical Neglect, Comment *i* and the Reporters' Note thereto. Moreover, a parent has a duty to provide medical care that is necessary to prevent serious harm or a substantial risk of serious harm to the child's health or to the safety of others, even when the parent's decision not to provide medical treatment, or to rely solely on spiritual treatment, is based on religious conscience.

Illustrations:

15. Helena is 13 years old. She and her mother Ava are members of a religious sect that strongly encourages excision of a female child's clitoris. A doctor in their sect performed the procedure with Ava's consent. Ava claims that federal and state criminal laws prohibiting female genital cutting violate her constitutionally protected right to free exercise of religion and to inculcate her child in her religious beliefs. Ava is subject to criminal liability. A parent's constitutionally protected right to free exercise of religion does not include the authority to consent to procedures that jeopardize the child's health or impinge on the child's constitutional rights to bodily integrity.

16. Same facts as Illustration 9, but Camilo's parents refuse the medication on religious grounds. A court may override the parents' decision. A parent has a duty to provide a child with medical care necessary to prevent serious harm or substantial risk of serious harm, even if the parent's reasons for denying medical treatment are based on religious beliefs.

Although a parent does not have a constitutional right to deprive a child of necessary medical care, even if the refusal is grounded in religious conscience, a majority of states have enacted spiritual treatment exemption statutes that provide an affirmative defense to criminal liability or civil child-protection liability in certain cases in which the parent's denial of medical treatment is based on the parent's religious beliefs. See § 3.26, Medical Neglect, Comment *i* and the Reporters' Note thereto. The majority of statutes, however, expressly authorize courts to order

medical treatment, despite a parent's religious objection, when necessary to prevent a substantial risk of serious harm to the child. See § 3.26, Medical Neglect, Statutory Note on Spiritual Treatment Exemptions. Moreover, courts have interpreted spiritual treatment exemptions narrowly. Under this Section, a court may override a parent's medical decision when necessary to prevent serious harm or a substantial risk of serious harm to the child's health even if the spiritual treatment statute does not expressly authorize intervention.

f. Who is obligated to provide necessary medical care? Under this Section, the duty to provide necessary medical care for a child extends to a parent, guardian, custodian, or temporary caregiver. The duty extends to a parent who does not reside with the child when the nonresident parent knows or has reason to know that the child is not receiving necessary medical care, even though the custodial parent has the authority to make medical decisions.

A parent is ordinarily the child's guardian but another person or agency may be the guardian if the parent is deceased, the state has limited the parent's authority, or the parent has voluntarily transferred authority to make decisions about medical care for the child to another person or agency. See Comment *b*. The guardian has a duty to provide necessary care for the child.

A custodian also has a duty to provide necessary medical care for a child. This Section adopts the statutory definition of a custodian in the majority of states. A custodian is a person other than a parent or legal guardian, including a foster parent, who stands *in loco parentis* to the child, or a person to whom a court has granted legal custody of the child. A person who has actual custody of the child is a custodian even though the person does not have legal custody.

At least half of all states have extended the duty to provide necessary medical care to a temporary caregiver. A temporary caregiver is a person other than a parent, guardian, or custodian who assumes responsibility for a child's care, even if only for a short period of time. A temporary caregiver has a duty to provide necessary medical care for the child when the child's parent, guardian, or custodian either is not present, or is unable or unwilling to provide such care. Extending the duty to provide necessary medical care to a temporary caregiver furthers the state's interest in protecting the child from harm and recognizes that a person other than a parent, guardian, or custodian may have caregiving responsibility for the child. See § 3.26, Medical Neglect, Comment *e*.

Illustration:

17. Tia is three years old. She lives with her mother but spends weekends with her father and his new wife, Adriana. Adriana is Tia's primary caretaker during these visits. She prepares Tia's meals, bathes her, and puts her to bed. During one of these weekend visits, Tia's father becomes angry with Tia because she refuses to eat. He repeatedly punches Tia, throws her into a wall, and pushes her onto the floor. Adriana witnesses these beatings and knows that Tia is severely injured. Adriana has a duty to seek medical attention for Tia because she is a temporary caregiver. She assumed temporary responsibility for Tia during Tia's visits, and Tia's father (the perpetrator of her injuries) is unwilling to seek medical care for Tia.

REPORTERS' NOTE

Comment a. History and rationale. The U.S. Supreme Court has long recognized broad parental authority over children and the corresponding duty to provide for their care. See Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923) (holding that the rights guaranteed under the Fourteenth Amendment include the right to "bring up children"); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-535 (1925) (stating that "those who nurture [the child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (stating that "it is cardinal with us that the custody, care and nurture of the child reside first in the parents" but recognizing that the state can limit parental authority when necessary to protect the child's health or protect the public from communicable disease); Wisconsin v. Yoder, 406 U.S. 205, 233-234 (1972) ("To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens."); Parham v. J.R., 442 U.S. 584, 602-603 (1979) (recognizing parents' broad authority over children and "'high duty' to recognize symptoms of illness and to seek and follow medical advice" and noting that the "state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized."); Troxel v. Granville, 530 U.S. 57, 65 (2000) ("the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court.").

For state courts recognizing a parent's duty under the common law to provide necessary medical care for a child, see Commonwealth v. Twitchell, 617 N.E.2d 609, 613-614 (Mass. 1993) (recognizing "common law duty to provide medical services for a child."); State v. Miranda, 794 A.2d 506, 516 (Conn. 2002) ("[i]t is undisputed that parents have a duty to provide . . . medical aid for their children . . . under the common law of Connecticut and other jurisdictions."), overruled on other grounds in later appeal, 878 A.2d 1118 (Conn. 2005); State v. Norman, 808 P.2d 1159,

1162 (Wash. Ct. App. 1991) (describing the parental common-law duty to provide medical care for a child as "sacred" and a "basic tenet of our society and law" and noting that "[f]or over a hundred years, it has been commonly accepted a parent has a duty to maintain his children, and this maintenance includes . . . *medical attendance* . . .") (emphasis in original); Faunteroy v. United States, 413 A.2d 1294, 1299 (D.C. App. 1980) (recognizing a "common law natural duty of parents to provide medical care for their minor dependent children" and noting that other state courts had held the same); Ex parte Lucas, 792 So. 2d 1169, 1170 (Ala. 2000) ("Alabama courts have recognized that, under common law, parents have a legal duty to secure medical treatment for their children."); People v. Pierson, 68 N.E. 243 (N.Y. 1903) (holding that parents, guardians, and persons acting *in loco parentis* have a common-law and statutory duty to provide necessary medical care for a child); see also Matter of Hofbauer, 47 N.Y.2d 648, 655 (N.Y. 1979) (recognizing that parents have a statutory "nondelegable affirmative duty to provide their child with adequate medical care"); People v. Latham, 137 Cal. Rptr. 3d 443, 449 (Cal. Ct. App. 2012) ("A parent owes his or her child a duty to obtain needed medical attention.").

For discussion of the justifications for parental authority to make medical decisions and the duty to provide necessary medical care, see 1 WILLIAM BLACKSTONE, COMMENTARIES *435 ("[t]he duty of parents to provide for the maintenance of their children is a principle of natural law."); JAMES KENT, COMMENTARIES ON AMERICAN LAW *159 (parents as the "natural guardians" of their children have a duty of "maintaining" their minor children); id. at 169 (discussing parents' duties and stating that "[t]he rights of parents result from their duties."); id. at *160 ("The obligation of parental duty is so well secured by the strength of natural affection, that it seldom requires to be enforced by human laws."); id. at 159 ("The wants and weaknesses of children render it necessary that some person maintain them, and the voice of nature has pointed out the parent as the most fit and proper person."); Parham v. J.R., 442 U.S. at 602 ("natural bonds of affection lead parents to act in the best interests of their children"); id. at 602 ("The law's concept of the family rests on the presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment"); id. at 603 (noting that "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments."); Commonwealth v. Nixon, 761 A.2d 1151, 1153 (Pa. 2000) ("parents have a duty to provide for their children which accompanies the right to raise children with minimal state encroachment."); Newmark v. Williams, 588 A.2d 1108, 1115-1116 (Del. 1991) (noting that "a child does not have the capacity to consent to an operation in most situations . . . [t]hus, the common law recognizes that the only party capable of authorizing medical treatment for a minor in "normal" circumstances is usually his parent or guardian); Commonwealth v. Konz, 450 A.2d 638, 641 (Pa. 1982) ("The inherent dependency of a child upon his parent to obtain medical aid, i.e., the incapacity of a child to evaluate his condition and summon aid by himself, supports imposition of such a duty upon the parent."); Commonwealth v. Barnhart, 497 A.2d 616, 624 (Pa. Super. Ct. 1985) ("Precisely because a child of two years and seven months cannot speak on his own behalf, the state has charged the parents with the affirmative duty of providing medical care to protect that child's

life."), cert. denied, 488 U.S. 817 (1988); In re Phillip B., 156 Cal. Rptr. 48, 51 (Cal. Ct. App. 1979) ("Inherent in the preference for parental autonomy is a commitment to diverse lifestyles, including the right of parents to raise their children as they think best.").

For scholarly articles discussing parental authority and duties, see Emily Buss, *"Parental" Rights*, 88 Va. L. REV. 635, 647 (2002) (arguing that a "legal system that shows strong deference to parents' child-rearing decisions serves children well" because "[p]arents' strong emotional attachment to their children and considerable knowledge of their particular needs make parents the child-specific experts most qualified to assess and pursue their children's best interests in most circumstances. In contrast, the state's knowledge of and commitment to any particular child is relatively thin."); Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995); James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371 (1994); Barbara Bennett Woodhouse, "*Who Owns the Child?":* Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992).

Comment b. Scope of parental authority. For cases recognizing parents' broad authority to make medical decisions for a child, see Parham v. J.R., 442 U.S. 584, 602-603 (1979) (recognizing parents' broad authority over children and "'high duty' to recognize symptoms of illness and to seek and follow medical advice"); Newmark v. Williams, 588 A.2d 1108, 1115-1116 (Del. 1991) (noting that courts "give great deference to parental decisions involving minor children."); In re Petra B., 265 Cal. Rptr. 342, 346 (Cal. Ct. App. 1989) ("Where parents fail to provide their children with adequate medical care, the state is justified to intervene. However, since the state should usually defer to the wishes of the parents, it has a serious burden of justification before abridging parental autonomy by substituting its judgment for that of the parents."); Custody of a Minor, 379 N.E.2d 1053, 1062 (Mass. 1978) (stating that the "court and others have sought to treat the exercise of parental prerogative with great deference," and noting courts' "reluctance to overturn parental objections to medical treatment."); Matter of Hofbauer, 47 N.Y.2d 648, 655 (N.Y. 1979) (holding that, although the State, as *parens patriae*, can intervene if a child's life or health is in danger, "greater deference must be accorded a parent's choice as to the mode of medical treatment to be undertaken and the physician selected to administer the same."); id. at 655, 656 (recognizing that the State "may intervene to ensure that a child's health or welfare is not being seriously jeopardized," but noting that a court cannot "assume the role of a surrogate parent and establish as the objective criteria with which to evaluate a parent's decision its own judgment as to the exact method or degree of medical treatment which should be provided."); Ruby v. Massey, 452 F. Supp. 361, 365 (D. Conn. 1978) (noting that a parent "may give lawful consent for [a doctor] to administer that medical or surgical treatment which, in the doctor's professional opinion, is necessary or advisable for the health of [the] child.").

For definitions of ordinary care, see, e.g., DEL. CODE ANN. tit. 31, § 5101(6) (2017) (defining "ordinary medical care" as "medical examination, medical treatment including surgical procedures and mental health treatment other than inpatient psychiatric hospitalization."); FLA. STAT. ANN. § 985.03(37) (West 2017) ("Ordinary medical care" means medical procedures that are administered or performed on a routine basis and include, but are not limited to, inoculations,

physical examinations, remedial treatment for minor illnesses and injuries, preventive services, medication management, chronic disease detection and treatment, and other medical procedures that are administered or performed on a routine basis and do not involve hospitalization, surgery, the use of general anesthesia, or the provision of psychotropic medications"); ILL. ADMIN. CODE tit. 89, § 327.2 (West 2017) (defining ordinary medical care as "medical procedures which are administered or performed on a routine basis and which do not involve hospitalization, surgery, or use of anesthesia and include, but are not limited to inoculations, physical examinations, and remedial treatment for minor illnesses and injuries."); OKLA. STAT. ANN. TIT. 10A, § 1-3-102 (West 2018) ("Routine and ordinary medical care and treatment" includes any necessary medical and dental examinations and treatment, medical screenings, clinical laboratory tests, blood testing, preventative care, health assessments, physical examinations, immunizations, contagious or infectious disease screenings or tests and care required for treatment of illness and injury, including x-rays, stitches and casts, or the provision of psychotropic medications . . ."); WYO. STAT. ANN. § 14-3-402(xviii) (West 2017) ("'Ordinary medical care' means medical, dental and vision examinations, routine medical, dental and vision treatment and emergency surgical procedures, but does not include nonemergency surgical procedures"); see also A. Rachel Camp, *A Mistreated Epidemic: State and Federal Failure to Adequately Regulate Psychotropic Medications Prescribed to Children in Foster Care*, 83 TEMP. L. REV. 369, 389 (2011) (stating that few states define "ordinary medical care," but it generally refers to care that is routine or usual).

For definitions of complementary and alternative care, see Kathi J. Kemper et al., *Holistic Pediatrics: A Research Agenda*, 103 PEDIATRICS 903, 903 (1999) (defining "alternative" care as "any health care remedy or system not generally accepted in modern biomedicine or therapies that are offered in place of or as substitutes for conventional therapies," and defining "complementary" care as "care provided in conjunction with conventional medical care."). For a discussion of the risks that CAM poses to children's health and suggesting legal reforms, see Kathleen M. Boozang, *CAM for Kids*, 1 HOUS. J. HEALTH L. & POL'Y 109 (2001).

For definitions of elective care, see ILL. ADMIN. CODE tit. 89, § 327.2 (West 2017) ("Elective medical treatment or surgical procedure" means major medical care, as defined in these rules, which may be delayed for 72 hours or more without jeopardizing the life, health, or safety of the patient or subjecting him to probable physical harm."); Walls v. United States, 582 F.3d 1358, 1366 n.10 (Fed. Cir. 2009) (noting that the Navy's Medical Department defines "elective care" as care that "could be performed at another time or place without jeopardizing the patient's life, limb, health, or well-being."); Rachel Roth, *Obstructing Justice: Prisons As Barriers to Medical Care for Pregnant Women*, 18 UCLA WOMEN'S L.J. 79, 93 n.66 (2010) (noting that the South Carolina Department of Corrections defines "elective" medical care as "a treatment or surgical procedure which is optional and does not require attention.").

For a case recognizing parents' authority to make medical decisions about elective care, see In re Marriage of Boldt, 176 P.3d 388 (Or. 2008). In *Boldt*, the custodial father sought to have his 12-year-old son circumcised over the objections of the noncustodial mother. The court stated that when parents agree, medical and religious decisions, such as the decision to circumcise a male

child, are "considered private family matters determined by the parents or between parents and child, without resort to the courts" and that "the authority of the custodial parent to make medical decisions for his or her child, including decisions involving *elective procedures* and decisions that may involve medical risks, is implicit in both our case law and Oregon statutes." Id. at 390, 393 (emphasis added).

For a case recognizing that a health-care provider generally only needs to obtain informed consent from one parent authorized to give consent, see Angeli v. Kluka, 190 So. 3d 700, 700-701 (Fla. Dist. Ct. App. 2016) (holding that when parents have equal custodial rights, "the consent of one parent to a non-emergency medical procedure for a minor child is sufficient to permit the health care provider to render such care or treatment . . . even when the health care provider allegedly knew or should have known that the other parent objected to the care or treatment."). See also In re Marriage of Boldt, 176 P.3d 388, 393 (Or. 2008) (upholding the authority of the custodial father sought to have his 12-year-old son circumcised over the objections of the noncustodial mother and stating that "the authority of the custodial parent to make medical decisions for his or her child . . . is implicit in both our case law and Oregon statutes."); Principles of the Law of Family Dissolution § 2.09 (American Law Inst. 2002) (providing that "(1) Unless otherwise resolved by agreement of the parents . . . the court should allocate responsibility for making significant life decisions on behalf of the child, including decisions regarding the child's . . . health care, to one parent or to two parents jointly, in accordance with the child's best interests . . .").

For an example of a statute authorizing a health care provider to treat a child upon consent of the parent, see OKLA. STAT. ANN. TIT. 10A, § 1-3-103 (West 2018) ("No physician or health care provider acting pursuant to consent or pursuant to court order authorizing treatment shall have any liability, civil or criminal, for acting pursuant to consent or authorization."); see also OKLA. STAT. ANN. TIT. 10A, § 1-3-101 (West 2018) ("Either parent or the court-appointed legal guardian of a child may authorize, in writing, any adult person into whose care the minor has been entrusted to consent to" medical treatment for the child.).

For a statute defining medical treatment and procedures, see ILL. ADMIN. CODE tit. 89, § 327.2 (West 2017) ("Medical treatment or procedure" means any medical or surgical procedure which is intended to alleviate, ameliorate, prevent or correct physical illness, injury, disability, or disfigurement. The term does not include psychological or psychiatric counseling, therapy, or treatment.")

For statutes describing the rights and responsibilities of a legal guardian, see DEL. CODE ANN. tit. 13, § 2302(10) (2016) ("'Guardian' means a nonparent or an agency charged with caring for a child during the child's minority."); ARIZ. REV. STAT. § 8-531(8) (2014) ("'Guardianship of the person' with respect to a minor means the duty and authority to make important decisions in matters affecting the minor including . . . [t]he authority to consent to . . . major medical, psychiatric and surgical treatment"); CONN. GEN. STAT. § 17a-1(12) (West 2018) ("'Guardian' means a person who has a judicially created relationship between a child or youth and such person that is intended to be permanent and self-sustaining as evidenced by the transfer to such person of

the following parental rights . . . the authority to make major decisions affecting the child's or youth's welfare, including . . . major medical, psychiatric or surgical treatment"); COLO. REV. STAT. § 19-1-103(60) (2017) ("'Guardianship of the person' means the duty and authority vested by court action to make major decisions affecting a child, including . . . the authority to consent to . . . medical or surgical treatment"); D.C. CODE § 16-2301(20) (2017) ("'guardianship of the person of a minor' means the duty and authority to make important decisions in matters having a permanent effect on the life and development of the minor, and concern with his general welfare. It includes . . . authority to consent to . . . major medical, surgical, or psychiatric treatment."); HAW. REV. STAT. ANN. § 571-2 (West 2017) (same); 705 ILL. COMP. STAT. 405/1-3(8) (2016) (same); IOWA CODE § 232.2(21) (2016) (same); N.H. REV. STAT. ANN. §§ 170-C:2(V) (2016) (same); UTAH CODE ANN. § 78A-6-105(17) (2016) (same); WIS. STAT. § 48.023 (2016) (same). But see MD. CODE ANN. FAM. LAW § 5-325(b) (2016) (authorizing court-appointed guardian to "make all decisions affecting the child's . . . medical, psychiatric, or surgical treatment" except that the guardian "may not place the child in an inpatient psychiatric facility" for more than 20 days "without express authorization of the juvenile court.").

A legal guardian may also be the child's legal custodian except when the court has granted custodial rights to another person or agency. See, e.g., COLO. REV. STAT. § 19-1-103(60) (2017) (providing that a guardian has "[t]he rights and responsibilities of legal custody when legal custody has not been vested in another person, agency, or institution."); 705 ILL. COMP. STAT. 405/1-3(8) (2016) (providing that a guardian has "the rights and responsibilities of legal custody except where legal custody has been vested in another person or agency"); ARIZ. REV. STAT. § 8-531(4), (8) (2014) (same); IOWA CODE § 232.2(21) (2016) (same); MD. CODE ANN. FAM. LAW § 5-325(b) (2016) (same); N.H. REV. STAT. ANN. § 170-C:2(V) (2016) (same); UTAH CODE ANN. § 78A-6-105(17) (2016) (same); WIS. STAT. § 48.023 (2016) (same).

Parents often petition courts to authorize organ or tissue donation by one sibling to another. Parental authority to consent to medical treatment for a child does not extend to nontherapeutic medical procedures, such as organ and tissue donation, that pose a substantial risk of serious harm to the child's health. See Bryan Shartle, *Proposed Legislation for Safely Regulating the Increasing Number of Living and Tissue Donations by Minors*, 61 LA. L. REV. 433 (2001); see also Wisconsin v. Yoder, 406 U.S. 205, 233-234 (1972) (parental powers can be subject to limitations "if it appears that parental decisions will jeopardize the health or safety of the child."). A parent lacks authority to consent to medical procedures that offer health benefits to a third party, including another child, but offer no health benefit to the donor child. Therefore, a guardian will be appointed in these cases to protect the minor's interests.

Reported organ-donation cases generally have involved children who are too young to give informed consent or incompetent adults with impaired mental capacities. When determining whether to authorize donation by a child, on parental petition, courts evaluate whether the donation is in the donor child's best interest and typically will approve organ or tissue donation from a child only if (1) it is necessary to save the life of a close family member, and (2) a parent (sometimes both parents) has provided informed consent. See In re Doe, 481 N.Y.S.2d 932 (N.Y. App. Div.

1984); In re Sidney Cowan, No. 180564 (Probate Court of Jefferson County, Ala. 2003). However, if the child refuses to consent to organ donation, the court will not authorize the donation regardless of the child's age. Uniform Anatomical Gift Act (2006), Sec. 7 http://www.uniformlaws.org/shared/docs/anatomical_gift/uaga_final_aug09.pdf (adopted by 37 states) ("Section 7 honors the autonomy of an individual whose body or part might otherwise be the subject of an anatomical gift by empowering the individual to make a refusal. There is no age limitation for an individual to sign a refusal. An individual of any age can do so.").

In Curran v. Bosze, 566 N.E.2d 1319 (Ill. 1990), the father of three-and-a-half-year-old twins sought an order compelling the twins, against the wishes of their mother, to donate bone marrow to their half-brother who suffered from leukemia. The court held that it was not in the best interests of the twins to undergo the procedure and refused to apply the substituted-judgment standard. Similarly, in In re Richardson, 284 So. 2d 185 (La. Ct. App. 1973), the court held that neither parent could consent to surgical removal of a child's kidney for donation to the child's older sister because the procedure was not immediately necessary to save the older sister's life and the loss of a kidney was not in the child's best interests. Some courts have allowed donations, however. In Hart v. Brown, 289 A.2d 386 (Conn. 1972), the court granted the parents' petition to authorize a kidney transplant from one seven-year-old twin to the other when the kidney transplant was necessary to save the life of one twin, the risks to both twins from the surgery were negligible, and the prognosis for good health post-surgery for both twins was excellent. In In re Sidney Cowan, No. 180564 (Probate Court of Jefferson County, Ala. 2003), the court authorized parental consent to skin harvesting of a six-year-old child for her badly burned identical twin sister, even though the surgical procedures would provide the donor child with no physical benefit and would cause her postoperative pain. See Samuel Tilden, *Ethical and Legal Aspects of Using an Identical Twin as a Skin Transplant Donor for Severely Burned Minor*, 31 AM. J.L. & MED. 87 (2005) (arguing that an incompetent child should not be used as a skin-transplant donor unless the transplant will save the recipient's life). See also Little v. Little, 576 S.W.2d 493, 500 (Tex. App. 1979) (concluding that trial court did not exceed its discretion in granting parents' petition to authorize mentally incompetent minor to donate kidney to her sibling "since there is strong evidence to the effect that she will receive substantial psychological benefits from such participation.").

Scholars have been critical of the application of the best-interest standard and substituted-judgment rule to determine whether a parent can consent to organ or tissue donations by a child. See Beth Schenberg, *Harvesting Organs From Minors and Incompetent Adults to Supply the Nation's Organ Drought: A Critical Review of the Substituted Judgment Doctrine and the Best Interest Standard*, 4 IND. HEALTH L. REV. 319 (2007) (suggesting that courts replace the substituted-judgment and best-interests doctrines with a more fact-centric approach that takes into account the nature of the incompetency and psychological effects on the donor and family); Jennifer Robbennolt, et al., *Advancing the Rights of Children and Adolescents to be Altruistic: Bone Marrow Donations by Minors*, 9 J.L. & HEALTH 213 (1994-1995) (arguing that substituted judgment should take into account empirical data about what a majority of persons would decide and that best interests should take into account more subjective factors such as compassion,

altruism, and courage); Charles Baron et al., *Live Organ and Tissue Transplants from Minor Donors in Massachusetts*, 55 B.U. L. REV. 159 (1975) (surveying Massachusetts's application of the best-interest rule, and suggesting several reforms—including representation of the child, further studies on the ability of minors to determine what is in their best interest, and a compensation system for minors harmed during the donation process). One author proposes a bright-line rule prohibiting tissue and organ donation from children below a certain age and creating a legislative standard to require the donor child's informed consent to proposed donations when the child reaches an age at which he or she can fully comprehend the risks involved. See Nicole Herbert, *Creating a Life to Save A Life: An Issue Inadequately Addressed by the Current Legal Framework Under Which Minors Are Permitted to Donate Tissue and Organs*, 17 S. CAL. INTERDISC. L.J. 337 (2008). But other scholars argue that there can be no justification for subjecting a healthy child to an unnecessary procedure to benefit another without a "definitive, non-speculative benefit for the donor." Robert Griner, *Live Organ Donations Between Siblings and the Best Interest Standard: Time for Stricter Judicial Intervention*, 10 GA. ST. U.L. REV. 589 (1994). Griner considers whether the mature-minor doctrine, see § 19.01, Consent to Treatment by Mature Minor, should be applied in such contexts but suggests that consent would seldom be voluntary given the pressure on the child to donate by family members. Id. at 611-612. Doriane Coleman argues that a healthy minor should be able to donate organs only if there is compelling factual evidence that the psychological benefits outweigh the physical injuries, but states that such evidence will "often be difficult, even impossible, to muster." Doriane Lambelet Coleman, *Good Question: An Exploration in Ethics* (2012), *available at* https://kenan.ethics.duke.edu/wp-content/uploads/2012/08/GQ-Coleman.pdf. See also Bryan Shartle, *Proposed Legislation for Safely Regulating the Increasing Number of Living and Tissue Donations by Minors*, 61 LA. L. REV. 433 (2001).

Studies have found conflicting psychological effects on donors, particularly kidney donors. See, e.g., Kristof Thys et al., *Could Minors Be Living Kidney Donors? A Systematic Review of Guidelines, Position Papers and Reports*, TRANSPLANT INTERNATIONAL (Apr. 8, 2013) (surveying scientific literature and finding that 27 studies endorsed an absolute prohibition, due to the decisionmaking capacity of children, parental involvement, and worries about psychological repercussions on the donor, and 12 studies supported kidney donations by children, in part relying on procedures being in place to ensure psychological benefits to the donor); Robert Eisendrath, Robert Guttman & Joseph Marry, *Psychologic Considerations in the Selection of Kidney Transplant Donors*, 129 SURG., GYNE. & OBSTET. 242, 245-248 (1969) (finding that donors often make the decision to donate without any deliberation); John P. Kemph, *Psychotherapy with Patients Receiving Kidney Transplant*, 124 AM. J. PSYCHIAT. 623 (1967). Some authors have focused on mature minors as donors, examining the psychological benefits. Dorothy M. Bernstein & Roberta Simmons, *The Adolescent Kidney Donor: The Right to Give*, 131 AM. J. PSYCHIAT. 1338, 1340 (1974). Scholars have addressed the issue of child donors. Charles H. Baron, Margot Botsford & Garrick F. Cole, *Live Organ and Tissue Transplants from Minor Donors in*

Massachusetts, 55 B.U. L. REV. 159 (1975) (suggesting that donations should be allowed as long as reforms—such as the appointment of a guardian ad litem—are adopted).

Illustration 5 is based on Hart v. Brown, 289 A.2d 386 (Conn. 1972).

For cases recognizing that judicial authorization is required before a parent may consent to sterilization of a child, see Parham v. J. R., 442 U.S. 584, 631 n.18 (U.S. 1979) (noting that "recent legal disputes involving the sterilization of children had led to the conclusion that parents are not permitted to authorize operations with such far-reaching consequences."); In re Debra B., 495 A.2d 781, 783 (Me. 1985) ("The duty of determining whether sterilization is in such a person's best interests falls on the court, and not on the person's parents or guardian. . . . Thus a judicial determination is necessary to ensure that the child's personal right is protected . . ."); Matter of Moe, 432 N.E.2d 712, 716-717 (Mass. 1982) ("Since sterilization is an extraordinary and highly intrusive form of medical treatment that irreversibly extinguishes the ward's fundamental right of procreative choice, we conclude that a guardian must obtain a proper judicial order for the procedure before he or she can validly consent to it. Guardians and parents, therefore, absent statutory or judicial authorization, cannot consent to the sterilization of a ward in their care or custody."); Matter of A. W., 637 P.2d 366, 370 (Colo. 1981) ("sterilization is a special case which requires more than parental consent. Rather than parents or guardians, a court, using uniform criteria, must be the ultimate arbiter on this matter."); Matter of Grady, 426 A.2d 467, 475 (N.J. 1981) ("we believe that an appropriate court must make the final determination whether consent to sterilization should be given on behalf of an incompetent individual. It must be the court's judgment, and not just the parents' good faith decision, that substitutes for the incompetent's consent"); Matter of C.D.M., 627 P.2d 607, 609 & n.3 (Alaska 1981) (noting that "due to the significance of the consequences involved" neither a parent or guardian can consent to sterilization of an incompetent child so "to avoid potential tort liability, doctors generally will not perform the necessary operation absent a court order authorizing the procedure."); A.L. v. G.R.H., 325 N.E.2d 501, 502 (Ind. App. 1975) (holding that "the common law does not invest parents with such power" to sterilize their children), cert. denied, 425 U.S. 936 (1976).

When a parent or guardian seeks a court order authorizing the sterilization of an incompetent minor, the minor must be represented by a guardian ad litem in an adversarial proceeding. See Matter of Guardianship of Hayes, 608 P.2d 635, 640 (Wash. 1980) (concluding that "in any proceedings to determine whether an order for sterilization should issue, the [incompetent] person must be represented . . . by a disinterested guardian ad litem."); In re Debra B., 495 A.2d 781 (Me. 1985); Matter of C.D.M., 627 P.2d 607 (Alaska 1981); Matter of A.W., 637 P.2d 366 (Colo. 1981); Matter of Grady, 426 A.2d 467 (N.J. 1981). States have set forth standards trial courts must follow before authorizing sterilization of an incompetent minor. Specifically, courts have stated that:

> The decision can only be made in a superior court proceeding in which (1) the incompetent individual is represented by a disinterested guardian ad litem, (2) the court has received independent advice based upon a comprehensive medical,

> psychological, and social evaluation of the individual, and (3) to the greatest extent possible, the court has elicited and taken into account the view of the incompetent individual.
>
> Within this framework, the judge must first find by clear, cogent and convincing evidence that the individual is (1) incapable of making his or her own decision about sterilization, and (2) unlikely to develop sufficiently to make an informed judgment about sterilization in the foreseeable future.
>
> Next, it must be proved by clear, cogent and convincing evidence that there is a need for contraception. The judge must find that the individual is (1) physically capable of procreation, and (2) likely to engage in sexual activity at the present or in the near future under circumstances likely to result in pregnancy, and must find in addition that (3) the nature and extent of the individual's disability, as determined by empirical evidence and not solely on the basis of standardized tests, renders him or her permanently incapable of caring for a child, even with reasonable assistance.
>
> Finally, there must be no alternatives to sterilization. The judge must find that by clear, cogent and convincing evidence (1) all less drastic contraceptive methods, including supervision, education and training, have been proved unworkable or inapplicable, and (2) the proposed method of sterilization entails the least invasion of the body of the individual. In addition, it must be shown by clear, cogent and convincing evidence that (3) the current state of scientific and medical knowledge does not suggest either (a) that a reversible sterilization procedure or other less drastic contraceptive method will shortly be available, or (b) that science is on the threshold of an advance in the treatment of the individual's disability.

Matter of Guardianship of Hayes, 608 P.2d at 640-641. See also In re Debra B., 495 A.2d 781 (Me. 1985); Matter of C.D.M., 627 P.2d 607 (Alaska 1981); Matter of A.W., 637 P.2d 366 (Colo. 1981); Matter of Grady, 426 A.2d 467 (N.J. 1981). Despite these procedural safeguards, judges have absolute immunity if they disregard them. Cf. Stump v. Sparkman, 435 U.S. 349 (1978) (holding that even if a judge's approval of a parent's petition to sterilize a child in an ex parte proceeding without a hearing or notice to the minor, or appointment of a guardian ad litem is erroneous as a matter of law, the judge retains absolute judicial immunity so long as he had jurisdiction to hear the petition).

Courts have recognized that "[t]here is a heavy presumption against sterilization of an individual incapable of informed consent" and held that "[t]his burden will be even harder to overcome in the case of a minor incompetent, whose youth may make it difficult or impossible to prove by clear, cogent and convincing evidence that he or she will never be capable of making an

informed judgment about sterilization or of caring for a child." Matter of Guardianship of Hayes, 608 P.2d at 640-641.

At least one court has recognized that physicians and hospitals who sterilize a child relying on the parent's consent without authorization from a court may be subject to liability. See Lake v. Arnold, 232 F.3d 360, 374 (3d Cir. 1999) (holding that statute of limitations did not bar federal civil-rights claim for violation of constitutional right to procreate brought by mentally disabled woman who had been sterilized with her parent's consent when she was a minor).

For cases recognizing that when parents seek authorization to have a child sterilized, the parents' interests "cannot be presumed to be identical to those of the child," see Matter of Guardianship of Hayes, 608 P.2d 635, 640 (Wash. 1980); In re Debra B., 495 A.2d 781 (Me. 1985); Matter of Grady, 426 A.2d 467, 482 (N.J. 1981). See also Matter of A.W., 637 P.2d 366, 370 (Colo. 1981) (stating that "[t]he inconvenience of caring for the incompetent child coupled with fears of sexual promiscuity or exploitation may lead parents to seek a solution which infringes their offspring's fundamental procreative rights").

Illustration 6 is based on Matter of A.W., 637 P.2d 366 (Colo. 1981).

There are no published opinions addressing parental authority to consent to nontherapeutic genital-normalizing surgery on an intersex child. However, in 2012, the adoptive parents of M.C., a boy who was born with male and female genitalia, brought suit on his behalf against the hospital that performed genital surgery on him when he was 16 months old to make his anatomy fit a female gender assignment. They also sued the South Carolina Department of Social Services, the child's legal guardian at the time, which consented to the surgery. The lawsuit alleged that defendants violated M.C.'s constitutional rights to due process by performing the surgery "without notice or a hearing to determine whether the procedure was in M.C.'s best interest" and that M.C. incurred medical expenses, impairment, and pain and suffering as a result of the surgery. Steven Nelson, *Parents of Intersex Child Sue Over "Unnecessary" Surgery*, U.S. NEWS, May 24, 2013. After four years of litigation, the plaintiffs entered into a $440,000 settlement with the hospital that performed the surgery. See Azeen Ghorayshi, *A Landmark Suit About an Intersex Baby's Genital Surgery Just Settled for $440,000*, BUZZFEED, July 27, 2017.

Since the 1960s, physicians have operated on intersex infants and children, relying on the parents' consent. Parents have consented to these medically unnecessary surgeries because they wanted the child to look "normal." However, in the last two decades, intersex adults and child advocates have spoken out about the physical and psychological harms caused by the surgeries. Many organizations and scholars have condemned the practice. For example, in 2013, the United Nations Special Rapporteur on Torture called on nations to ban genital-normalizing surgeries on children. That report found that "Children who are born with atypical sex characteristics are often subject to irreversible sex assignment, involuntary sterilization, involuntary genital normalizing surgery, performed without their informed consent, or that of their parents, 'in an attempt to fix their sex,' leaving them with permanent, irreversible infertility and causing severe mental suffering." UN General Assembly, Report of the Special Rapporteur on Torture, and Other Cruel, Inhuman, and Degrading Treatment, at 18 (2013) available at

http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf. In June 2017, three former U.S. Surgeons General issued a statement concluding that "evidence does show that the surgery itself can cause severe and irreversible physical harm and emotional distress" and recommending that "[c]osmetic genitoplasty should be deferred until children are old enough to voice their own view about whether to undergo the surgery." Joycelyn Elders, David Satcher, Richard Carmona, *Re-Thinking Genital Surgeries on Intersex Infants* (2017), available at http://www.palmcenter.org/wp-content/uploads/2017/06/Re-Thinking-Genital-Surgeries-1.pdf. A month later, Human Rights Watch, in collaboration with InterACT, an advocacy organization for intersex youth, issued a 160-page report describing the physical and psychological harms caused by medically unnecessary genital surgeries and urged for "a moratorium on all surgical procedures that seek to alter the gonads, genitals, or internal sex organs of children with atypical sex characteristics too young to participate in the decision, when those procedures both carry a meaningful risk of harm and can be safely deferred." See Human Rights Watch, *"I Want to Be Like Nature Made Me:" Medical Unnecessary Surgeries on intersex Children in the U.S.* (2017), available at https://www.hrw.org/sites/default/files/report_pdf/lgbtintersex0717_web_0.pdf. In February 2018, California state senator Scott Wiener proposed a resolution calling on medical professionals to protect intersex children from medically unnecessary genital surgeries. See 2017 California Senate Concurrent Resolution No. 110, California 2017-2018 Regular Session.

Given the documented harms resulting from unnecessary genital surgeries performed on intersex children who lack the capacity to consent and parents' reasons for consenting to these surgeries, the safeguards adopted in cases involving sterilization of an incompetent minor are necessary to protect intersex children. See Matter of Guardianship of Hayes, 608 P.2d at 640-641 (setting forth standards courts must apply before authorizing sterilization of an incompetent minor). While there are no published decisions addressing parental authority to consent to nontherapeutic genital surgeries, the substantial settlement in the M.C. litigation, the resolution pending in the California Senate, and the positions of the Special Rapporteur on Torture, former U.S. Surgeons Generals, and human-rights organizations suggest that parents do not have authority to consent to these surgeries absent judicial authorization.

For scholarly critiques of parental authority in cases involving genital normalizing surgeries, see Anne Tamar-Mattis, *Exceptions to the Rule: Curing the Law's Failure to Protect Intersex Infants*, 21 BERKELEY J. GENDER L. & JUST. 59 (2006) (discussing the physical and psychological harms of genital normalizing surgeries); Nancy Ehrenreich & Mark Barr, *Intersex Surgery, Female Genital Cutting, and the Selective Condemnation of "Cultural Practices,"* 40 HARV. C.R.-C.L. L. Rev. 71 (2005); Hazel Glenn Beh & Milton Diamond, *An Emerging Ethical and Medical Dilemma: Should Physicians Perform Sex Assignment Surgery on Infants With Ambiguous Genitalia*?, 7 MICH. J. GENDER & L. 1 (2000).

Illustration 7 is based on the M.C. lawsuit.

For federal and state criminal statutes prohibiting female genital cutting, see *Statutory Note on Female Genital Cutting*.

For discussion of the criminal prosecution of a doctor charged with performing genital cutting on young girls in violation of federal law, see Jacey Fortin, *Michigan Doctor is Accused of Genital Cutting of Two Girls*, N.Y. TIMES, April 13, 2017; Pam Belluk, *Michigan Case Adds U.S. Dimension to Debate on Genital Mutilation*, N.Y. TIMES, June 10, 2017. Although the federal statute prohibiting female cutting was enacted in 1996, this is the first prosecution under the statute. In 2013, Congress amended the statute to prohibit the practice of taking girls residing in the U.S. abroad for the purpose of performing the prohibited acts in another country. 18 U.S.C. § 116(d) ("Whoever knowingly transports from the United States and its territories a person in foreign commerce for the purpose of conduct with regard to that person that would be a violation of subsection (a) if the conduct occurred within the United States, or attempts to do so, shall be fined under this title or imprisoned not more than 5 years, or both.").

For discussion of the harms of female genital cutting, including psychological trauma, chronic infections, pain during menstruation and intercourse, and complications in pregnancy and childbirth, see American Academy of Pediatrics, *Ritual Genital Cutting of Female Minors*, 125 PEDIATRICS 1088 (2010). The U.S. has long recognized female genital cutting as a ground for asylum. See Mohammed v. Gonzales, 400 F.3d 785, 795 (9th Cir. 2005) (citing cases and holding that female genital cutting constitutes "persecution" for purposes of asylum).

Although many scholars have argued that circumcision of a male child is outside the scope of parental authority, see, e.g., J. S. Svoboda, P. W. Adler & R. S. Van Howe, *Circumcision Is Unethical and Unlawful*, 44 J.L. MED. & ETHICS 263 (2016); Kat Moller, *Ritual Male Circumcision and Parental Authority*, 8 JURISPRUDENCE 461 (2017), courts in the U.S. have recognized parental authority to consent to circumcision of a male child. For example, in In re Marriage of Boldt, 176 P.3d 388 (Or. 2008), the custodial father sought to have his 12-year-old son circumcised over the objections of the noncustodial mother. The court "conclude[d] that, although circumcision is an invasive medical procedure that results in permanent physical alteration of a body part and has attendant medical risks, the decision to have a male child circumcised for medical or religious reasons is one that is commonly and historically made by parents in the United States. We also conclude that the decision to circumcise a male child is one that generally falls within a custodial parent's authority." Id. at 394. At least one federal appellate court has held that state restrictions on a parent's authority to consent to circumcision of a male child are subject to strict scrutiny even though some practices have infected infant boys with herpes. See Central Rabbinical Congress of U.S. & Canada v. New York City Dept. of Health & Mental Hygiene, 763 F.3d 183 (2d Cir. 2014) (holding that city ordinance prohibiting direct oral suction as part of male circumcision procedure, a practice that is part of the religious ritual in circumcisions of Orthodox Jewish babies, unless a parent first signed a written consent warning that that such procedure "exposes an infant to the risk of transmission of herpes simplex virus infection, which may result in brain damage or death" is subject to strict scrutiny under the Free Exercise Clause). For discussion of the problem of herpes infections among Orthodox Jewish infant boys, see PAUL A. OFFIT, BAD FAITH: WHEN RELIGIOUS BELIEF UNDERMINES MODERN MEDICINE 68-73 (2015).

Challenges to statutes prohibiting genital cutting of a female child but not of a male child on equal protection grounds have been unsuccessful. See Fishbeck v. State of N.D., 115 F.3d 580 (8th Cir. 1997) (dismissing equal protection challenge on ground that plaintiffs lacked standing); Flatt ex rel. Flatt v. Kantak, 687 N.W.2d 208 (N.D. 2004) (same).

Despite courts' acceptance of parental authority to circumcise a male child, the medical and legal communities are divided. For example, the American Academy of Pediatrics (AAP) convened a Task Force to conduct a peer review of the studies on male circumcision and concluded that the health benefits of male infant circumcision outweigh the risks. See AAP, *Male Circumcision*, 130 Pediatrics e756 (2012). The AAP report noted that the health benefits included reduction in urinary-tract infections, transmission of certain sexually transmitted diseases, penile cancer, and HIV infection. The report further concluded that some of these benefits are lost and the risks increase if the procedure is deferred until the child can make the decision for himself. The American College of Obstetricians and Gynecologists has endorsed the AAP's position. The Center for Disease Control (CDC) has issued a similar statement and recommended that health-care providers inform parents about the benefits and risks of male infant circumcision. Although neither the AAP nor the CDC go as far as recommending male infant circumcision, they view the decision as one for a parent to make without judicial oversight.

Some medical providers, child advocates, and legal scholars vehemently disagree with the AAP's and CDC's position. See, e.g., J. S. Svoboda, P. W. Adler & R. S. Van Howe, *Circumcision Is Unethical and Unlawful*, 44 J.L. MED. & ETHICS 263 (2016). They argue that studies exaggerate the potential benefits of male infant circumcision and minimize the harm while disregarding the child's right to enjoy natural and unaltered sex organs. They further argue that male circumcision violates the child's human rights.

Although the scientific and legal communities are deeply divided on the question of whether the health benefits of male circumcision outweigh the risks, it is undisputed that there are *some* benefits. Thus, given the potential health benefits, this Section recognizes a parent's authority to consent to circumcision of a male child. In contrast, female genital cutting offers no health benefit. Consequently, a parent does not have authority to consent to such a procedure.

For scholarly sources discussing female genital cutting and male circumcision of children, see M. Brady, *Newborn Male Circumcision with Parental Consent, as Stated in the AAP Circumcision Policy Statement, Is Both Legal and Ethical*, 44 J.L. MED. & ETHICS 256 (2016) (defending parental authority to consent to circumcision of a male child); J. S. Svoboda, P. W. Adler & R. S. Van Howe, *Circumcision Is Unethical and Unlawful*, 44 J.L. MED. & ETHICS 263 (2016) (arguing that male circumcision is similar to female genital cutting and should be prohibited); Eric Rassbach, *Coming Soon to A Court Near You: Religious Male Circumcision*, 2016 U. ILL. L. REV. 1347, 1353 (2016) (discussing efforts to ban male circumcision in the U.S. and a recent decision in Germany holding that parents lack authority to consent to circumcision of a child because the procedure violates the child's right to bodily integrity); Pamela Laufer-Ukeles, *The Relational Rights of Children*, 48 CONN. L. REV. 741, 809 (2016) (noting that "[t]he issue of whether male infant circumcision violates children's rights to bodily integrity is increasingly an

issue of public debate"); Nancy Ehrenreich & Mark Barr, *Intersex Surgery, Female Genital Cutting, and the Selective Condemnation of "Cultural Practices,"* 40 HARV. C.R.-C.L. L. REV. 71 (2005).

As of July 2017, nine states and the District of Columbia prohibited mental-health professionals from engaging in efforts to change a child's sexual orientation and gender identity. See *Statutory Note on Conversion Therapy*. As of July 2017, legislation prohibiting mental-health professionals from engaging in efforts to change a child's sexual orientation or gender identity was pending in more than a dozen states. See id. Many municipalities have similar ordinances prohibiting such efforts. See id.

For cases rejecting constitutional challenges to statutes prohibiting conversion therapy on minors, see Pickup v. Brown, 740 F.3d 1208, 1236 (9th Cir. 2014) (concluding that parents do not have a fundamental right "to choose a specific type of provider for a specific medical or mental-health treatment that the state has reasonably deemed harmful."); King v. Governor of the State of New Jersey, 767 F.3d 216, 221 (3d Cir. 2014) (holding that licensed counselors lacked standing to assert that statute violated their minor clients' rights to free speech and free exercise of religion).

For scholarly discussion of the signaling function of bans on conversion therapy even though the laws do not apply to religious counselors, see Marie-Amélie George, *Expressive Ends: Understanding Conversion Therapy Bans*, 68 ALA. L. REV. 793 (2017).

For scholarly articles discussing the scope of parents' authority to make medical decisions for a child, see, e.g., Maxine Eichner, *Bad Medicine: Parents, the State, and the Charge of "Medical Child Abuse,"* 50 U.C. DAVIS L. REV. 205 (2016); Alicia Ouellette, *Shaping Parental Authority Over Children's Bodies*, 85 IND. L.J. 955 (2010); Jennifer L. Rosato, *Using Bioethics Discourse to Determine When Parents Should Make Health Care Decisions for Their Children: Is Deference Justified?*, 73 TEMP. L. REV. 1 (2000); Charles H. Baron, *Medicine and Human Rights: Emerging Substantive Standards and Procedural Protections for Medical Decision Making Within the American Family*, 17 FAM. L.Q. 1 (1983); John William McDermott, Note, *Growth Attenuation in the Profoundly Developmentally Disabled: A Therapeutic Option or A Socioeconomic Convenience?*, 32 SETON HALL LEGIS. J. 427 (2008).

Comment c. Duty to provide necessary care—serious harm or substantial risk of serious harm to the child. The U.S. Supreme Court has recognized the state's power to limit a parent's authority when necessary to prevent harm to the child's health. See Prince v. Massachusetts, 321 U.S. 158, 166-167 (1944) (holding that parents' authority to choose their child's religious upbringing does not include the "liberty to expose the community or the child to communicable disease or the latter to ill health or death."); *Parham*, 442 U.S. 584, 603 (1979) ("we have recognized that a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized."); Wisconsin v. Yoder, 406 U.S. 205, 233-234 (1972) ("the power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens."). The majority of states have

codified the duty to provide necessary medical care in civil child-welfare statutes and in criminal statutes. See § 3.26, Medical Neglect, Statutory Note on Civil Medical Neglect Statutes.

For cases recognizing a parent's duty to provide medical care when necessary to prevent serious harm or a substantial risk of serious harm to the child's health, see In re A.R., 175 Cal. Rptr. 3d 851, 855, 856 (Cal. Ct. App. 2014) (finding that the children did not receive "required medical care" and noting that the court has jurisdiction under the child-protection statute "when a parent's failure to provide his or her child with adequate . . . medical treatment causes or presents a substantial risk of serious physical harm"); In re Petra B., 265 Cal. Rptr. 342, 343 (Cal. Ct. App. 1989) (noting that the state can interfere with a parent's medical decision "only when a child's health is actually and seriously threatened"); In Interest of N.C., 551 N.W.2d 872, 874 (Iowa 1996) (affirming finding that state could intervene when parents' refusal to consent to inpatient treatment of child suffering from aggressive-type conduct disorder "threatened the physical and emotional well-being of himself" and others); New Jersey Div. of Youth & Family Servs. v. S.I., 97 A.3d 265 (N.J. Super. Ct. App. Div. 2014) (concluding that court intervention was not warranted because the legal custodian's refusal to consent to immediate mental-health evaluation for adolescent did not create a substantial risk of harm to the child); Matter of Hofbauer, 47 N.Y.2d 648, 655 (N.Y. 1979) (recognizing that the State "may intervene to ensure that a child's health or welfare is not being seriously jeopardized"); In re Dustin P., 57 A.D.3d 1480 (N.Y. App. Div. 2008) (parent's failure to provide psychiatric care to a child experiencing suicidal and homicidal ideations until after the child jumped out a window breached duty to provide care necessary to prevent impairment of the child's emotional condition); In re Sampson, 37 A.D.2d 668 (N.Y. App. Div. 1971) (court may override parent's authority to refuse to consent to surgery to correct child's severe facial disfigurement that was essential to the child's physical, mental, and emotional well-being even though there was "no immediate threat to [the child's] life nor [had] it seriously affected his general health"), aff'd, 278 N.E.2d 918 (N.Y. 1972) (per curiam). For a case applying a higher threshold than serious harm, see In re Green, 292 A.2d 387 (1972) (refusing to override the parents' decision unless the child's life was in imminent danger).

Courts routinely authorize blood transfusions for a child over the parent's objection when necessary to prevent serious harm to the child's health. See In re Guardianship of L.S. & H.S., 87 P.3d 521 (Nev. 2004); Matter of McCauley, 565 N.E.2d 411 (Mass. 1991); In re Sampson, 278 N.E.2d 918 (N.Y. 1972); State v. Perricone, 181 A.2d 751 (N.J. 1962); People ex rel. Wallace v. Labrenz, 104 N.E.2d 769 (Ill. 1952); Morrison v. State, 252 S.W.2d 97 (Mo. App. 1952). See also Jehovah's Witnesses in State of Wash. v. King County Hospital Unit No. 1, 278 F. Supp. 488, 503 (W.D. Wash. 1967), aff'd per curiam, 390 U.S. 598 (1968).

For cases and statutes defining serious harm, see Chapter 3, § 3.26, Medical Neglect, Comment *d*.

Illustration 8 is loosely based on In re M.R.R., 807 N.W.2d 158 (Iowa Ct. App. 2011) (Table) (unpublished).

Illustration 9 is loosely based on People in Interest of D. L. E., 645 P.2d 271 (Colo. 1982). However, in People in Interest of D. L. E., both the mother and the child refused the medication on religious grounds.

Illustration 10 draws from facts in both In re Dustin P., 57 A.D.3d 1480 (N.Y. App. Div. 2008) and In re Jaelin L., 126 A.D.3d 795 (N.Y. App. Div.), leave to appeal denied, 25 N.Y.3d 910 (2015).

For cases addressing when a court must defer to a parent's medical decision despite a substantial risk of serious harm to the child, see Newmark v. Williams, 588 A.2d 1108, 1117 (Del. 1991) ("The linchpin in all cases discussing the 'best interests of a child', when a parent refuses to authorize medical care, is an evaluation of the risk of the procedure compared to its potential success. . . . The State's interest in forcing a minor to undergo medical care diminishes as the risks of treatment increase and its benefits decrease."); Matter of Hofbauer, 47 N.Y.2d 648, 656 (N.Y. 1979) ("the court's inquiry should be whether the parents, once having sought accredited medical assistance and having been made aware of the seriousness of their child's affliction and the possibility of cure if a certain mode of treatment is undertaken, have provided for their child a treatment which is recommended by their physician and which has not been totally rejected by all responsible medical authority."); Custody of a Minor, 379 N.E.2d 1053 (Mass. 1978) (authorizing chemotherapy treatment for the child over the parents' objections where all the doctors agreed that this was the only effective treatment, the risks posed by the treatment were minimal, and the treatment's likelihood of success was high); State v. Perricone, 181 A.2d 751, 760 (N.J. 1962) (ordering blood transfusion over parents' objection but noting that "[h]ad there been a relevant and substantial difference of medical opinion about the efficacy of the proposed treatment or if there were substantial evidence that the treatment itself posed a significant danger to the infant's life, a strong argument could be made in favor" of allowing the parents to refuse the treatment); People ex rel. Wallace v. Labrenz, 104 N.E.2d 769, 773 (Ill. 1952) (ordering blood transfusion over parents' objection but noting the low risk associated with blood transfusions as distinguished from procedures that pose a substantial risk of harm to the child's life and thus require deference to the parent's decision); Matter of Matthews, 225 A.D.2d 142, 150 (N.Y. App. Div. 1996) (deferring to parent's refusal of feeding tube for malnourished mentally incompetent adult son where doctor supported continued oral feeding instead and noting that "in cases where there is a division of medical opinion as to the appropriate treatment for a life-threatening condition, deference should be given to the decision of the parents as long as the chosen course of treatment is a reasonable one within medical standards."); M.N. v. S. Baptist Hosp. of Florida, Inc., 648 So. 2d 769, 771 (Fla. Dist. Ct. App. 1994) (concluding that the state's interest in overriding the parent's medical decision for the child "diminishes as the severity of an affliction and the likelihood of death increase" and that in determining whether to order chemotherapy treatment and blood transfusions for eight-month-old child over a parent's objections, the court must consider the parents' "interest in making fundamental decisions regarding the care of their minor child, the state's interest in preserving human life, and the child's own welfare and best interests, in light of the severity of the child's illness, the likelihood . . . the proposed treatment will be effective, the child's chances of

survival with and without such treatment, and the invasiveness and nature of the treatment with regard to its effect on the child."); In re Willmann, 493 N.E.2d 1380 (Ohio Ct. App. 1986) (concluding that the court had authority to order surgery and chemotherapy for seven-year-old child over the parents' objections and noting that the child's doctors were all in agreement that the recommended treatment offered the only chance of survival); In re Phillip B., 156 Cal. Rptr. 48, 51 (Cal. Ct. App. 1979) (noting the significant risks posed by the state's recommended cardiac surgery and stating that "[s]everal relevant factors must be taken into consideration before a state insists upon medical treatment rejected by the parents. The state should examine the seriousness of the harm the child is suffering or the substantial likelihood that he will suffer serious harm; the evaluation for the treatment by the medical profession; the risks involved in medically treating the child; and the expressed preferences of the child."); Muhlenberg Hosp. v. Patterson, 320 A.2d 518, 521 (N.J. Super. Ct. Law Div. 1974) (ordering blood transfusion for the child over the parents' objections but noting that if the transfusion posed "a significant danger to the infant, the parents' wishes would be respected."). See also A.D.H. v. State Dep't of Human Res., 640 So. 2d 969, 971 (Ala. Civ. App. 1994) (ordering HIV treatment for a child over the mother's objection because the "mother's adamant belief at trial that her child was not infected with HIV leads us to conclude that she was incapable of making a well-reasoned, rational decision regarding treatment that was in the best interests of her child.").

For statutes providing that the court must defer to a parent's medical decision when doctors disagree or when the treatment that the parents reject poses significant risks to the child's health and offers limited benefits, see CA. WELF. & INST. § 300(b)(1) (West 2017) ("Whenever it is alleged that a child comes within the jurisdiction of the court on the basis of the parent's or guardian's willful failure to provide adequate medical treatment or specific decision to provide spiritual treatment through prayer, the court shall give deference to the parent's or guardian's medical treatment, nontreatment, or spiritual treatment through prayer alone . . . and shall not assume jurisdiction unless necessary to protect the child from suffering serious physical harm or illness. In making its determination, the court shall consider (1) the nature of the treatment proposed by the parent or guardian, (2) the risks to the child posed by the course of treatment or nontreatment proposed by the parent or guardian, (3) the risk, if any, of the course of treatment being proposed by the petitioning agency, and (4) the likely success of the courses of treatment or nontreatment proposed by the parent or guardian and agency."); FLA. STAT. Ann. § 39.01(42) (West 2017) ("Medical neglect does not occur if the parent or legal guardian of the child has made reasonable attempts to obtain necessary health care services or the immediate health condition giving rise to the allegation of neglect is a known and expected complication of the child's diagnosis or treatment and: (a) The recommended care offers limited net benefit to the child and the morbidity or other side effects of the treatment may be considered to be greater than the anticipated benefit; or (b) The parent or legal guardian received conflicting medical recommendations for treatment from multiple practitioners and did not follow all recommendations."); UTAH CODE ANN. § 78A-6-105(35)(d) (West 2017) ("a health care decision made for a child by the child's parent or guardian does not constitute neglect unless the state or

other party to the proceeding shows, by clear and convincing evidence, that the health care decision is not reasonable and informed. (ii) Nothing in Subsection (35)(d)(i) may prohibit a parent or guardian from exercising the right to obtain a second health care opinion and from pursuing care and treatment pursuant to the second health care opinion . . . .").

For cases recognizing that a medical professional is not liable for malpractice if he or she complies with an acceptable method of treatment, even if it is only practiced by a minority of physicians, see Borja v. Phoenix Gen. Hosp., Inc., 727 P.2d 355, 357 (Ariz. Ct. App. 1986) ("a doctor does not commit malpractice simply because he employs a method of diagnosis or a course of treatment some doctors do not find efficacious. So long as a respectable minority of physicians approve the disputed technique and so long as the defending doctor properly employed that technique, he has not fallen below the standard of care."); Hood v. Phillips, 537 S.W.2d 291, 294 (Tex. Civ. App. 1976), writ granted (Sept. 29, 1976), aff'd, 554 S.W.2d 160 (Tex. 1977) ("a physician is not guilty of malpractice where the method of treatment used is supported by a respectable minority of physicians, as long as the physician has adhered to the acceptable procedures of administering the treatment as espoused by the minority."); Baldor v. Rogers, 81 So.2d 658, 660 (Fla. 1954) (en banc) ("If the treatment used is approved by a "respectable minority of the medical profession" that would relieve the defendant of the charge of malpractice. The doctor is obligated only to use reasonable skill and he fulfills his obligation if he uses methods approved by others of the profession who are reasonably skilled."); Dahl v. Wagner, 151 P. 1079, 1080 (Wash. 1915) ("It has been the uniform holding of this court that where doctors of equal skill and learning, being in no way impeached or discredited, disagree in opinion upon a given state of facts, the courts cannot hold a defendant in a malpractice suit to the theory of the one to the exclusion of the other. . . . It is enough if the treatment employed 'have the approval of at least a respectable minority of the medical profession who recognized it as a proper method of treatment.'"). Cf. Jones v. Chidester, 610 A.2d 964, 969 (Pa. 1992) ("We, therefore, provide the following as a correct statement of the law: Where competent medical authority is divided, a physician will not be held responsible if in the exercise of his judgment he followed a course of treatment advocated by a considerable number of recognized and respected professionals in his given area of expertise. In recognizing this doctrine, we do not attempt to place a numerical certainty on what constitutes a "considerable number." The burden of proving that there are two schools of thought falls to the defendant. The burden, however, should not prove burdensome. The proper use of expert witnesses should supply the answers.").

Illustration 11 is based on the medical abuse case involving Justina Pelletier, discussed in Maxine Eichner, *Bad Medicine: Parents, the State, and the Charge of "Medical Child Abuse*," 50 U.C. DAVIS L. REV. 205 (2016).

Illustration 12 is loosely based on Newmark v. Williams, 588 A.2d 1108 (Del. 1991), but the facts have been changed to demonstrate that the treatment's likelihood of success was unacceptably low when compared to the potential risks and likely side effects.

Illustration 13 is based on Matter of Cabrera, 552 A.2d 1114 (Pa. Super. Ct. 1989).

For cases discussing parental authority to withdraw or withhold life-sustaining treatment from a child, see In re Doe, 418 S.E.2d 3, 6 (Ga. 1992) (holding that where "it was apparent that the life support system was prolonging [the child's] death, rather than her life. . . . [t]here was no state interest in maintaining life support systems" and "those legally responsible for [the child] could have refused treatment on her behalf without seeking prior judicial approval."). However, the court noted that although "judicial intervention need not be solicited as a matter of course . . . [i]n cases where doubt exists, or there is a lack of concurrence among the family, physicians, and the hospital, or if an affected party simply desires a judicial order, then the court must be available to consider the matter."); In re Rosebush, 491 N.W.2d 633, 641 (Mich. Ct. App. 1992) (holding that parental authority to make medical treatment decisions for a child includes the authority to make decisions to withdraw and withhold life-sustaining treatment from 12-year-old child in a persistent vegetative state, but recognizing that the state may intervene when necessary to protect the child's interests or when the parties disagree on the best course of treatment and cautioning that in most cases, these decisions should be made in the clinical setting without resort to the courts); In re Guardianship of Barry, 445 So. 2d 365, 372 (Fla. Dist. Ct. App. 1984) (declining the state's request of "judicial review before life support can be withheld from a non brain-dead child" because "decisions of this character have traditionally been made within the privacy of the family relationship based on competent medical advice and consultation by the family with their religious advisors, if that be their persuasion."); In re AB, 196 Misc.2d 940, 960 (N.Y. Sup. Ct. 2003) ("Absent extraordinary circumstances such as incapacity, conflict of interest, or disagreement between parents, a parent of a minor child with an established diagnosis of persistent vegetative state should have the right to decide whether to terminate life support in the best interest of the child, without the necessity of judicial intervention. While the courts are always available to assist if there is a disagreement or question of abuse, the decision to end the dying process of a minor child is a personal decision for the parents, in consultation with the child's medical providers, as they bear the legal, moral and ethical responsibility for their child."). Cf. Montalvo v. Borkovec, 647 N.W.2d 413, 419 (Wis. Ct. App. 2002) (citing Wisconsin Supreme Court's holding that "withholding or withdrawing life-sustaining medical treatment is not in the best interests of any patient who is not in a persistent vegetative state" and concluding that "in Wisconsin, in the absence of a persistent vegetative state, the right of a parent to withhold life-sustaining treatment from a child does not exist.").

For statutes addressing parental authority to make decisions about life-sustaining treatment for a child under certain circumstances, see, e.g., N.Y. PUB. HEALTH LAW §§ 2994-d.5; 2994-e (McKinney) (effective May 28, 2018) ("The parent or guardian of a minor patient shall have the authority to make decisions about life-sustaining treatment, including decisions to withhold or withdraw such treatment" only if "(a)(i)Treatment would be an extraordinary burden to the patient and an attending physician or attending nurse practitioner determines, with the independent concurrence of another physician or nurse practitioner, that, to a reasonable degree of medical certainty and in accord with accepted medical standards, (A) the patient has an illness or injury which can be expected to cause death within six months, whether or not treatment is provided; or

(B) the patient is permanently unconscious; or (ii) The provision of treatment would involve such pain, suffering or other burden that it would reasonably be deemed inhumane or extraordinarily burdensome under the circumstances and the patient has an irreversible or incurable condition, as determined by an attending physician or attending nurse practitioner with the independent concurrence of another physician or nurse practitioner to a reasonable degree of medical certainty and in accord with accepted medical standards."); W. VA. CODE ANN. § 16-30C-6(d) (West 2018) (providing that "[a] parent may consent to a do-not-resuscitate order for his or her minor child, provided that a second physician who has examined the child concurs with the opinion of the attending physician that the provision of cardiopulmonary resuscitation would be contrary to accepted medical standards.").

A parent may not consent to withdrawal of life-sustaining treatment over the objections of a mature minor. See N.Y. PUB. HEALTH LAW § 2994-e (McKinney) (effective May 28, 2018) ("(b) An attending physician or attending nurse practitioner, in consultation with a minor's parent or guardian, shall determine whether a minor patient has decision-making capacity for a decision to withhold or withdraw life-sustaining treatment. If the minor has such capacity, a parent's or guardian's decision to withhold or withdraw life sustaining treatment for the minor may not be implemented without the minor's consent."). Other states have similar safeguards. For example, Louisiana law provides that a parent may not consent to withdraw or withhold life-sustaining treatment from a minor if the minor or other parent objects. See LA. STAT. ANN. § 40:1151.5 (West 2017). West Virginia requires the minor's consent to a do-not-resuscitate, or DNR, order if the minor is at least 16 years old and the attending physician determines that the minor has the maturity to understand the effect of a DNR. See W. VA. CODE ANN. § 16-30C-6 (West 2018).

For a case recognizing that a health-care provider may not withdraw life-sustaining treatment over the objections of a parent even if another parent has consented, see In re Doe, 418 S.E.2d 3, 7 (Ga. 1992) (stating that "[w]here two parents have legal custody of a child, each parent shares equal decision-making responsibility for that child" and interpreting statute allowing a patient or parent to revoke consent to an order not to resuscitate to mean that "One parent may consent. If there is no second parent, if the other parent is not present, or if the other parent simply prefers not to participate in the decision, the consent of one parent to a DNR order is legally sufficient . . . . However, if there is a second *custodial* parent who disagrees with the decision to forego cardiopulmonary resuscitation, the second parent may revoke consent . . . .").

For a statute indicating that a health-care provider may not withdraw life-sustaining treatment from a child over the objections of a parent even if another parent has consented, see N.Y. PUB. HEALTH LAW § 2994-e (McKinney) (effective May 28, 2018) ("(c) Where a parent or guardian of a minor patient has made a decision to withhold or withdraw life-sustaining treatment and an attending physician or attending nurse practitioner has reason to believe that the minor patient has a parent or guardian who has not been informed of the decision, including a non-custodial parent or guardian, an attending physician, attending nurse practitioner or someone acting on his or her behalf, shall make reasonable efforts to determine if the uninformed parent or

guardian has maintained substantial and continuous contact with the minor and, if so, shall make diligent efforts to notify that parent or guardian prior to implementing the decision.").

For cases recognizing that a health-care provider seeking to withhold or withdraw life-sustaining treatment over a parent's objection must obtain judicial authorization, see Rideout v. Hershey Med. Ctr., 30 Pa. D. & C.4th 57, 84 (Com. Pl. 1995) (holding that parents have a constitutionally protected privacy interest in making important decisions on behalf of their children, including "the right to assert their child's right to life" and noting that the hospital's "decision to unilaterally withdraw life support without the benefit of court intervention was made in clear contravention to the overwhelming majority of case law at that time which stressed the need for judicial intervention in cases where there was disagreement between the parties."); Velez v. Bethune, 466 S.E.2d 627, 629 (Ga. Ct. App. 1995) (holding that allegations that provider who withdrew life-support measures from premature newborn without the parents' consent were sufficient to state a claim for wrongful death because a physician has "no right to decide, unilaterally, to discontinue medical treatment even if . . . the child was terminally ill and in the process of dying. That decision must be made with the consent of the parents."). See generally Matter of Baby K, 16 F.3d 590, 598 (4th Cir. 1994). But see Hudson v. Texas Children's Hosp., 177 S.W.3d 232, 238 (Tex. App. 2005) (upholding health-care provider's decision to withdraw life-sustaining treatment over the parent's objection based on state's medical-futility statute) (discussed in Patrick Moore, *An End-of-Life Quandary in Need of A Statutory Response: When Patients Demand Life-Sustaining Treatment That Physicians Are Unwilling to Provide*, 48 B.C. L. REV. 433 (2007).

Courts deciding whether to authorize the withdrawal or withholding of life-sustaining treatment from a minors have considered a number of factors, including but not limited to:

> (1) the child's present levels of physical, sensory, emotional and cognitive functioning; (2) the quality of life, life expectancy and prognosis for recovery with and without treatment, including the futility of continued treatment; (3) the various treatment options, and the risks, side effects, and benefits of each; (4) the nature and degree of physical pain or suffering resulting from the medical condition; (5) whether the medical treatment being provided is causing or may cause pain, suffering, or serious complications; (6) the pain or suffering to the child if the medical treatment is withdrawn; (7) whether any particular treatment would be proportionate or disproportionate in terms of the benefits to be gained by the child versus the burdens caused to the child; (8) the likelihood that pain or suffering resulting from withholding or withdrawal of treatment could be avoided or minimized; (9) the degree of humiliation, dependence and loss of dignity resulting from the condition and treatment; (10) the opinions of the family, the reasons behind those opinions, and the reasons why the family either has no opinion or cannot agree on a course of treatment; (11) the motivations of the family in

advocating a particular course of treatment; and (12) the child's preference, if it can be ascertained, for treatment.

In re Christopher I., 106 Cal. App. 4th 533, 551 (2003), as modified on denial of reh'g (Mar. 10, 2003). Other courts have considered similar factors. See, e.g., In re Rosebush, 491 N.W.2d at 640 (providing "nonexclusive list of the factors which should be considered" when determining whether the withholding of life-sustaining treatment is in the child's best interests including "evidence about the patient's present level of physical, sensory, emotional, and cognitive functioning; the degree of physical pain resulting from the medical condition, treatment, and termination of the treatment, respectively; the degree of humiliation, dependence, and loss of dignity probably resulting from the condition and treatment; the life expectancy and prognosis for recovery with and without treatment; the various treatment options; and the risks, side effects, and benefits of each of those options." In re AB, 196 Misc.2d 940, 960 (N.Y. Sup. Ct. 2003); In re Truselo, 846 A.2d 256, 272 (Del. Fam. Ct. 2000); In re K.I., 735 A.2d 448, 465 (D.C. Ct. App. 1999). Although courts have noted that "where a patient was formerly competent or is a minor of mature judgment—the substituted judgment standard is an appropriate test," in cases involving children who have never had decisionmaking capacity, the best interest standard must guide the decisionmaker. In re Rosebush, 491 N.W.2d at 639.

For courts requiring that party seeking an order authorizing the withdrawal or withhold life-sustaining treatment from the child prove that such an order is in the child's best interests by clear and convincing evidence, see In re Christopher I., 106 Cal. App. 4th 533; In re Gianelli, 834 N.Y.S.2d 623 (N.Y. Sup. Ct. 2007); In re AB, 196 Misc.2d 940; In re Truselo, 846 A.2d 256; In re K.I., 735 A.2d 448.

Illustration 14 is based on In re Gianelli, 834 N.Y.S.2d 623, 625 (N.Y. Sup. Ct. 2007).

Comment d. Duty to provide necessary care—substantial risk of serious harm to others. Courts have unanimously upheld compulsory child-vaccination laws against federal and state constitutional challenges. See, e.g., Zucht v. King, 260 U.S. 174 (1922) (rejecting equal protection and due process challenge to ordinance that prohibited a child from attending school without proof of vaccination even though there was no threat of an epidemic); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (rejecting constitutional challenge to Massachusetts's compulsory vaccination law and holding that mandatory vaccination is within the state's police power); Nikolao v. Lyon, 875 F.3d 310, 316 (6th Cir. 2017) (holding that although Michigan law provides a statutory exemption, there is no federal constitutional right to a religious exemption from vaccination); Phillips v. City of New York, 775 F.3d 538, 543 (2d Cir. 2015), cert. denied, 136 S. Ct. 104 (2015) (rejecting due-process and free-exercise challenge to compulsory vaccination law and stating that "New York could constitutionally require that all children be vaccinated in order to attend public school. New York law goes beyond what the Constitution requires by allowing an exemption for parents with genuine and sincere religious beliefs."); McCarthy v. Boozman, 212 F. Supp. 2d 945, 948 (W.D. Ark. 2002) ("The constitutional right to freely practice one's religion does not provide an exemption for parents seeking to avoid compulsory immunization for their school-aged

children."); Caviezel v. Great Neck Pub. Sch., 739 F. Supp. 2d 273, 285 (E.D.N.Y. 2010) ("the free exercise clause of the First Amendment does not provide a right for religious objectors to be exempt from New York's compulsory inoculation law."), aff'd, 500 F. App'x 16 (2d Cir. 2012), cert. denied 133 S. Ct. 1997 (2013); Workman v. Mingo Cty. Bd. of Educ., 419 F. App'x 348 (4th Cir. 2011) (collecting cases and holding that the state has a compelling interest in preventing the spread of communicable diseases and thus, it need not provide a religious exemption from compulsory vaccination even when there is no threat of an epidemic); Davis v. State, 294 Md. 370, 378-379 (Md. 1982) ("a state may adopt a program of compulsory immunization for school-aged children" without providing a religious exemption.); State v. Drew, 89 N.H. 54, 57 (N.H. 1937); Syska v. Montgomery Cty. Bd. of Educ., 45 Md. App. 626, 632-634 (Md. Ct. Spec. App. 1980) (mandatory vaccination law did not violate free-exercise rights because appellant's objections were based on philosophical beliefs, and law does not violate Fourteenth Amendment because the State has a right to protect the public health); Kleid v. Board of Educ., 406 F. Supp. 902, 905-906 (W.D. Ky. 1976) (mandatory immunization law does not violate the Free Exercise Clause of the Constitution because the law served a primarily secular purpose and no particular religion received a disproportionate benefit); Hanzel v. Arter, 625 F. Supp. 1259, 1265-1266 (S.D. Ohio 1985) (the State's exercise of its discretion in determining who received a good-cause exemption was rational and, therefore, did not violate the plaintiff's equal-protection rights). For scholarly discussion of the constitutionality of compulsory vaccination laws, see Erwin Chemerinsky & Michele Goodwin, *Compulsory Vaccination Laws Are Constitutional*, 110 NW. U. L. REV. 589, 591 (2016).

Although a parent does not have a constitutional right to refuse to vaccinate a child, every state, except California, Mississippi, and West Virginia, grants a child an exemption from compulsory vaccination based on the religious beliefs of the parent, and in some states, the religious beliefs of the child. A significant minority of states also provide exemptions from compulsory vaccination laws based on philosophical beliefs. These exemptions do not apply when the failure to vaccinate the child creates a substantial risk of serious harm to the public health. For example, in the event of an outbreak of a communicable disease, the state may order the child to be vaccinated over the parent's religious or philosophical objection or to be excluded from school.

For states providing exemptions from compulsory vaccination based on religious or philosophical beliefs, see Statutory Note on Compulsory Vaccination.

Two states recently repealed their religious or philosophical exemptions. See 2015 California Senate Bill No. 277, California 2015-2016 Regular Session (repealing religious and philosophical exemptions); VT Legis 37 (2015), 2015 Vermont Laws No. 37 (H. 98) (repealing philosophical exemption). California repealed its exemption in response to the Disneyland measles outbreak in 2015 that began in the theme park and resulted in 125 confirmed cases of measles across seven other states and two other countries. See Soumya Karlamangla & Rong-Gong Lin II, *Vaccination Rate Jumps in California After Tougher Inoculation Law*, L.A. TIMES, Apr. 13, 2017. At least one epidemiological study linked the Disneyland outbreak to parents who declined to vaccinate their children. See Karen Kaplan, *Vaccine Refusal Helped Fuel Disneyland Measles Outbreak, Study Says*, L.A. TIMES, Mar. 16, 2015. For discussion of Vermont's decision to repeal

its philosophical exemption, see Michael Specter, *Vermont Says No to the Anti-Vaccine Movement*, THE NEW YORKER, May 29, 2015. For comprehensive discussion of the myriad reasons parents refuse to vaccinate their children, the risks to public health of nonvaccination, the statutory exemptions to mandatory vaccination laws, and the legal tools to promote compliance with vaccination mandates), see Dorit Rubinstein Reiss & Lois A. Weithorn, *Responding to the Childhood Vaccination Crisis: Legal Frameworks and Tools in the Context of Parental Vaccine Refusal*, 63 Buff. L. Rev. 881, 952 (2015).

For statutes providing that religious or philosophical exemptions do not apply in the event of an outbreak of a communicable disease or threat to public health, see, e.g., ALA. CODE § 16-30-3(1) (West 2016) (providing that exemption applies "In the absence of an epidemic or immediate threat thereof"); IOWA CODE ANN. § 139A.8 (West 2016) ("The exemptions under this subsection do not apply in times of emergency or epidemic . . ."); GA. CODE ANN. § 20-2-771 (West 2016) ("the immunization may be required in cases when such disease is in epidemic stages."); HAW. REV. STAT. ANN. § 325-34 (West 2016) ("no objection shall be recognized when, in the opinion of the director of health, there is danger of an epidemic from any communicable disease."); KY. REV. STAT. ANN. § 214.036 (West 2016) ("in the event of an epidemic in a given area, the Cabinet for Health and Family Services may, by emergency regulation, require the immunization of all persons within the area of epidemic, against the disease responsible for such epidemic."); MD. CODE ANN., HEALTH-GEN. § 18-403(a)(1)-(2) (West 2016) (providing exemption "Unless the Secretary declares an emergency or disease epidemic"); MASS. GEN. LAWS ANN. CH. 76, § 15 (West 2016) (providing exemption "In the absence of an emergency or epidemic"); N.J. STAT. ANN. § 26:1A-9.1 (West 2016) (providing that "exemption may be suspended by the State Commissioner of Health during the existence of an emergency"); TENN. CODE ANN. § 37-10-402 (West 2016) (authorizing exemption "In the absence of an epidemic or immediate threat thereof"); TEX. EDUC. CODE ANN. § 38.001 (West 2016) ("A person who has not received the immunizations required by this section for reasons of conscience, including because of the person's religious beliefs, may be excluded from school in times of emergency or epidemic declared by the commissioner of public health."); VA. CODE ANN. § 32.1-47 (West 2016) ("Upon the identification of an outbreak, potential epidemic or epidemic of a vaccine-preventable disease in a public or private school, the Commissioner shall have the authority to require the exclusion from such school of all children who are not immunized against that disease.").

A significant minority of states have enacted Religious Freedom Restoration Acts ("RFRA") which provide that a state may not burden the exercise of religion except when necessary to serve a compelling state interest. Protecting the public from communicable diseases is a compelling state interest. Thus, as Professor Douglas Laycock has argued, any challenge to a vaccination requirement under a state RFRA would fail. See Douglas Laycock, *Religious Liberty, Health Care, and Culture Wars*, *in* LAW, RELIGION, AND HEALTH IN THE UNITED STATES 21 (Holly Fernandez Lynch et al., eds., Cambridge 2017); see also Dina Nathanson, *Herd Protection v. Vaccine Abstention: Potential Conflict Between School Vaccine Requirements and State Religious Freedom Restoration Acts*, 42 Am. J.L. & Med. 621, 639 (2016) (concluding that "[t]he probability

of someone bringing a RFRA claim to obtain a vaccine exemption seems unlikely."). For a list of states with Religious Freedom Restoration Acts, see Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 845 n.26 (2014) (listing statutes).

Comment e. Religious beliefs. See Chapter 3, § 3.26, Medical Neglect, Comment *i* and the Reporters' Note thereto.

Comment f. Who is obligated to provide necessary medical care? For cases recognizing a parent's duty to provide necessary medical care for the child, see Comment *b* and the Reporters' Note thereto.

For cases recognizing that this duty extends to a parent who does not reside with the child, see State v. Evans, 492 N.W.2d 141, 146 (Wis. 1992) (affirming conviction for criminal neglect against nonresident father who left seriously ill child with the custodial mother even though father "knew or reasonably should have known that [the mother] could not be trusted to provide [the child] with timely medical care"); State v. Mahurin, 799 S.W.2d 840, 844 (Mo. 1990) (noting that father was "obligated to see to his children's health and welfare" even if he did not reside with them); In re A.R., 175 Cal. Rptr. 3d 851, 856 (Cal. Ct. App. 2014) (holding that nonresident mother had a duty of support that includes medical care and that her failure to provide support may have contributed to the custodial father's failure to provide dental care "that caused or posed a substantial risk of serious physical harm to the girls"). See also CAL. PENAL CODE § 270 (West 2017) (providing that a parent is not relieved of criminal liability for failure to provide the child with medical care "merely because the other parent . . . is legally entitled to the custody of such child.").

For statutes defining a legal guardian and the guardian's rights and duties, see Reporters' Note to Comment *b*.

For examples of statutes defining a custodian and the duties of a custodian, see ARIZ. REV. STAT. §§ 8-531(4) ("'Custodian' means a person, other than a parent or legal guardian, who stands in loco parentis to the child or a person to whom legal custody of the child has been given by order of a court of competent jurisdiction."); ARK. CODE ANN. § 9-27-303(14)(A) (West) ("'Custodian' means a person other than a parent or legal guardian who stands in loco parentis to the juvenile or a person, agency, or institution to whom a court of competent jurisdiction has given custody of a juvenile by court order."); COLO. REV. STAT. ANN. § 19-1-103(35), (73)(a) (West) ("'Custodian' means a person who has been providing shelter, food, clothing, and other care for a child in the same fashion as a parent would, whether or not by order of court" and providing that legal custody includes the "duty to provide . . . ordinary medical care"); D.C. CODE §§ 16-2301(12), (20), (21) (2016) ("'custodian' means a person or agency, other than a parent or legal guardian . . . to whom the legal custody of a child has been granted by the order of a court [or] who is acting in loco parentis" and providing that legal custody includes the responsibility to provide the minor with . . . ordinary medical care."); FLA. STAT. ANN. § 39.01(34) (2016) ("'Legal custody' means a legal status created by a court which vests in a custodian of the person or guardian, whether an agency or an individual, the right to have physical custody of the child and the right and duty to . . . provide him or her with . . . ordinary medical, dental, psychiatric, and psychological care.");

HAW. REV. STAT. ANN. § 571-2 ("'Legal custody' means the relationship created by the court's decree which imposes on the custodian the responsibility of physical possession of the minor and the duty to . . . provide the minor with food, shelter, education, and ordinary medical care, all subject to residual parent rights and responsibilities and the rights and responsibilities of any legally appointed guardian of the person."); MO. REV. STAT. § 211.021(1)(4) ("'Legal custody' means the right to the care, custody and control of a child and the duty to provide food, clothing, shelter, ordinary medical care."); N.H. REV. STAT. ANN. § 170-C:2(IV) ("'Legal custody' means a status created by court order, embodying the . . . responsibility to provide the child with food, clothing, shelter, education and ordinary medical care"); N.M. STAT. ANN. §§ 32A-1-4(F), (P) ("custodian" means an adult with whom the child lives and who is not a parent or guardian of the child . . . 'legal custody' means a legal status created by order of the court . . . or by operation of statute that vests in a person, department or agency the right to determine where and with whom a child shall live; the right and duty to protect, train and discipline the child and to provide the child with . . . ordinary and emergency medical care"); N.D. CENT. CODE § 27-20-01(5) (2016) ("'Custodian' means a person, other than a parent or legal guardian, who stands in loco parentis to the child or a person to whom legal custody of the child has been given by order of a court"); WYO. STAT. ANN. § 14-3-402 (vii), (x) (West) ("'Custodian' means a person, institution or agency responsible for the child's welfare and having legal custody of a child by court order or having actual physical custody and control of a child and acting in loco parentis" and providing that legal custody includes the "duty to provide . . . ordinary medical care").

A legal custodian may be a foster parent, agency, or institution. See ALA. CODE § 12-15-102(15) (West 2016) (defining "legal custodian" as "[a] parent, person, agency, or department."); FLA. STAT. ANN. § 39.01(34) (West 2016) (defining "legal custody" as "a legal status created by a court which vests in a custodian of the person or guardian, whether an agency or an individual."); GA. CODE ANN. § 15-11-2(42) (West 2016) (stating that a legal custodian can be "a person to whom legal custody of a child has been given by order of a court or a public or private agency or other private organization."); WYO. STAT. ANN. § 14-3-402(a)(vii) (West 2016) ("'Custodian' means a person, institution, or agency responsible for the child's welfare.").

For cases recognizing the duty of caregivers to seek necessary medical care for a child even if they do not have legal custody, see Staples v. Commonwealth, 454 S.W.3d 803, 807 (Ky. 2014) (finding that the term "actual custody" in the criminal child-abuse statute imposes a duty to seek medical care on adults "who co-habit with another adult and that person's minor child and who share substantial responsibilities with the parent for the child's day-to-day necessities such as food, shelter, and care" even though the adult does not have legal custody of the child); State v. Wyatt, 482 S.E.2d 147, 154 (W. Va. 1996) (concluding that the father's cohabitating partner was a "custodian" under a statute providing that "any parent, guardian or custodian" who maliciously and intentionally causes a child's death by failing to seek medical care is guilty of murder, even though the father's partner did not have legal custody of the child); People v. Berg, 525 N.E.2d 573, 576 (Ill. App. 1988) ("Recognizing the primary responsibility of a natural parent does not mean that an unrelated person may not also have some responsibilities incident to the care and

custody of a child. . . If immediate or emergency medical attention is required by a child's custodian it should not matter that such custodian is not the primary care provider or for that matter a legally designated surrogate"); State v. Cabral, 810 P.2d 672 (Haw. Ct. App. 1991) (holding that stepparents have statutory duty of support which includes duty to provide medical care); State v. Smith, 935 P.2d 841, 843 (Ariz. Ct. App. 1996) (rejecting argument that "[a] non-parent cannot share 'care or custody' for the purposes of criminal liability under criminal endangerment statute with a parent who is present and capable of assuming the parental role.").

Courts extending the duty to seek medical care to caregivers who traditionally had no such duty have reasoned that "expanding the bounds of who is legally responsible for children beyond the realm of the traditional family and legal guardian . . . takes into account the modern-day reality that parenting functions are not always performed by a parent." People v. Carroll, 715 N.E.2d 500, 502 (N.Y. 1999). See also Staples v. Commonwealth, 454 S.W.3d at 807 (concluding that "as the traditional household of two biological parents residing with their minor children becomes increasingly less common, imposition of criminal responsibility for breach of a duty of care by an 'actual custodian' is not only entirely logical but the plain intent of our legislators.").

More than half of all states statutorily extend the duty to provide necessary medical care to a child to an adult other than a parent, guardian, or custodian who provides caregiving or lives with the child. For examples of statutes, see ALA. CODE §§ 26-15-2, 26-15-3 (2016) (extending duty to "any other person who has the permanent or temporary care or custody or responsibility for the supervision of a child"); ARIZ. REV. STAT. ANN. § 13-3623 (West 2017) (imposing criminal liability on "any person" who "[u]nder circumstances likely to produce death or serious physical injury . . . [and] having the care or custody of a child . . . causes or permits the person or health of the child . . . to be injured or who causes or permits a child . . . to be placed in a situation where the person or health of the child . . . is endangered . . ."); ARK. CODE ANN. § 9-27-303(36)(A) (West) (extending duty to "a parent, guardian, custodian, foster parent, or any person who is entrusted with the juvenile's care by a parent, custodian, guardian, or foster parent"); CAL. PENAL CODE § 273a (West) (imposing criminal liability on "Any person who . . . having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered"); COLO. REV. STAT. ANN. § 18-6-401(1)(a) (West 2018) ("A person commits child abuse if such person . . . permits a child to be unreasonably placed in a situation that poses a threat of injury to the child's life or health, or engages in a continued pattern of conduct that results in . . . lack of proper medical care . . . or an accumulation of injuries that ultimately results in the death of a child or serious bodily injury to a child."); DEL. CODE ANN. TIT. 10, § 901(3), (12), (18), (20) (West 2016) (extending duty to "members of the child's family or household, meaning persons living together permanently or temporarily without regard to whether they are related to each other" including "persons who previously lived in the household such as paramours of a member of the child's household; Any person who, regardless of whether a member of the child's household, is defined as family or relatives . . . ; Persons temporarily responsible for the child's well-being or care such as a health-care provider, aide, teacher, instructor, coach, sitter, day care

or child care provider, or any other person having regular direct contact with children through affiliation with a school, church, or religious institution, health-care facility, athletic or charitable organization or any other organization whether such a person is compensated or acting as a volunteer; or [a]ny person who has assumed control of or responsibility for the child."); IDAHO CODE ANN. § 18-1501 (West) (imposing criminal liability on "Any person who . . . having the care or custody of any child, willfully causes or permits the person or health of such child to be injured, or willfully causes or permits such child to be placed in such situation that its person or health is endangered"); FLA. STAT. ANN. § 39.01 (West) (extending duty to include "person legally responsible for the child's welfare in a residential setting; and also includes an adult sitter or relative entrusted with a child's care"); 325 ILL. COMP. STAT. ANN. 5/3 (extending duty to a "relative caregiver [or] any other person responsible for the child's welfare at the time of the alleged abuse or neglect"); KAN. STAT. ANN. § 38-2202 (West) (imposing duty on "parent, guardian or person responsible for the care of a child"); KY. REV. STAT. ANN. §§ 532.045, 600.020(1)(a)(8) (West 2016) (extending duty to "stepparent, foster parent, relative, household member . . . or other person exercising custodial control or supervision of the child"); LA. CHILD. CODE ANN. ART. 603(4) (extending duty to any "person providing a residence for the child."); ME. REV. STAT. TIT. 22, § 4002 (extending duty to "person with responsibility for a child's health or welfare, whether in the child's home or another home"); MD. CODE ANN., FAM. LAW § 5-701 (West) (imposing duty on "a parent or other person who has permanent or temporary care or custody or responsibility for supervision of the child"); MINN. STAT. ANN. §§ 609.376, 609.378(1) (2016) (extending liability for criminal neglect to a "caretaker" defined as "an individual who has responsibility for the care of a child as a result of a family relationship or who has assumed responsibility for all or a portion of the care of a child."); MISS. CODE. ANN. § 97-5-39(1)(a), (d) (2016) (imposing criminal liability on any "person who intentionally, knowingly or recklessly" deprives the child "of necessary . . . health care"); MONT. CODE ANN. §§ 41-3-102(2), 21(a)(iv) (extending duty to "adult who resides in the same home in which the child resides . . ."); N.J. STAT. ANN. §§ 9:6-1, 9:6-2 (West) (extending duty to a stepparent and "any person who has assumed the care of a child, or any person with whom a child is living at the time the offense is committed . . . and a person who legally or voluntarily assumes the care, custody, maintenance or support of the child."); N.Y. FAM. CT. ACT § 1012(g) (McKinney) (imposing duty on the "child's custodian, guardian, [or] any other person responsible for the child's care at the relevant time and defining custodian as "any person continually or at regular intervals found in the same household as the child when the conduct of such person causes or contributes to . . . neglect of the child."); N.C. GEN. STAT. ANN. § 7B-101(3), (15) (West) (extending duty to "a stepparent, foster parent, an adult member of the juvenile's household, an adult relative entrusted with the juvenile's care . . ."); OKLA. STAT. ANN. TIT. 21, § 852.A; tit. 10A, § 1-1-105(51) (West) (extending duty to an adult "with whom the child's parent cohabitates or any other adult residing in the home of the child . . ."); 18 PA. STAT. AND CONS. STAT. ANN. § 4304 (West) (imposing duty on "parent, guardian or other person supervising the welfare of a child"); S.C. CODE ANN. § 63-7-20 (imposing duty on "the child's parent, guardian . . . or caregiver"); VT. STAT. ANN. TIT. 33, § 4912(10) (West) (imposing

duty on "parent, guardian, foster parent, [or] any other adult residing in the child's home who serves in a parental role"); VA. CODE ANN. § 18.2-371.1 (West) (imposing duty on "Any parent, guardian, or other person responsible for the care of a child"); WASH. REV. CODE ANN. § 9A.42.020 (West) (extending duty to "person entrusted with the physical custody of a child or dependent person, a person who has assumed the responsibility to provide to a dependent person the basic necessities of life"); WYO. STAT. ANN. § 14-3-202 (West) (imposing duty on "parent, noncustodial parent, guardian, custodian, stepparent, foster parent or other person, institution or agency having the physical custody or control of the child").

Illustration 17 is based on People v. Carroll, 715 N.E.2d 500 (N.Y. 1999). In *Carroll*, the stepmother was charged with child endangerment. The criminal statute applied to a "parent, guardian or other person legally charged with the care or custody of a child," N.Y. PENAL LAW § 260.10 (McKinney). Although the statute did not define who is a person "legally charged with the care or custody of a child," the New York Court of Appeals held that it could include a custodian or "any other person responsible for the child's care at the relevant time." Id. at 502. Moreover, the court rejected the stepmother's argument that she did not have a duty to seek medical care for the child because she did not stand *in loco parentis* unless she intended to support or take care of her on a permanent basis. The court held that, depending on the factual circumstances, an adult who has only assumed temporary care of the child and is not *in loco parentis* may act as the functional equivalent of a parent and be responsible for the child's care.

Under the common law, an adult who was not a parent or legal guardian had no duty to seek medical care for a child, except when the person was acting *in loco parentis*, "in the place of a parent." *In Loco Parentis*, BLACK'S LAW DICTIONARY (10th ed. 2014). See 1 WILLIAM BLACKSTONE, COMMENTARIES *453; JAMES KENT, COMMENTARIES ON AMERICAN LAW *161 (stating that a stepparent had no duty of care or support except when the stepparent stood *in loco parentis*). An adult stood *in loco parentis* if the adult voluntarily assumed and exercised the duties of a parent. The vast majority of courts recognize the doctrine of *in loco parentis*, but some require proof that the adult intended to assume all of the obligations of a parent. See Staples v. Commonwealth, 454 S.W.3d 803, 813-814 (Ky. 2014) (explaining that the law has recognized an *in loco parentis* "relationship only where the nonparent 'has put himself in situation of lawful parent by assuming *all* the obligations incident to parental relationship and . . . [has] actually discharge[d] those obligations'"); State v. Sherman, 266 S.W.3d 395, 407 (Tenn. 2008) (stating that "an adult stands in loco parentis to a child if the adult *intended* to assume parental obligations to the child" and concluding that a man who allowed a woman and her child to live in his home may have a duty to seek medical treatment for the child if the evidence establishes *in loco parentis* relationship even though the man was not the child's father, stepfather, or legal guardian); People v. Myers, 201 A.D.2d 855, 856 (N.Y. App. Div. 1994) (concluding that mother's cohabiting partner did not stand *in loco parentis* to the child because the evidence "indicate[s] only that defendant was a contributing member of the household for financial purposes, not that he had assumed responsibility for, or control over, the children"). In those jurisdictions, an adult who did not intend to assume all of the obligations of a parent does not stand *in loco parentis* and has no

duty to seek necessary medical care for the child. See, e.g., People v. Myers, 201 A.D.2d 855 (N.Y. App. Div. 1994). This Section's extension of the parental duty to provide medical care to a custodian and temporary caregiver includes a person who stands *in loco parentis*, but it also includes an individual who did not intend to permanently assume all of the obligations of a parent.

At least one state supreme court has expressly refused to extend the duty to provide a child with necessary medical care to caregivers who are not parents or legal guardians. See State v. Miranda, 878 A.2d 1118, 1131 (Conn. 2005) (Borden, J., with whom Norcott, and Palmer, JJ., joined, concurring). This case involved an abusive mother and her cohabitating boyfriend's failure to protect the child from the mother's abuse and failure to seek medical care for the child. The Connecticut Supreme Court initially held that the cohabitating boyfriend owed the child a duty of care because he saw himself as the child's stepfather (even though he was not married to the mother) and shared responsibility for the child's day-to-day care. However, in his appeal of his 30-year sentence, the cohabitating boyfriend asked the court to reconsider and reverse its prior decision, which the court did in a plurality opinion. Three concurring justices reasoned that the increase in nontraditional families weighs against imposing a duty of care on additional adults because "the boundaries of this duty-based criminal liability will be too amorphous, and too fact-based and based on hindsight . . . ." Id. at 1131.

This Section rejects the *Miranda* plurality decision. The *Miranda* court's approach is at odds with the majority of states that recognize that a caregiver may have a duty to provide necessary medical care despite the lack of a legally recognized parental relationship. It also fails to account for the reality of nonmarital and extended families that raise children outside the traditional marital family and does not serve children's, the state's, or society's interest in providing medical care necessary to prevent physical, mental, and emotional harm to a child.

Statutory Note on Female Genital Cutting

Federal law and 24 states prohibit female genital cutting. See 18 U.S.C.A. § 116 ("whoever knowingly circumcises, excises, or infibulates the whole or any part of the labia majora or labia minora or clitoris of another person who has not attained the age of 18 years shall be fined under this title or imprisoned not more than 5 years, or both."); ARIZ. REV. STAT. ANN. § 13-1214(A)(1)-(3) (making it unlawful for a person to "mutilate a female who is under eighteen years of age" or "knowingly transport a female who is under eighteen years of age to another jurisdiction for the purpose of mutilation" or "recklessly transport a female who is under eighteen years of age to another jurisdiction where mutilation is likely to occur"); CAL. PENAL CODE § 273.4(b) (making it a crime to perform "the excision or infibulation of the labia majora, labia minora, clitoris, or vulva, performed for nonmedical purposes"); COLO. REV. STAT. ANN. § 18-6-401(1)(b)(I) ("a person commits [criminal] child abuse if such person excises or infibulates, in whole or in part, the labia majora, labia minora, vulva, or clitoris of a female child. A parent, guardian, or other person legally responsible for a female child or charged with the care or custody of a female child commits child abuse if he or she allows the excision or infibulation, in whole or in part, of such child's labia majora, labia minora, vulva, or clitoris"); DEL. CODE ANN. TIT. 11,

§ 780(a) (making it unlawful when a person "knowingly circumcises, excises or infibulates" or when "a parent, guardian or other person legally responsible or charged with the care or custody of a female minor allows the circumcision, excision or infibulation, in whole or in part, of such minor's labia majora, labia minora, or clitoris"); FLA. STAT. ANN. § 794.08(1)-(4) (a person commits a felony if he or she "knowingly commits, or attempts to commit, female genital mutilation upon a female person younger than 18 years of age[;] knowingly removes, or causes or permits the removal of, a female person younger than 18 years of age from this state for purposes of committing female genital mutilation[;] or is a parent, a guardian, or in a position of familial or custodial authority to a female person younger than 18 years of age and who knowingly consents to or permits the female genital mutilation of that female person"); GA. CODE ANN. § 16-5-27(a) (making it a crime for any person to "knowingly circumcise[], excise[], or infibulate[], in whole or in part, the labia majora, labia minora, or clitoris of a female under 18 years of age" or for a parent, guardian, custodian to "knowingly consent[] to or permit[]" such procedure); 720 ILL. COMP. STAT. ANN. 5/12-34(a) ("whoever knowingly circumcises, excises, or infibulates, in whole or in part, the labia majora, labia minora, or clitoris of another commits female genital mutilation"); KAN. STAT. ANN. § 21-5431(a) (making it a crime to "knowingly [circumcise], [excise], or [infibulate] the whole or any part of the labia majora, labia minora, or clitoris of a female under 18 years of age" or to remove "a female under 18 years of age from this state for the purpose of circumcising, excising, or infibulating the whole or any part of the labia majora, labia minora or clitoris of such female[,]" or cause or permit "another to perform the conduct [. . .] when the person causing or permitting such conduct is the parent, legal guardian or caretaker of the victim"); LA. STAT. ANN. § 14:43.4(A) (a "person is guilty of female genital mutilation when [. . .] the person knowingly circumcises, excises, or infibulates the whole or any part of the labia majora, labia minora, or clitoris of a female minor[,]" or when "the parent, guardian, or other person legally responsible or charged with the care or custody of a female minor allows the circumcision, excision, or infibulation, in whole or in part, of such minor's labia majora, labia minora, or clitoris[,]" or when "the person knowingly removes or causes or permits the removal of a female minor from this state for the purpose of circumcising, excising, or infibulating, in whole or in part, the labia majora, labia minora, or clitoris of such female"); MD. CODE ANN., HEALTH-GEN. § 20-601(a) ("a person who knowingly circumcises, excises, or infibulates the whole or any part of the labia majora or labia minora or clitoris of an individual who is under the age of 18 years is guilty of female genital mutilation"); MINN. STAT. ANN. § 609.2245 ("whoever knowingly circumcises, excises, or infibulates, in whole or in part, the labia majora, labia minora, or clitoris of another is guilty of a felony"); MO. ANN. STAT. § 568.065(1) ("a person commits the offense of genital mutilation if he or she[] excises or infibulates, in whole or in part, the labia majora, labia minora, vulva or clitoris of a female child less than seventeen years of age; or [] is a parent, guardian or other person legally responsible for a female child less than seventeen years of age and permits the excision or infibulation, in whole or in part, of the labia majora, labia minora, vulva or clitoris of such female child"); NEV. REV. STAT. ANN. § 200.5083(1) (a person is guilty of mutilation of genitalia of a female child when he or she "mutilates, or aids, abets, encourages

or participates in the mutilation of the genitalia of a female child; or []removes a female child from this State for the purpose of mutilating the genitalia of the child"); N.J. STAT. ANN. § 2C:24-10(a) (making it a crime of the third degree if a person "knowingly circumcises, excises, or infibulates, in whole or in part, the labia majora, labia minora, or clitoris of a female under 18 years of age[,]" or knowingly removes or permits the removal of the female, or "is a parent, guardian, or has immediate custody or control of a female under 18 years of age and knowingly consents to, or permits the" procedures); N.Y. PENAL LAW § 130.85(1) (making it a crime for any person to "knowingly circumcise[], excise[], or infibulate[], in whole or in part, the labia majora, labia minora, or clitoris of a female under 18 years of age" or for a parent, guardian, custodian to "knowingly consent[] to or permit[]" such procedure); N.D. CENT. CODE ANN. § 12.1-36-01(1) ("any person who knowingly separates or surgically alters normal, healthy, functioning genital tissue of a female minor is guilty of a class C felony."); OKLA. STAT. ANN. TIT. 21, § 760(A) (making it unlawful for anyone who "knowingly circumcises, excises, or infibulates, in whole or in part, the labia majora, labia minora, or clitoris of another"); OR. REV. STAT. ANN. § 163.207(1) (making it a crime if a person "knowingly circumcises, excises or infibulates the whole or any part of the labia majora, labia minora or clitoris of a child[;]or []is the parent, guardian or other person legally responsible for the care or custody of a child and knowingly allows the circumcision, excision or infibulation of the whole or any part of the child's labia majora, labia minora or clitoris"); 11 R.I. GEN. LAWS ANN. § 11-5-2(c)(3) (making it a crime to "cause[] serious permanent disfigurement or circumcise[], excise[] or infibulate[] the whole or any part of the labia majora or labia minora or clitoris of a person"); SD ST § 22-18-37 ("it is a Class 4 felony for any person to knowingly circumcise, excise, mutilate, or infibulate, in whole or in part, the labia majora, labia minora, or clitoris of a female under the age of eighteen years[,]" or for "a parent, guardian, or [one who] has immediate custody or control of a female under the age of eighteen years to knowingly consent to or permit the" procedures, or to "knowingly remove, cause, or permit the removal of a female under the age of eighteen years from this state for the purpose of" such procedures); TENN. CODE ANN. § 39-13-110(a) ("whoever knowingly circumcises, excises or infibulates, in whole or in part, the labia majora, labia minora or clitoris of another commits a Class D felony"); TEX. HEALTH & SAFETY CODE ANN. § 167.001(a) ("a person commits an offense if the person knowingly circumcises, excises, or infibulates any part of the labia majora or labia minora or clitoris of another person who is younger than 18 years of age"); W. VA. CODE ANN. § 61-8D-3a (a) (making it a crime for "any person who circumcises, excises or infibulates, in whole or in part, the labia majora, labia minora or clitoris of a female under the age of eighteen, or any parent, guardian or custodian of a female under the age of eighteen who allows the circumcision, excision or infibulation, in whole or in part, of such female's labia majora, labia minora or clitoris, shall be guilty of a felony"); WIS. STAT. ANN. § 146.35(1) ("no person may circumcise, excise or infibulate the labia majora, labia minora or clitoris of a female minor").

Criminal statutes prohibiting female genital cutting provide an exception in cases in which the procedure is medically necessary and is performed by a licensed provider. See, e.g., 18 U.S.C.A. § 116(b)(1) (providing exemption to criminal statute prohibiting female cutting if

"necessary to the health of the person on whom it is performed, and is performed by a person licensed in the place of its performance as a medical practitioner; or . . . performed on a person in labor or who has just given birth and is performed for medical purposes connected with that labor or birth by a person licensed in the place it is performed as a medical practitioner, midwife, or person in training to become such a practitioner or midwife"); ARIZ. REV. STAT. ANN. § 13-1214(F) ("mutilate and mutilation do not include procedures performed by a licensed physician that are proven to be medically necessary due to a medically recognized condition"); COLO. REV. STAT. ANN. § 18-6-401(1)(b)(III) (providing an exception when the procedure is "necessary to preserve the health of the child on whom it is performed and is performed by a person licensed to practice medicine" or when it is "performed on a child who is in labor or who has just given birth and is performed for medical purposes connected with that labor or birth by a person licensed to practice medicine"); DEL. CODE ANN. TIT. 11, § 780(d) (providing an exception if the procedure is "necessary to the health of the minor and is performed by a licensed physician [. . .] or performed on a minor who is in labor or who has just given birth and is performed for medical purposes connected with that labor or birth by a licensed physician"); FLA. STAT. ANN. § 794.08(5) (providing an exemption to "procedures performed by or under the direction of a physician licensed [. . .], an osteopathic physician licensed [. . .], a registered nurse licensed [. . .], a practical nurse licensed [. . .], an advanced registered nurse practitioner licensed [. . .], a midwife licensed [. . .], or a physician assistant licensed [. . .] when necessary to preserve the physical health of a female person[,]" and to "any autopsy or limited dissection"); GA. CODE ANN. § 16-5-27(c) (providing exception from provision criminalizing surgery on a female child's genitalia if the procedure is "performed by or under the direction of a physician, a registered professional nurse, a certified nurse midwife, or a licensed practical nurse [. . .] when necessary to preserve the physical health of the female"); 720 ILL. COMP. STAT. ANN. 5/12-34(b) (providing exemption "if the procedure is performed by a physician licensed to practice medicine in all its branches and is necessary to the health of the person on whom it is performed; or is performed on a person who is in labor or who has just given birth and is performed for medical purposes connected with that labor or birth"); KAN. STAT. ANN. § 21-5431(c) (providing an exemption if the "physical health of the female under 18 years of age makes circumcising, excising or infibulating the whole or any part of her labia majora, labia minora or clitoris medically necessary pursuant to the order of a physician, and such procedure is performed by a physician; or the female [. . .] is in labor or has just given birth, and" makes the procedure(s) medically necessary); LA. STAT. ANN. § 14:43.4(C) (providing an exception for the genital mutilation performed "by a licensed physician during a surgical procedure" if the "procedure is necessary to the physical health of the minor on whom it is performed" or "the procedure is performed on a minor who is in labor or who has just given birth and is performed for medical purposes connected with that labor or birth"); MD. CODE ANN., HEALTH-GEN. § 20-602 (providing an exemption if the surgical operation "is necessary to the health of the individual on whom it is performed and is performed by a person licensed in the State as a medical practitioner"); MINN. STAT. ANN. § 609.2245 (providing an exemption if the surgical operation "is necessary to the health of the individual on whom it was

performed and is performed by[] a physician licensed [. . .], a physician in training under the supervision of a licensed physician; or a certified nurse midwife practicing within the nurse midwife's legal scope of practice; or if performed on a person who is in labor or who has just given birth and is performed for medical purposes connected with that labor or birth"); MO. ANN. STAT. § 568.065(4) (providing a defense if the genital mutilation was "necessary to preserve the health of the child on whom it is performed and is performed by a person licensed to practice medicine in this state" or performed on a child in labor or who has just given birth for "medical purposes connected with such labor or birth by a person licensed to practice medicine in this state"); N.J. STAT. ANN. § 2C:24-10(b) (exempting the circumcision, excision, or infibulation if it is "necessary to the health of the female [. . .] and it is performed by a licensed health care professional acting within the scope of the professional's license;" or is performed by the professional for medical purposes connected with [the female in labor or who has just given birth]"); N.Y. PENAL LAW § 130.85(2) (providing an exemption if such act of circumcision, excision, or infibulation is "necessary to the health of the person on whom it is performed, and is performed by a person licensed in the place of its performance as a medical practitioner; or performed on a person in labor or who has just given birth and is performed for medical purposes connected with that labor or birth by a person licensed in the place it is performed as a medical practitioner, midwife, or person in training to become such a practitioner or midwife"); N.D. CENT. CODE ANN. § 12.1-36-01(2) (providing exception from provision criminalizing surgery on a female child's genitalia "if a licensed medical practitioner performs the operation to correct an anatomical abnormality or to remove diseased tissue that is an immediate threat to the health of the female minor"); OKLA. STAT. ANN. TIT. 21, § 760(B) (providing an exemption if the surgical procedure is "necessary as a recognized treatment for a known disease or for purposes of cosmetic surgery to repair a defect or injury for the person on whom it is performed [. . .] or is necessary in the assistance of childbirth or for medical purposes connected with that labor or birth and is performed by a licensed physician, or a physician in training under the supervision of a licensed physician, or a certified nurse-midwife"); OR. REV. STAT. ANN. § 163.207(3)(a) (providing an exception if the person who performs the procedure "is a physician, licensed to practice in this state; and the surgery is medically necessary for the physical well-being of the child"); S.D. CODIFIED LAWS § 22-18-39 ("a surgical procedure is not a violation of SD ST § 22-18-37 if the procedure is[] necessary to the health of the individual on whom it is performed and the procedure is performed by a licensed medical practitioner in a licensed medical facility; or performed on an individual in labor or who has just given birth and the procedure is performed for medical purposes connected with that labor or birth and the procedure is performed by a licensed medical practitioner"); TENN. CODE ANN. § 39-13-110(b) (permitting an exception if the procedure is "necessary to the health of the person on whom it is performed and is performed by a licensed physician or physician-in-training under supervision of a licensed physician; or performed on a person who is in labor or who has just given birth and is performed for medical purposes connected with that labor or birth by a licensed physician or a physician-in-training under the supervision of a licensed physician"); TEX. HEALTH & SAFETY CODE ANN. § 167.001(c) ("It is a defense to prosecution [. . .] that the person

performing the act is a physician or other licensed health care professional and the act is within the scope of the person's license; and the act is performed for medical purposes"); W. VA. CODE ANN. § 61-8D-3a(b) (providing an exemption if the mutilation is "necessary to preserve the health of the child on whom it is performed and is performed by a licensed medical professional authorized to practice medicine in this state; or the procedure is performed on a child who is in labor or has just given birth and is performed for legitimate medical purposes connected with that labor or birth by a licensed medical professional authorized to practice medicine in this state); WIS. STAT. ANN. § 146.35(3) (Providing an exemption "if the circumcision, excision or infibulation is performed by a physician [. . .] and is necessary for the health of the female minor or is necessary to correct an anatomical abnormality").

Statutory Note on Conversion Therapy

As of July 2017, nine states and the District of Columbia prohibited mental-health professionals from engaging in efforts to change a child's sexual orientation and gender identity, see CAL. BUS. & PROF. CODE § 865.1 (West 2013) ("Under no circumstances shall a mental health provider engage in sexual orientation change efforts with a patient under 18 years of age."); 2017 Conn. Pub. Acts 17-5, § 2 ("No health care provider shall engage in conversion therapy."); D.C. CODE ANN. § 7-1231.14a (West 2015) ("A provider shall not engage in sexual orientation change efforts with a consumer who is a minor."); 405 ILL. COMP. STAT. ANN. 48/20 (West 2016) ("Prohibition on conversion therapy. Under no circumstances shall a mental health provider engage in sexual orientation change efforts with a person under the age of 18."); S.B. 201, 2017 Leg., 79th Reg. Sess. (Nev. 2017) (adopted) ("A psychotherapist shall not provide any sexual orientation or gender identity conversion therapy to a person who is under 18 years of age regardless of the willingness of the person or his or her parent or legal guardian to authorize such therapy."); N.J. STAT. ANN. § 45:1–55 (West 2013) ("A person who is licensed to provide professional counseling . . . including, but not limited to, a psychiatrist, licensed practicing psychologist, certified social worker, licensed clinical social worker, licensed marriage and family therapist, certified psychoanalyst . . . shall not engage in sexual orientation change efforts with a person under 18 years of age."); N.M. STAT. ANN. § 61-1 (West 2017) ("A person licensed pursuant to provisions of Chapter 61 NMSA 1978 shall not provide conversion therapy to any person under eighteen years of age."); OR. REV. STAT. ANN. § 675.850 (2015) ("A mental health care or social health professional may not practice conversion therapy if the recipient of the conversion therapy is under 18 years of age."); 23 R.I. GEN. LAWS ANN. § 23-9-3 (West 2017) ("No licensed professional shall advertise for or engage in conversion therapy efforts with or relating to a patient(s) under the age of eighteen (18)."); VT. STAT. ANN. tit. 18, § 8352 (West 2016) ("A mental health care provider shall not use conversion therapy with a client younger than 18 years of age.").

As of July 2017, legislation banning conversion therapy for minors was pending in more than a dozen states. See, e.g., S.B. 65, 149th Gen. Assemb., 1st Reg. Sess. (Del. 2017) ("A person practicing psychology in this State . . . may not engage in conversion therapy with a child or refer a child to a provider in another jurisdiction to receive conversion therapy."); H.B. 800, 29th Leg.,

Reg. Sess. (Haw. 2017) ("No person who is licensed to provide professional counseling, including a physician specializing in the practice of psychiatry, physician assistant, psychologist, social worker, mental health counselor, marriage and family therapist, or a person who performs counseling as part of the person's professional training for any of these professions, shall . . . [e]ngage in sexual orientation change efforts on a person under eighteen years of age . . ."); S.B. 74, 87th Gen. Assemb. (Iowa 2017) ("A mental health provider shall not engage in sexual orientation change efforts with a patient under eighteen years of age."); H.B. 93, 87th Gen. Assemb. (Iowa 2017) ("A mental health provider shall not engage in sexual orientation change efforts with a patient under eighteen years of age."); S.B. 172, 87th Leg., Reg. Sess. (Kan. 2017) ("Any physician licensed by the state board of healing arts who practices in the area of psychiatry shall not perform conversion therapy with an individual under 18 years of age.") and ("Any licensee of the behavioral sciences regulatory board shall not practice conversion therapy with an individual under 18 years of age."); H.P. 640, 128th Leg., 1st Reg. Sess. (Me. 2017) ("practices or treatments that seek to change an individual's sexual orientation or gender identity are prohibited . . ."); S.B. 62, 190th Gen. Ct. (Mass. 2017) ("Under no circumstances shall a licensed professional advertise for or engage in sexual orientation and gender identity change efforts with a patient less than 18 years of age."); H.B. 1190, 190th Gen. Ct. (Mass. 2017) ("Under no circumstances shall a licensed professional advertise for or engage in sexual orientation and gender identity change efforts with a patient less than 18 years of age."); S.F. 1854, 90th Leg. Sess., 1st Reg. Sess. (Minn. 2017) ("No mental health practitioner or mental health professional shall engage in conversion therapy with a client under 18 years of age . . ."); H.F. 2246, 90th Leg. Sess., 1st Reg. Sess. (Minn. 2017) (No mental health practitioner or mental health professional shall engage in conversion therapy with a client under 18 years of age . . . ."); S.B. 224, 165th Sess. Gen. Ct. (N.H. 2017) ("A person who is licensed to provide professional counseling . . . shall not engage in conversion therapy with a person under 18 years of age."); H.B. 587, 165th Sess. Gen. Ct. (N.H. 2017) ("A person who is licensed to provide professional counseling . . . shall not engage in conversion therapy with a person under 18 years of age."); S.B. 44, 201st Gen. Assemb. (Pa. 2017) ("A mental health professional shall not engage in sexual orientation change efforts with an individual under 18 years of age."); H.B. 569, 85th Leg. (Tex. 2017) ("A mental health provider engages in unprofessional conduct if, in the course of providing services to a child or minor, the mental health provider attempts to: (1) to change the child's or minor's sexual orientation, including by attempting to change the child's or minor's behavior or gender identity or expression . . . ."); S.B. 5722, 64th Leg., Reg. Sess. (Wash. 2017) (prohibiting of "conversion therapy on a patient under age eighteen."); S.B. 435, 83rd Leg., Reg. Sess. (W. Va. 2017) ("A mental health provider may not engage in sexual orientation change efforts with a person under the age of eighteen under any circumstances."); S.B. 261, 103rd Leg., Reg. Sess. (Wis. 2017) ("No mental health provider may engage in conversion therapy with an individual who is under 18 years of age.").

For municipalities banning conversion therapy for minors, see ALLENTOWN, PA., art. 320 § 320.02 (2017) ("A person who is licensed by the State of Pennsylvania to provide professional counseling, or who performs counseling as part of his or her training . . . may not engage in

conversion therapy with a minor."); BAY HARBOR ISLANDS, FLA., CODE OF ORDINANCES ch. 23, art. I, § 23-5.2 (2016) ("Conversion therapy prohibited. A person who is licensed by the State of Florida to provide professional counseling, or who performs counseling as part of his or her professional training . . . may not engage in conversion or reparative therapy with a minor."); Boynton Beach, Fla., Ordinance 17-003 (Jan. 17, 2017) ("It shall be unlawful for any Provider to practice conversion therapy efforts on any individual who is a minor regardless of whether the person receives monetary compensation in exchange for such services."); CINCINNATI, OHIO, CODE OF ORDINANCES tit. VII, ch. 769, § 769-3 (2016) ("No mental health professional shall engage, within the geographic boundaries of the City of Cincinnati, in sexual orientation or gender identity change efforts with a minor . . . ."); COLUMBUS, OHIO, CITY CODES, tit. 23, ch. 2331, § 2331.10 (2017) ("No mental health professional shall knowingly engage, within the geographic boundaries of the City of Columbus, in sexual orientation or gender identity change efforts with a minor . . . ."); Dayton, Ohio, Ordinance 31572-17 (July 5, 2017) ("No mental health professional shall engage, within the geographic boundaries of the City of Dayton, in conversion therapy with a minor . . . ."); Delray Beach, Fla., Ordinance 18-17 (May 2, 2017) ("It shall be unlawful for any Provider to practice conversion therapy efforts on any individual who is a minor . . . ."); El Portal, Fla., Ordinance 2016-08 (Jan. 24, 2017) ("A person who is licensed to provide professional counseling, or who performs counseling as part of his or her professional training . . . may not engage in conversion therapy with a person younger than 18 years of age within the geographic boundaries of the Village of El Portal."); Key West, Fla., Ordinance 16-10634 (March 7, 2017) ("A person who is licensed by the State of Florida to provide professional counseling, or who performs counseling as part of his or her professional training . . . may not engage in conversion or reparative therapy."); Lake Worth, Fla., Ordinance 2017-02 (Jan. 10, 2017) ("prohibit conversion therapy on minors."); MIAMI, FLA., CODE OF ORDINANCES ch. 70, art. VII, § 70-406 (2016) ("A person who is licensed by the State of Florida to provide professional counseling, or who performs counseling as part of his or her professional training . . . may not engage in conversion or reparative therapy with a minor."); Miami-Dade, Fla., Ordinance 13638 (Oct. 13, 2016) ("Conversion Therapy prohibited. A person who is licensed by the State of Florida to provide professional counseling, or who performs counseling as part of his or her professional training . . . may not engage in Conversion Therapy or Reparative Therapy with a Minor."); North Bay Village, Fla., Ordinance to Prohibit Against Licensed Professionals Engaging in Counseling Efforts, Practices, or Treatments with the Goal to Change a Minor's Sexual Orientation or Gender Identity (Oct. 25, 2016) ("The Commission of North Bay Village hereby . . . prohibit[s] the use of sexual orientation or gender identity change efforts with minors, including reparative and conversion therapy . . . ."); Philadelphia, Pa., Ordinance 161111 (July 11, 2017) ("No Mental Health Provider shall engage in conversion therapy with a Minor."); Pima County, Ariz., Ordinance 2017-22 (Aug. 1, 2017) ("No person may engage in sexual orientation change efforts with a minor in exchange for a fee."); PITTSBURGH, PA., CODE OF ORDINANCES tit. 6, art. I, ch. 28, § 628.02 (2016) ("No mental health professional shall engage, within the geographic boundaries of the City of Pittsburgh, in sexual orientation or gender identity or

expression conversion efforts with a minor . . . ."); Riviera Beach, Fla., Ordinance Prohibiting the Practice of Conversion Therapy on Patients who are Minors (May 4, 2017) ("That the City of Riviera Beach hereby prohibits the practice of Conversion Therapy on patients who are minors . . . ."); SEATTLE, WASH., MUNICIPAL CODE tit. 14, ch. 14.21, § 14.21.040 (2016) ("It is a violation for any provider to provide conversion therapy or reparative therapy to a minor, regardless of whether the provider receives compensation in exchange for such services."); TAMPA, FLA., CODE OF ORDINANCES ch. 14, art. X, § 14-312 (2017) ("It shall be unlawful for any provider to practice conversion therapy efforts on any individual who is a minor . . . ."); TOLEDO, OHIO, MUNICIPAL CODE part 5, ch. 554, § ch. 554, § 554.06 ("No mental health provider shall engage in sexual orientation or gender identity change efforts with any person . . . ."); Wellington, Fla., Ordinance 2017-10 (June 27, 2017) ("It shall be unlawful for any Provider to practice conversion therapy efforts on any individual who is a minor . . . .); West Palm Beach, Fla., Ordinance 4666-16 (Nov. 7, 2016) ("[P]rohibit the practice of conversion therapy on patients who are minors."); WINTON MANORS, FL., CODE OF ORDINANCES part II, ch. 12, art. IV, § 12-12 (2016) ("A person who is licensed by the State of Florida to provide professional counseling, or who performs counseling as part of his or her professional training . . . may not engage in conversion or reparative therapy with a minor.")

The federal Therapeutic Fraud Prevention Act of 2017, S.928, 115th Congress (2017-2018), was introduced by Senator Patty Murray (D-WA) on April 25, 2017 and would prohibit anyone from advertising, providing, or facilitating conversion therapy for minors in exchange for compensation. As of March 18, 2018, however, all but one of the bill's 25 co-sponsors—Senator Bernie Sanders (I-VT)—were Democrats. Given Republican control of the Senate and the House, the bill's prospects of passage appear unlikely.

Statutory Note on Compulsory Vaccination

For statutes providing exemptions from compulsory vaccination based on religious beliefs, see ALA. CODE § 16-30-3(1) (West 2016) (exempting child from requirement that child show certificate of vaccination as a condition of enrollment into any private or public school if . . . the parent or guardian of the child shall object thereto in writing on grounds that the immunization or testing conflicts with his religious tenets and practices."); ALASKA ADMIN. CODE TIT. 4 § 06.055(b)(3) (West 2016) (providing exemption from vaccination if child seeking to enroll in school "has an affidavit signed by his parent or guardian affirming that immunization conflicts with the tenets and practices of the church or religious denomination of which the applicant is a member."); ARIZ. REV. STAT. ANN. § 36-883(C) (West 2016) ("Any rule that relates to educational activities, physical examination, medical treatment or immunization shall include appropriate exemptions for children whose parents object on the ground that it conflicts with the tenets and practices of a recognized church or religious denomination of which the parent or child is an adherent or member."); ARK. CODE ANN. § 6-18-702(d)(4)(A) (West 2016) ("This section shall not apply if the parents or legal guardian of that child object thereto on the grounds that immunization conflicts with the religious or philosophical beliefs of the parent or guardian.");

COLO. REV. STAT. ANN. § 25-4-903(2)(b) (West 2016) ("It is the responsibility of the parent or legal guardian to have his or her child immunized unless the child is exempted . . . by submitting to the student's school a statement signed by one parent or guardian or the emancipated student or student eighteen years of age or older that the parent, guardian, or student is an adherent to a religious belief whose teachings are opposed to immunizations."); CONN. GEN. STAT. ANN. § 10-204a(3) (West 2016) ("Any such child who . . . presents a statement from the parents or guardian of such child that such immunization would be contrary to the religious beliefs of such child or the parents or guardian of such child . . . shall be exempt."); DEL. CODE ANN. tit 14, § 131(a)(6) (West 2016) (stating that the Department of Education shall adopt certain rules, including a "provision for exemption from the immunization program for an enrollee whose parents or legal guardian, because of individual religious beliefs, reject the concept of immunization."); D.C. CODE ANN. § 38-506(1) (West 2016) ("No certification of immunization shall be required for the admission to a school of a student . . . for whom the responsible person objects in good faith and in writing, to the chief official of the school, that immunization would violate his or her religious beliefs."); FLA. STAT. ANN. § 1003.22(5)(a) (West 2016) ("The provisions of this section shall not apply if the parent of the child objects in writing that the administration of immunizing agents conflicts with his or her religious tenets or practices."); GA. CODE ANN. § 20-2-771(e) (West 2016) ("This Code section shall not apply to a child whose parent or legal guardian objects to immunization of the child on the grounds that the immunization conflicts with the religious beliefs of the parent or guardian."); HAW. REV. STAT. § 302A-1156(2) (West 2016) ("A child may be exempted from the required immunizations . . . if any parent, custodian, guardian, or any other person in loco parentis to a child objects to immunization in writing on the grounds that the immunization conflicts with that person's bona fide religious tenets and practices."); IDAHO CODE ANN. § 39-4802(2) (West 2016) ("Any minor child whose parent or guardian has submitted a signed statement to school officials stating their objections on religious or other grounds shall be exempt from the provisions of this chapter."); 105 ILL. COMP. STAT. ANN. 5/27-8.1(8) (West 2016) ("Children of parents or legal guardians who object to . . . immunizations . . . on religious grounds shall not be required to undergo . . . immunizations to which they so object."); IND. CODE ANN. § 20-34-3-2(a) (West 2016) ("Except as otherwise provided, a student may not be required to undergo any testing, examination, immunization, or treatment required under this chapter or IC 20-34-4 when the child's parent objects on religious grounds."); IOWA CODE ANN. § 139A.8(4)(a)(2) (West 2016) ("Immunization is not required for a person's enrollment in any elementary or secondary school or licensed child care center if . . . the applicant, or if the applicant is a minor, the applicant's parent or legal guardian, submits an affidavit . . . stating that the immunization conflicts with the tenets and practices of a recognized religious denomination of which the applicant is an adherent or member."); KAN. STAT. ANN. § 72-5209(b)(2) (West 2016) (stating that, as an alternative to proof of immunizations, a student may submit "a written statement signed by one parent or guardian that the child is an adherent of a religious denomination whose religious teachings are opposed to such tests or inoculations."); KY. REV. STAT. ANN. § 214.036 (West 2016) (providing that compulsory vaccination statute may not "be construed to require the immunization of any child whose parents

. . . object by a written sworn statement to the immunization of such child on religious grounds."); ME. REV. STAT. TIT. 20-A, § 6355(3) (West 2016) (allowing exemption if "the parent states in writing a sincere religious belief that is contrary to the immunization requirement of this subchapter or an opposition to the immunization for philosophical reasons."); MD. CODE ANN., HEALTH-GEN. § 18-403(a)(1)-(2) (West 2016) ("Unless the Secretary declares an emergency or disease epidemic, the Department may not require the immunization of an individual if the individual objects to immunization because it conflicts with the individual's bona fide religious beliefs and practices; or the individual is a minor and the individual's parent or guardian objects to immunization because it conflicts with the parent or guardian's bona fide religious beliefs and practices."); MASS. GEN. LAWS ANN. CH. 76, § 15 (West 2016) ("In the absence of an emergency or epidemic of disease declared by the department of public health, no child whose parent or guardian states in writing that vaccination or immunization conflicts with his sincere religious beliefs shall be required to present said physician's certificate in order to be admitted to school."); MICH. COMP. LAWS ANN. § 333.9215(2) (West 2016) ("A child is exempt from this part if a parent, guardian, or person in loco parentis of the child presents a written statement to the administrator of the child's school or operator of the group program to the effect that the requirements of this part cannot be met because of religious convictions or other objection to immunization."); MO. ANN. STAT. § 167.181(3) (West 2016) ("This section shall not apply to any child if one parent or guardian objects in writing to his school administrator against the immunization of the child, because of religious beliefs or medical contraindications."); MONT. CODE ANN. § 20-5-405(1) (West 2016) (granting exemption if the "parent, guardian, or adult who has the responsibility for the care and custody of a minor seeking to attend school or the person seeking to attend school, if an adult" submits a notarized affidavit "stating that immunization is contrary to the religious tenets and practices of the signer."); NEB. REV. STAT. ANN. § 79-221(2) (West 2016) (granting exemption if student submits "an affidavit signed by the student or, if he or she is a minor, by a legally authorized representative of the student, stating that the immunization conflicts with the tenets and practice of a recognized religious denomination of which the student is an adherent or member or that immunization conflicts with the personal and sincerely followed religious beliefs of the student."); NEV. REV. STAT. ANN. § 392.435(1) (West 2016) (providing exemption "because of religious belief or medical condition"); N.H. REV. STAT. ANN. § 141-C:20-c(2) (West 2016) ("A child shall be exempt from immunization if . . . a parent or legal guardian objects to immunization because of religious beliefs."); N.J. STAT. ANN. § 26:1A-9.1 (West 2016) (providing exemption if parent or guardian submits written objection "upon the ground that the proposed immunization interferes with the free exercise of the pupil's religious rights."); N.M. STAT. ANN. § 24-5-3(3) (West 2016) (providing an exemption if the child or parent provides "affidavits or written affirmation from his parent or legal guardian that his religious beliefs, held either individually or jointly with others, do not permit the administration of vaccine or other immunizing agent."); N.Y. PUB. HEALTH LAW § 2164(9) (McKinney 2016) ("This section shall not apply to children whose parent, parents, or guardian hold genuine and sincere religious beliefs which are contrary to the practices herein required."); N.C. GEN. STAT. ANN. § 130A-157 (West 2016) ("If the bona fide

religious beliefs of an adult or the parent, guardian or person in loco parentis of a child are contrary to the immunization requirements contained in this Chapter, the adult or the child shall be exempt from the requirements."); N.D. CENT. CODE ANN. § 23-07-17.1(3) (West 2016) ("Any minor child, through the child's parent or guardian, may submit to the institution authorities . . . a certificate signed by the child's parent or guardian whose religious, philosophical, or moral beliefs are opposed to such immunization."); OHIO REV. CODE ANN. § 3313.671(B)(4) (West 2016) ("A pupil who presents a written statement of the pupil's parent or guardian in which the parent or guardian declines to have the pupil immunized for reasons of conscience, including religious convictions, is not required to be immunized."); OKLA. STAT. ANN. TIT. 10, § 413 (West 2016) ("Any minor child, through his or her parent or guardian, may submit . . . a written statement by the parent or guardian objecting to such immunizations because of religious or other reasons, then such child shall be exempt from the provisions of this act."); OR. REV. STAT. ANN. § 433.267(1)(c)(A) (West 2016) (providing exemption because of "a religious or philosophical belief."); 24 PA. STAT. AND CONS. STAT. ANN. § 13-1303a(d) (West 2016) ("The provisions of this section shall not apply in the case of any child whose parent or guardian objects in writing to such immunization on religious grounds."); 16 R.I. GEN. LAWS ANN. § 16-38-2(a) (West 2016) ("Every person upon entering any public or private school including any college or university in this state as a pupil shall furnish to the administrative head of the school . . . a certificate signed by the pupil, if over eighteen (18) years of age, or by the parent or guardian stating that immunization and/or testing for communicable diseases is contrary to that person's religious beliefs."); S.C. CODE ANN. REGS. 61-8(II)(A)(2) (West 2016) (granting exemption "to any student whose parent, guardian, or person in loco parentis signs the appropriate section of the South Carolina Certificate of Religious Exemption stating that one or more immunizations conflicts with their religious beliefs."); S.D. CODIFIED LAWS § 13-28-7.1(2) (2016) (granting exemption if the child submits "a written statement signed by one parent or guardian that the child is an adherent to a religious doctrine whose teachings are opposed to such immunization."); TENN. CODE. ANN. § 37-10-402 (West 2016) (granting exemption to child "whose parent or guardian files . . . a signed, written statement that such immunization and other preventative measures conflict with the religious tenets and practices of the parent or guardian."); TEX. EDUC. CODE ANN. § 38.001(C)(1)(B) (West 2016) ("Immunization is not required for a person's admission to any elementary or secondary school if the person applying for admission submits to the admitting official . . . an affidavit signed by the applicant or, if a minor, by the applicant's parent or guardian stating that the applicant declines immunization for reasons of conscience, including a religious belief."); UTAH CODE ANN. § 53A-11-302(3)(c) (West 2016) ("A student is exempt from receiving the required immunizations if there is presented to the appropriate official of the school . . . a statement that the person is a bona fide member of a specified, recognized religious organization whose teachings are contrary to immunizations."); VT. STAT. ANN. TIT. 18, § 1122(a)(3)(A) (West 2016) ("[A] person may remain in school or in a child care facility without a required immunization . . . if the person or, in the case of a minor, the person's parent or guardian annually provides a signed statement to the school or child care facility on a form created by the Department that the person, parent, or guardian holds

religious beliefs opposed to immunization."); VA. CODE ANN. § 221.271.2(C) (West 2016) ("No certificate of immunization shall be required for the admission to school of any student if the student or his parent submits an affidavit . . . stating that the administration of immunizing agents conflicts with the student's religious tenets or practices."); WASH. REV. CODE ANN. § 28A.210.090(1)(b) (West 2016) ("Any child shall be exempt in whole or in part from the [required] immunization measures . . . upon the presentation of . . . a written certification signed by any parent or legal guardian of the child or any adult in loco parentis to the child that the religious beliefs of the signator are contrary to the required immunization measures."); WIS. STAT. ANN. § 252.04(3) (West 2016) ("The immunization requirement is waived if the student, if an adult, or the student's parent, guardian, or legal custodian submits a written statement to the school, child care center, or nursery school objecting to the immunization for reasons of health, religion, or personal conviction."); WYO. STAT. ANN. § 21-4-309(a) (West 2016) ("Waivers shall be authorized by the state or county health officer upon submission of written evidence of religious objection.").

Although a few states that provide exemptions do not expressly provide religious exemptions, the broad statutory language encompasses religious objections. See, e.g., LA. REV. STAT. ANN. § 17:170(E) (West 2016) (providing exemption from immunization if "written dissent from the student or his parent or guardian is presented."); MINN. STAT. ANN. § 121A.15(Subd. 3)(c) (West 2016) (granting exemption from immunizations if "a notarized statement signed by the minor child's parent or guardian or by the emancipated person is submitted . . . stating that the person has not been immunized . . . because of the conscientiously held beliefs of the parent or guardian of the minor child or of the emancipated person.").

For states providing exemptions from vaccination based on philosophical beliefs, see ARIZ. REV. STAT. ANN. § 15-873(A)(1) (West 2016) (providing that a student may be exempt from the immunization requirement if the parent submits a signed statement stating that "due to personal beliefs, the parent or guardian does not consent to the immunization of the pupil."); ARK. CODE ANN. § 6-18-702(d)(4)(A) (West 2016) (providing exemption if "immunization conflicts with the religious or philosophical beliefs of the parent or guardian."); COLO. REV. STAT. ANN. § 25-4-903(2)(b) (West 2016) (providing that a student may be exempt "by submitting to the student's school a statement of exemption signed by one parent or guardian or the emancipated student or student eighteen years of age or older . . . has a personal belief that is opposed to immunizations."); IDAHO CODE ANN. § 39-4802(2) (West 2016) ("Any minor child whose parent or guardian has submitted a signed statement to school officials stating their objections on religious *or other grounds* (emphasis added) shall be exempt."); LA. REV. STAT. CODE § 17:170(E) (West 2016) (providing exemption upon "written dissent from the student or his parent or guardian"); ME. REV. STAT. ANN. TIT. 20-a, § 6355(3) (West 2016) (providing exemption if "the parent states in writing . . . an opposition to the immunization for philosophical reasons."); MICH. COMP. LAWS ANN. § 333.9215(2) (West 2016) ("A child is exempt from this part if a parent, guardian, or person in loco parentis of the child presents a written statement . . . that the requirements of [the compulsory vaccination law] cannot be met because of religious convictions or other objection to

immunization."); MINN. STAT. ANN. § 121A.15(3)(d) (West 2016) (providing exemption based on "the conscientiously held beliefs of the parent or guardian of the minor child or of the emancipated person"); MO. STAT. ANN. § 210.003(2)(2)(b) (West 2016) (providing exemption from compulsory vaccination law for children entering "day care center, preschool, or nursery school caring for ten or more children . . . if one parent or guardian files a written objection to immunization."); N.D. CENT. CODE ANN. § 23-07-17.1(3) (West 2016) (providing exemption based on "certificate signed by the child's parent or guardian whose religious, philosophical, or moral beliefs are opposed to such immunization."); OHIO REV. CODE ANN. § 3313.671(B)(4) (West 2016) ("A pupil who presents a written statement of the pupil's parent or guardian in which the parent or guardian declines to have the pupil immunized for reasons of conscience . . . is not required to be immunized."); OKLA. STAT. ANN. TIT. 70, § 1210.193 (West 2016) ("The parents, guardian or person having legal custody of any child may claim an exemption from the immunizations on medical, religious or personal grounds."); OR. REV. STAT. ANN. § 433.267(1)(c)(A) (West 2016) (providing exemption if student submits document stating that "the parent is declining the immunization because of a religious or philosophical belief."); 28 PA. CODE § 23.84(b) (2016) ("Children need not be immunized if the parent, guardian or emancipated child objects in writing to immunization on religious grounds or on the basis of a strong moral or ethical conviction similar to a religious belief."); TEX. EDUC. CODE ANN. § 38.001(c)(1)(B) (West 2016) ("Immunization is not required for a person's admission to any elementary or secondary school if the person applying for admission submits to the admitting official . . . an affidavit signed by the applicant or, if a minor, by the applicant's parent or guardian stating that the applicant declines immunization for reasons of conscience, including a religious belief."); UTAH CODE ANN. § 53A-11-301(1) (West 2016) (providing exemption based on "personal, medical, or religious objections"); WASH. REV. CODE ANN. § 28A.210.090(1)(c) (West 2016) (granting exemption upon "presentation of . . . a written certification signed by any parent or legal guardian of the child or any adult in loco parentis to the child that the signator has either a philosophical or personal objection to the immunization of the child."); WIS. STAT. ANN. § 252.04(3) (West 2016) ("The immunization requirement is waived if the student, if an adult, or the student's parent, guardian, or legal custodian submits a written statement . . . objecting to the immunization for reasons of health, religion, or personal conviction.").

CHAPTER 3

STATE INTERVENTION FOR ABUSE AND NEGLECT

Introductory Note: Consistent with constitutional protections for the family, federal and state law, and best practices in the child welfare system, this Restatement adopts several principles to inform the legal response to child abuse and neglect. First, the state may intervene in a family only if there is evidence of serious harm or a substantial risk of serious harm to the child's physical or mental health. As explained in the Introductory Note to Part I, parents have a constitutionally protected right to raise their children without undue interference from the state. The U.S. Supreme Court has recognized the state's *parens patriae* authority to intervene in a family to protect children. As set forth in this Part, the authority to intervene is limited to circumstances where the state has established that the care provided by parents poses a serious threat to a child's physical or mental health. Even when a parent's behavior may be suboptimal, state intervention is not authorized absent this heightened level of harm.

This relatively high threshold recognizes that although abuse and neglect clearly harm children, state intervention can also harm families and children. The standards adopted in this Chapter thus consider the harms from state intervention in determining when state intervention is authorized. As elaborated in the Introduction to Part I, both family integrity and parental autonomy are presumed to further children's welfare. State intervention in cases of abuse and neglect is a serious interference with family integrity and parental autonomy. In a civil proceeding, the child may be placed under the jurisdiction of the family court, leading to oversight of the parent–child relationship and potentially leading to the removal of the child from the home. In a criminal proceeding, the parent may be incarcerated and thus unable to care for a child. Further, the removal of a child from a home can cause harm, and the child faces potential dangers in state care. For these reasons, state intervention requires substantial justification.

Second, the state must allow for diverse parenting choices and practices. Raising a child entails myriad choices, and parental freedom to raise a child according to a family's value system is deeply rooted in the Constitution. The state will not scrutinize these choices absent serious harm or a substantial risk of serious harm to the child. Allowing diverse parenting practices is particularly important because of the history of discrimination against racial, ethnic, and religious minority parents in the United States and because parenting practices, such as the use of corporal

punishment, can vary by demographic group. As described below, Black families are disproportionately represented in the child welfare system. (Native American children are also disproportionately represented, but this Restatement does not describe the child welfare involvement of Native American children because this involvement is governed by different legal rules, pursuant to the Indian Child Welfare Act. This issue is addressed in the Restatement of the Law, The Law of American Indians.) Allowing diverse parenting values and practices, as well as avoiding unwarranted intervention in families of color, are important goals for the legal system.

Finally, the state's goal is to assist parents to provide adequate care to their children, not to remove children from their homes if other assistance suffices. Thus, the state will remove children only when serious harm or the substantial risk of serious harm cannot otherwise be averted. Ordinarily, the state will try to keep children in their homes, if this can be accomplished without serious risk to the child. Keeping families together is usually in a child's best interests, and the means of state intervention should safeguard family integrity when possible

These principles guiding state intervention are rooted in the U.S. Constitution and respond to the particular history of the child welfare system in the United States, which has long focused on low-income families and families of color. In the first half of the 19th century, the state occasionally removed poor children and freed Black children from their homes and either auctioned them off as involuntary apprentices or placed them in children's institutions. By the end of the 19th century, intervention in the family—particularly low-income families and families of color—had become more common, with reformers founding private child protection societies. These societies worked in tandem with the newly created juvenile courts. These courts were empowered to oversee families and remove children from homes that were considered failures. During this period, states passed the first laws prohibiting child abuse. State laws also authorized the private societies to arrest parents, initiate court complaints, provide evidence in court proceedings, and remove children from their homes. This hybrid public–private effort focused on poor and immigrant families. Although there were cases of physical abuse, many of the problems, such as lack of medical care, limited adult supervision, and very poor living conditions, were the product of poverty, not necessarily parental indifference. During the same period, Black women, who were barred from the private societies, formed their own groups to address the well-being of children. These groups did not seek to remove children from their homes and instead tried to support mothers, believing that assisting mothers would benefit children.

By the middle of the 20th century, state agencies took over the work of the private child protection societies. In the 1960s, the modern child welfare movement began in earnest. In 1962, Dr. Henry Kempe, a pediatrician, published a seminal article identifying child abuse as a distinct phenomenon. His work led to mandatory reporting laws and, in 1974, passage of the first federal legislation, the Child Abuse Prevention and Treatment Act. Today, every state has a child welfare system to respond to child abuse and neglect.

As noted above, in cases of child abuse and neglect—usually described under the umbrella term "child maltreatment"—the state responds through the criminal justice system and the child welfare system. The state uses the criminal justice system to punish the adult and deter others from acting in a similar manner. As a practical matter, criminal liability is generally reserved for cases where the conduct is deeply repugnant, including cases where the physical abuse is inflicted by someone other than a parent, guardian, or custodian. In most cases, the initiation of a child protection proceeding meets the state's goals of protecting children, expressing condemnation of the conduct, and engaging a regulatory system that deters similar conduct in the future.

Consistent with its history, the majority of families involved in the child welfare system today are low-income, and they are disproportionately Black. Moreover, Black families in the child welfare system have disparate outcomes. As compared with children from other races and ethnicities, Black children are more likely to be reported to the child welfare system, and agencies are more likely to investigate their cases. Black children are also more likely to be removed from their homes and placed in foster care. Once in care, Black children stay for longer periods of time and have a lower likelihood of returning home. Two examples illustrate the cumulative risk facing Black children as compared with children of other races and ethnicities: Approximately one in five Black children will have a report of maltreatment confirmed by the child welfare system by age 18, as compared with one in eight Hispanic children, one in nine white children, and one in 26 Asian children. One in nine Black children will be placed in foster care before age 18, as compared with one in 19 Hispanic children, one in 21 white children, and one in 47 Asian children.

There is uncertainty about the precise causes and mechanisms of the disproportionality and the disparate outcomes for Black children, but researchers posit several possible, nonexclusive explanations. To begin, there is evidence that geographic context explains at least part of the disproportionality. Maltreatment is more common in disadvantaged areas, particularly areas with high concentrations of poverty, low levels of social integration, low rates of employment, and low

levels of services. Black families are more likely to live in these areas, and this partially accounts for their disproportionate involvement with the child welfare system.

Further, there is evidence that factors within the child welfare system, including a lack of resources for both families and children, influence racial disproportionality and disparities. Black families are more likely than white families to live in neighborhoods without the kinds of resources that enable parents to keep children safely in their homes. After a family has become involved with the child welfare system, this lack of resources makes removal of the child more likely. Once children are removed, there is evidence that Black parents receive fewer resources that facilitate reunification and that children receive fewer services while in care, notably mental health services.

Additionally, before controlling for various factors, there is evidence that Black children experience higher rates of maltreatment than white children. These varying rates of maltreatment are largely explained by differences among families, including socioeconomic status and parental employment. These factors, especially low socioeconomic status, are strong predictors for child maltreatment. Once researchers control for these and similar factors, the racial differences in maltreatment largely, although not completely, disappear.

Finally, there is mixed evidence that racial bias plays a role in the decisions of key players in the child welfare system. A particular focus is on the decisions that bring families into the child welfare system: decisions by community and mandated reporters about which children to report for a case of suspected maltreatment as well as the decisions of caseworkers about which incidents to investigate and confirm and when to seek the removal of a child from a home. Some studies have found differences by the race of the decisionmaker or the race of the child, but other studies have not.

The principles adopted in this Restatement are intended to further the general aim of protecting children from harm while still respecting family integrity and parental decisionmaking. Moreover, by establishing a relatively high threshold of harm for intervention, requiring substantial justification for intervention, explicitly protecting diverse parenting choices, and emphasizing the goal of keeping children at home when possible, the principles address at least some of the concerns about racial disproportionality and disparate outcomes.

REPORTERS' NOTE

Under its *parens patriae* and police power authority, the state can override parental authority when necessary to protect the health and welfare of children. See Parham v. J. R., 442 U.S. 584, 603, 606 (1979) (analyzing the interests of parents, children, and the state in an adversarial proceeding before the voluntary commitment by the parent of a minor to a mental-health facility, and noting "that a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized" and that the state has a "*parens patriae* interest in helping parents care for the mental health of their children"); Wisconsin v. Yoder, 406 U.S. 205, 213 (1972) (recognizing state authority to mandate education for children—"there is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education"—but finding the First and Fourteenth Amendments protect the right of parents in a religious minority group to withdraw children from school after the eighth grade); Prince v. Massachusetts, 321 U.S. 158 (1944) (upholding the application of a state statute prohibiting child labor); Jacobson v. Massachusetts, 191 U.S. 11 (1905) (upholding a mandatory vaccination program). For a history of the *parens patriae* authority, see Natalie Loder Clark, Parens Patriae *and a Modest Proposal for the Twenty-First Century: Legal Philosophy and A New Look at Children's Welfare,* 6 MICH. J. GENDER & L. 381 (2000).

For a discussion of the risk to children of removing them from their homes, see Joseph J. Doyle, Jr., *Causal effects of foster care: An instrumental-variables approach,* 35 CHILD. & YOUTH SERVS. REV. 1143 (2013) (using the natural experiment of varying removal recommendations among caseworkers to estimate the effect of removal on juvenile delinquency; finding that for marginal cases—where caseworkers may disagree about whether to remove a child—foster-care placement is associated with higher juvenile-delinquency rates later in life and no corresponding increase in child safety as measured by emergency health care usage).

Historically, the state did not intervene in the family to protect children from abuse or neglect. Under Roman law, a father had complete control over his children, and the courts had no role in mediating this relationship. This tradition persisted in the common law, although parental control was less absolute. For a historical description of the right of parents to control their children, see WILLIAM BLACKSTONE, 1 COMMENTARIES *452. The control under Roman law was embodied in the concept of *patria potestas*—"[t]he authority held by the male head of a family . . . over his legitimate and adopted children, as well as further descendants in the male line, unless emancipated," authority that included power over "life and death." BLACK'S LAW DICTIONARY (10th ed. 2014). But see WILLIAM BLACKSTONE, 1 COMMENTARIES *440 (contrasting ancient Roman law with the English common law, which did not contain a right over the life of the child and instead permitted a father only to "lawfully correct his child, being under age, in a reasonable manner; for this is for the benefit of his education"). Only the father possessed this authority. See Sibylla Flügge, *On the History of Fathers' Rights and Mothers' Duty of Care,* 3 CARDOZO WOMEN'S L.J. 377 (1996). For a discussion of the law during the colonial period, see STEVEN

MINTZ & SUSAN KELLOGG, DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE (1988).

When it first began intervening in the family, the state did not treat abused and neglected children as a distinct category of children needing assistance and instead put them in a larger group that included juveniles convicted of crimes and children living in poverty. Private societies, notably the New York Children's Aid Society, founded in 1853, played an active role in removing children from the streets and their homes. Beginning in 1854 and continuing for the next 25 years, the Children's Aid Society, which operated with considerable public funding, sent more than 50,000 children to farming families in the west.

In the second half of the 19th century, industrialization and immigration had restructured the economy and society, with significant effects on the family, including greater participation by women in the workforce, lower birth rates in middle- and upper-income families, higher birth rates among lower-income and immigrant families, and growing poverty and juvenile crime. These changes provoked anxiety among the middle- and upper-classes, who believed the changes were the product of failing families. At the time, society was embracing a broad reconceptualization of childhood, seeing children not as market players and instead as individuals in need of time and space to play, learn, and grow. There was a widely shared concern among the middle- and upper-classes that children in low-income families did not have such childhoods.

For a description of the 19th-century approach to child welfare, see ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF AMERICAN SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT (2004); LINDA GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE: BOSTON 1880-1960 (1988); MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 263-268 (1985); Michael Grossberg, *Changing Conceptions of Child Welfare in the United States, 1820-1935*, *in* A CENTURY OF JUVENILE JUSTICE (Margaret K. Rosenheim et al. eds., 2002); Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299, 304-309 (2002) (describing the history of the private protection agencies and their effectiveness: "By the end of 1900, the [New York Society for the Prevention of Cruelty to Children] had brought 52,860 criminal cases, resulting in 49,330 convictions . . . . During the same period, the society removed 90,078 children with judicial approval.") (citations omitted); Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909) (describing the early history of juvenile courts exercising jurisdiction over cases of abuse and neglect, in addition to juvenile delinquency). For a description of Black women's groups, see Dorothy E. Roberts, *Black Club Women and Child Welfare: Lessons for Modern Reform*, 32 FLA. ST. U. L. REV. 957 (2005).

For an early case approving the removal of a child because of abuse and neglect, see The Etna, 8 F. Cas. 803, 804 (C.C. Me. 1838) (no. 4,542) (in a dispute over a child's wages, noting that paternal rights are "not of the nature of a sovereign and independent power. It is subject to the restraints and regulation of law," and "[i]f instead of treating his child with tenderness and affection, and bringing him up in habits of industry, sobriety, and virtue, [a father] treats [a child] with such cruelty that [the child] cannot be safely left in [the father's] custody . . . the protecting

justice of the county will interpose and deprive" the father of custody; further noting that "[t]here are many cases in which the court of chancery in England has interposed its authority and taken children from the custody of their fathers who have abused their paternal authority, and placed them under the care of persons proper to have the control of them").

For a description of Henry Kempe's work, see C. Henry Kempe, et al., *The Battered Child Syndrome*, 181 J. AM. MED. ASS'N 17 (1962). For a description of the federal legislative responses to abuse and neglect, which created the legal framework for most state laws regulating child protection, see Lois Weithorn, *Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment Statutes*, 53 HASTINGS L.J. 1, 55-80 (2001). The first major federal response was the Child Abuse Prevention and Treatment Act of 1974. Pub. L. No. 93-247, 88 Stat. 4 (1974), codified as amended at 42 U.S.C. §§ 5101-5120 (2000). The most recent overhaul of the child welfare system was the Adoption and Safe Families Act of 1997. Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended at scattered sections of 42 U.S.C.).

For a basic overview of the child welfare system, see U.S. DEP'T HEALTH & HUM. SERVS., CHILDREN'S BUR., HOW THE CHILD WELFARE SYSTEM WORKS, available at https://www.childwelfare.gov/pubpdfs/cpswork.pdf.

For a case explaining the focus of the child welfare system, see In re Rocco M., 1 Cal. App. 4th 814, 824 (Cal. Ct. App. 1991) ("While evidence of past conduct may be probative of current conditions, the question under [the statute] is whether circumstances *at the time of the hearing* subject the minor to the defined risk of harm. Thus, the past infliction of physical harm by a caretaker, standing alone, does not establish a substantial risk of physical harm; [t]here must be some reason to believe the acts may continue in the future") (internal quotations and citations omitted) (emphasis in original); see also New Jersey Div. of Youth & Family Servs. v. S.H., 106 A.3d 1256, 1261 (N.J. App. Div. 2015) (noting that child welfare proceedings "should focus on harm to the child, rather than intent of the caregiver").

For an overview of the racial disproportionality and disparities in the child welfare system, see U.S. DEP'T HEALTH & HUM. SERVS., CHILDREN'S BUR., RACIAL DISPROPORTIONALITY AND DISPARITY IN CHILD WELFARE, ISSUE BRIEF (2016), available at https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf. This source contains statistics showing that as a child progresses through the child welfare system, the extent of the disproportionality lessens. Although there is a marked racial disproportionality at the point of entry, for example, there is less disproportionality in the number of children exiting foster care and in adoption rates. See id. at 4 & tbl. 2. As the source describes, there is uncertainty whether the underrepresentation of some racial groups, notably Asians, stems from lower maltreatment rates or underreporting. See id. at 5 ("It is unclear whether underrepresentation is due to a lower occurrence of child maltreatment among those populations—perhaps due to cultural protective factors—or if it is caused by underreporting due to cultural perceptions of others or those populations being less likely to report maltreatment because of cultural norms.").

For other sources describing the disproportionality in the child welfare system, see CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., ADOPTION AND FOSTER CARE

ANALYSIS AND REPORTING SYSTEM, THE AFCARS REPORT: PRELIMINARY FY1 2015 ESTIMATES AS OF JUNE 2016, at 2 (2016) (documenting the racial disparity of children entering foster care in fiscal year 2015), available at https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport23.pdf; ANNIE E. CASEY FOUNDATION, DISPARITIES AND DISPROPORTIONALITY IN CHILD WELFARE: ANALYSIS OF THE RESEARCH (2011), available at http://www.aecf.org/m/resourcedoc/AECF-DisparitiesAndDisproportionalityInChildWelfare-2011.pdf (describing both the disproportionalities and disparities in the child welfare system with specific examples from localities and focusing on each stage in the process: reports, investigations, substantiations, removals, placements in care (foster home, group home, institutions), reunification, and adoptions, guardianships, and emancipations; also describing disparities in service provision, for children and families); Christopher Wildeman et al., *The Prevalence of Confirmed Maltreatment Among US Children, 2004 to 2011*, 168 JAMA PEDIATRICS 706, 709 (2014), available at http://inequality.hks.harvard.edu/files/inequality/files/wildeman14b.pdf (finding that of the 670,000 children who had a report of maltreatment in 2011 confirmed by the child welfare system, "[t]he percentage of white children in the United States with a confirmed report of maltreatment (0.8%) was significantly lower than the percentages of black (1.5%), Native American (1.1%), and Hispanic (0.9%) children, although higher than the percentage of Asian/Pacific Islander children (0.2%)."). For statistics on the cumulative risks, see Christopher Wildeman & Natalia Emanuel, *Cumulative Risks of Foster Care Placement by Age 18 for U.S. Children, 2000-2011*, PLOS ONE 9:e92785 (2014), available at http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0092785.

For an overview of the voluminous research on racial disproportionality and disparities, see ANNIE E. CASEY FOUNDATION, DISPARITIES AND DISPROPORTIONALITY IN CHILD WELFARE: ANALYSIS OF THE RESEARCH, supra; U.S. DEP'T HEALTH & HUM. SERVS., CHILDREN'S BUR., RACIAL DISPROPORTIONALITY AND DISPARITY IN CHILD WELFARE, ISSUE BRIEF, supra.

An oft-cited source documenting varying rates of maltreatment is the National Incidence Study, a periodic study mandated by Congress and intended to capture the actual incidence of child maltreatment. The study relies on interviews with professionals who work with children in a variety of settings, and thus it sweeps in far more incidents of maltreatment than those investigated by the child welfare system. The most recent iteration (referred to as the NIS-4) is based on data collected in 2005 and 2006. The study breaks maltreatment into a more stringent category (the harm standard, where the child is demonstrably harmed) and a more inclusive category (the endangerment standard, where the child is demonstrably harmed or at risk of harm), and it breaks maltreatment into different categories (physical, sexual, and emotional abuse; and physical, emotional, and educational neglect). See ANDREA J. SEDLAK ET AL., U.S. DEPT. OF HEALTH & HUMAN SERVS., FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-4): REPORT TO CONGRESS (2010) [hereinafter NIS-4], available at https://www.acf.hhs.gov/sites/default/files/opre/nis4_report_exec_summ_pdf_jan2010.pdf.

Unlike previous iterations of the study, the NIS-4 found a significant variation in maltreatment by race: the incidence rate for all kinds of maltreatment under the harm standard was

24.0 per 1000 Black children as compared with 12.6 per 1000 white children and 6.7 per 1000 Hispanic children. The incidence rate for all kinds of maltreatment under the endangerment standard was 49.6 per 1000 Black children as compared with 28.6 per 1000 white children and 30.2 per 1000 Hispanic children. There were also differences in the subcategories. The incidence rate for physical abuse under the harm standard, for example, was 6.6 per 1000 Black children, 3.2 per 1000 white children, and 4.4 per 1000 Hispanic children. By contrast, the differences in sexual abuse were statistically marginal.

The researchers posited that the change in the 2006 study was due to a larger sample size and thus an ability to determine correlations with greater confidence than in previous studies and greater differences in the underlying rates of maltreatment between earlier studies and the 2006 study, with the incidence rate in most categories declining for white children but not Black children. See NIS-4 at 9-10.

In a supplementary analysis, the researchers explored these and many other issues in depth. This analysis controlled for various risk factors correlated with child maltreatment, particularly socioeconomic status, see ANDREA J. SEDLAK ET AL., U.S. DEPT. OF HEALTH & HUMAN SERVS., SUPPLEMENTARY ANALYSES OF RACE DIFFERENCES IN CHILD MALTREATMENT RATES IN THE NIS-4 (2010), available at https://www.acf.hhs.gov/sites/default/files/opre/nis4_supp_analysis_race_diff_mar2010.pdf. The researchers found that the risk factors explained almost all of the racial differences. For example, among low-SES families (defined as families with incomes below $15,000 and parents with less than a high school degree), the racial differences largely disappeared for physical abuse under the harm standard. In families outside the low-SES category, there was a difference in rates of physical abuse under the harm standard, with Black children experiencing higher rates of physical abuse. A likely explanation is that the category was so capacious—any family earning more than $15,000 and with a high school diploma—that it likely masked socioeconomic differences within this large group, and that Black children were more likely to be closer to the low-SES category than white children. In one subcategory—physical neglect under the endangerment standard—white children in low-SES households had a higher incidence rate than Black children in low-SES households. One explanation posited by the researchers is that low-SES white families experience high rates of social isolation and are less likely to be embedded in supportive networks than low-SES Black families.

The National Incidence Study found that socioeconomic status (SES) is the strongest predictor of child maltreatment and that SES is strongly correlated with all forms of child maltreatment. See NIS-4 at 12 ("Children in low socioeconomic status households had significantly higher rates of maltreatment in all categories and across both definitional standards. They experienced some type of maltreatment at more than 5 times the rate of other children; they were more than 3 times as likely to be abused and about 7 times as likely to be neglected.").

For a discussion of the methodological concerns with the NIS as well as the study's limitations, see SEDLAK ET AL, supra; ANNIE E. CASEY FOUNDATION, DISPARITIES AND DISPROPORTIONALITY IN CHILD WELFARE: ANALYSIS OF THE RESEARCH, supra.

For a discussion of the research on potential bias by decisionmakers within the child welfare system, see ANNIE E. CASEY FOUNDATION, DISPARITIES AND DISPROPORTIONALITY IN CHILD WELFARE: ANALYSIS OF THE RESEARCH, supra. As that source describes, there is evidence in both directions, finding that race does influence decisionmaking and finding that it does not. In a study of children under age three who were hospitalized for bone and skull fractures, for example, researchers found that doctors were more likely to order additional bone scans of minority children than white children when the source of the injury was indeterminate, and doctors were more likely to report minority toddlers, although not infants, to the child welfare system than white children, even after controlling for likelihood of abuse. See Wendy G. Lane et al., *Racial Differences in the Evaluation of Pediatric Fractures for Physical Abuse*, 288 JAMA 1603 (2002). Another study found that the race of the caseworker—but not the race of the child—influenced an assessment of risk and the chance that a case would be substantiated. Black caseworkers in the study were more likely than white caseworkers to assign a higher risk level to a child, regardless of the child's race. Black children, because of racial homogeneity in service areas, were more likely to be assessed by a Black caseworker and thus faced greater risk of substantiation. See Sarah A. Font et al., *Examining racial disproportionality in child protective services case decisions*, 34 CHILD. & YOUTH SERVS. REV. 2188 (2012). Finally, a study of cases in Wisconsin found that caseworkers were less likely to substantiate reports of maltreatment for the Black children in the sample than the white children. See ALISON BOWMAN ET AL., RACIAL DISPROPORTIONALITY IN WISCONSIN'S CHILD WELFARE SYSTEM, DEP'T CHILD. & FAM., UNIV. WISC. (2009), available at https://www.lafollette.wisc.edu/images/publications/workshops/2009-racial.pdf. That study did find, however, that caseworkers were more likely to investigate and remove Black children than white children even after controlling for poverty and other factors using county-level (but not case-specific) data. The study did not control for the severity of the injury or risk.

For commentary on both sides of the debate about racial disproportionality and disparities, compare DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002), with Elizabeth Bartholet, *The Racial Disproportionality Movement in Child Welfare: False Facts and Dangerous Directions*, 51 ARIZ. L. REV. 871 (2009); Elizabeth Bartholet, Fred Wulczyn, Richard P. Barth & Cindy Lederman, *Race and Child Welfare*, CHAPIN HALL ISSUE BRIEF (June 2011), available at http://www.chapinhall.org/sites/default/files/publications/06_27_11_Issue%20Brief_F.pdf.

TOPIC 2. GROUNDS

TITLE A. ABUSE

SUBTITLE I. PHYSICAL

§ 3.20. Physical Abuse

(a) In a criminal proceeding, physical abuse is

(1) a person purposely, knowingly, or recklessly inflicting serious physical harm on a child or creating a substantial risk of serious physical harm to a child, or

(2) a parent, guardian, custodian, or person caring for a child purposely, knowingly, or recklessly causing another person or permitting another person to inflict serious physical harm on a child or creating a substantial risk of serious physical harm to a child.

(b) In a civil child-protection proceeding, a court may find a child has been physically abused if

(1) a parent, guardian, or custodian inflicts serious physical harm on a child, or creates a substantial risk of serious physical harm to a child, in a manner that substantially deviates from the standard of care exercised by a reasonable parent, or

(2) a parent, guardian, or custodian causes another person to inflict serious physical harm on a child, or create a substantial risk of serious physical harm to a child, in a manner that substantially deviates from the standard of care exercised by a reasonable parent.

Cross-reference:

Chapter 3. State Intervention for Abuse and Neglect; § 3.24, Defenses: Parental Privilege to Use Reasonable Corporal Punishment

Comment:

a. Guiding principles. As explained in the Introductory Note to this Chapter, state intervention in cases of child maltreatment balances the twin goals of protecting children from

harm while respecting family integrity, pluralism, and parental decisionmaking about children. The relatively strict definition of physical abuse adopted in this Section means that the state cannot intervene in cases in which a parent's care is merely suboptimal or does not conform to mainstream parenting practices. This protection for family integrity and parental decisionmaking is rooted in the Constitution.

The definitions of physical abuse adopted in this Section recognize that state intervention imposes its own costs on the family and requires substantial justification. Criminal proceedings may lead to the incarceration of a parent, and civil proceedings initiated by the child welfare system may lead to the removal of the child from the home. Both forms of state intervention constitute a serious interference with family integrity and parental autonomy and can harm children.

Further, the definitions in this Section allow for diverse parenting choices and practices. The limited privilege to use reasonable corporal punishment, for example, addressed in § 3.24, constrains the state from intervening in a family. As described in that Section, the privilege is more limited than in the past, but it continues to restrict state intervention, and it allows for diverse parenting practices across different communities. Protecting diverse childrearing choices is particularly important because of the history of discrimination against racial, ethnic, and religious minority parents in the United States. As described in the Introductory Note to this Chapter, Black families are disproportionately represented in the child welfare system. Allowing diverse parenting values and practices, as well as avoiding unwarranted state intervention, are important goals for the legal system.

Finally, by limiting state intervention, the definitions in this Section reinforce the goal of keeping children in their homes, if this can be accomplished without substantial risk to the child.

b. Limited privilege to use corporal punishment. This Chapter distinguishes physical abuse, which the law prohibits, from reasonable corporal punishment, which the law privileges. In the context of both criminal and civil child-protection proceedings, the use of reasonable corporal punishment by parents and other covered adults is privileged, as described at length in § 3.24. That Section determines the line between physical abuse and privileged corporal punishment, and this Section defines physical abuse and describes the basis for state intervention.

c. Criminal liability and intervention by the child welfare system—state goals. This Section recognizes two nonexclusive legal responses to situations where parental use of physical force results in serious physical harm to a child or poses a substantial threat of producing such harm: the

imposition of criminal liability and the initiation of a child-protection proceeding. In a criminal proceeding, the state seeks to punish the adult perpetrator for causing serious harm and to deter the adult and others from acting in a similar manner. As a practical matter, criminal liability is generally reserved for cases where the conduct is deeply repugnant. Additionally, when the physical abuse is inflicted by someone other than a parent, guardian, or custodian, criminal liability is the only means for punishing the conduct. Much problematic conduct, however, is not deeply repugnant and is inflicted by a parent, guardian, or custodian. In these cases, the state generally responds through the child welfare system. When the conduct is both deeply repugnant and is inflicted by a parent, guardian, or custodian, the state can respond through both the criminal and civil systems.

The initiation of a child protection proceeding meets the state's goals of protecting children, expressing condemnation of the conduct, and engaging a regulatory system that deters similar conduct in the future. In light of the ongoing relationship between the parent and child, the state is focused on the prospective safety and wellbeing of the child and the ability of the parent to care for the child without inflicting serious harm. The state's interest in condemning the behavior and deterring child abuse is met by the potential loss of custody of the child, but the state's goals are not punitive. In a child protection proceeding, a parent's physical liberty is not at stake, but the consequences are still significant. A finding of physical abuse will trigger oversight by a child welfare agency and may lead the agency to remove the child from the parent's custody.

d. Criminal liability and intervention by the child welfare system—differences and similarities. There are three differences between criminal liability for physical abuse and civil child-protection proceedings for physical abuse. First, as explained in Comments *f* and *h*, criminal liability attaches to any person, but a child-protection proceeding for physical abuse is initiated only for the actions of a parent, guardian, or custodian. Second, the definition of physical abuse in the criminal context includes permitting another person to inflict physical harm or create a risk of physical harm. The equivalent in the child-protection context is the failure to protect a child from harm, but this is considered physical neglect, not physical abuse. Section 3.25 addresses this circumstance in detail. Finally, as explained in Comments *g* and *i*, criminal liability requires the adult to act with purpose, knowledge, or recklessness. By contrast, a civil child-protection proceeding turns on whether the parent's conduct substantially deviated from the standard of care exercised by a reasonable parent. This distinction reflects the fundamental difference between a

criminal proceeding, which is an action brought against the parent and is concerned with determining criminal fault, and a child-protection proceeding, which is brought in the name of the child and is focused on the child's safety. In a child-protection proceeding, the court determines whether the parent's behavior harms the child such that state intervention is necessary to protect the child. The court is not judging fault. Asking whether the parent's behavior substantially deviates from behavior of reasonable parents focuses attention on the harm or potential harm to the child.

The principal similarity between criminal liability and a civil child-protection proceeding is the standard of harm. Both definitions require the infliction of serious physical harm or the creation of a substantial risk of serious physical harm. This relatively high standard of harm reflects the balance between protecting children and respecting family integrity, pluralism, and parental decisionmaking.

e. Serious physical harm or the substantial risk of serious physical harm. The requirement of serious physical harm covers a wide range of injuries. In addition to injuries that are clearly covered—such as broken bones and deep lacerations—extensive, deep bruising can constitute serious physical harm.

Illustrations:

1. Joseph becomes angry with his 15-year-old stepdaughter, Maya, in the driveway of their home. He strikes her repeatedly on the head and back with a piece of wood. At the hospital, she is treated for a severe concussion, deep lacerations requiring multiple stitches, and extensive bruising. Joseph's conduct caused serious physical harm to Maya.

2. Rick hits his four-year-old son, Samuel, with a wooden spoon, creating deep purple bruising and welts. The father's conduct caused serious physical harm to Samuel and the limited privilege to use corporal punishment has been exceeded. See § 3.24.

Whether the state chooses to pursue criminal liability or initiate a child-protection proceeding or both will depend on the circumstances. See Comment *c*.

Serious physical harm does not include minor injuries.

Illustrations:

3. Same relationship and location as Illustration 1, but this time the only physical contact is that Joseph slaps Maya on her face, creating a red mark that disappears after a few minutes. Joseph's conduct did not cause serious physical harm to Maya.

4. Nine-year-old Shanice refuses to get ready for school in the morning. Her mother, Ayala, becomes frustrated and engages in a physical altercation with Shanice. Ayala inflicts small fingernail scratches on the child's face and ear. The minor injuries do not constitute serious physical harm.

This Section does not define physical abuse to include any nonaccidental injury, a standard adopted in some state statutes governing civil child-protection proceedings. Such a standard would not adequately constrain state intervention, would assume state intervention is better than suboptimal but not seriously harmful parenting practices, and would not adequately protect diverse parenting practices. For further discussion of balancing state intervention when there is harm to the child but the harm is not serious, see § 3.24.

The harm standard adopted in this Section includes the creation of a substantial risk of serious physical harm to a child. An injury need not have occurred.

Illustration:

5. Fifteen-year-old Prianka gets into an argument with her father. The father pulls a loaded gun from its storage space and points it at Prianka. Pointing a loaded weapon during a heated verbal argument, and the potential for escalation, create a substantial risk of serious harm to Prianka.

Finally, some conduct is presumptively physical abuse because of the inherent danger to the child, such as interfering with a child's breathing.

Illustration:

6. Mary places her eight-month-old baby in a sleep sack and ties the opening with a thick handkerchief for extended periods of time, thus significantly restricting the child's access to oxygen. Mary's conduct is presumptively physical abuse because she interfered with the child's breathing, which creates a substantial risk of serious physical harm.

f. Criminal liability—covered adults. Any person can be subject to criminal liability for the physical abuse of a child.

Illustration:

7. Louisa, a 19-year-old neighbor, is left alone with one-year-old Dimitri for several minutes. While alone with him, Louisa purposely burns Dimitri's hands with a hot iron, resulting in severe and disfiguring burns. Louisa is subject to criminal liability.

Louisa is criminally liable even though she is not the parent, guardian, or custodian of Dimitri. Children are at risk of harm from a range of adults, and the broad coverage in this Section protects children from physical abuse regardless of the legal relationship between the child and the perpetrator.

This Section also imposes criminal liability on a narrower category of persons in specified circumstances: parents, guardians, custodians, and adults caring for a child who cause another person or permit another person to physically abuse a child.

Illustrations:

8. Donna instructs her adult son to whip Donna's eight-year-old daughter with an electrical cord. Donna is subject to criminal liability for causing another person to inflict serious harm on her daughter.

9. Maria moves into her boyfriend's home, bringing her two-year-old daughter, Ashley. In Maria's presence, the boyfriend regularly hits Ashley on the head with a hard object. Maria knows that the boyfriend recently had his parental rights to his two children terminated because of physical abuse that left the children hospitalized for a month. Maria, who does not physically abuse Ashley, notices that Ashley has multiple bruises and a swollen hand and is experiencing difficulty walking. The next day, when Maria leaves Ashley in the care of the boyfriend, he hits Ashley so hard that she suffers a severe concussion with lasting damage. Both the boyfriend and Maria are subject to criminal liability: the boyfriend because he inflicted serious physical harm and Maria because she permitted the boyfriend to inflict the serious harm.

g. Criminal liability—culpability requirements. Criminal liability requires purposeful, knowing, or reckless conduct. The definitions follow the Model Penal Code.

Illustrations:

10. Patricia feeds her six-month-old son pieces of glass in the child's bottle of baby formula. After the baby vomits and passes blood, Patricia calls for medical help. Patricia can be subject to criminal liability for purposeful or knowing physical abuse if the factfinder determines that placing glass in her baby's formula and feeding it to him indicated a purpose to cause serious physical harm or that she was practically certain that her conduct would cause serious physical harm.

11. Michael's five-year-old daughter refuses to go to bed. As punishment, Michael hits her with a weight-lifting belt on her clothed buttocks, creating deep bruises that last several days. Michael can be subject to criminal liability for reckless physical abuse if the factfinder determines that he consciously disregarded a substantial and unjustifiable risk that his conduct would inflict serious physical harm and, considering the nature and purpose of his conduct and the circumstances known to him, his disregard of the risk involved a gross deviation from the standard of conduct that a law-abiding person would observe in Michael's situation.

12. Juan is cooking dinner. He believes his three-year-old son, Diego, is at the playground in the care of an adult. Juan removes a pot of boiling pasta from the stove to drain it. Before he gets to the sink, Juan trips on Diego, who has quietly come back home and into the kitchen without Juan noticing. Juan spills the boiling water on Diego, causing severe burns. If the factfinder believes Juan's account, Juan should not be subject to criminal liability because the infliction of serious physical harm was not purposeful, knowing, or reckless.

As Illustration 12 demonstrates, an accidental injury, even if severe, is not considered criminal child abuse if the adult's conduct does not rise to the level of criminally reckless behavior. The severity of the penalty generally turns on the defendant's culpability level, with the most serious penalties reserved for purposeful and knowing conduct. State law sets forth the penalties.

Criminal liability for causing or permitting another person to inflict serious physical harm or the substantial risk of serious physical harm follows the same culpability requirements.

h. Intervention by the child welfare system—covered adults. In the child welfare context, child-protection proceedings for physical abuse are focused on the conduct of parents, guardians, and custodians, not all adults. When a person with ongoing legal responsibility for a child inflicts

serious physical harm or creates a substantial risk of serious harm, state intervention may be necessary to protect the child. Similarly, if a parent, guardian, or custodian causes another person to inflict serious physical harm or create a substantial risk of serious physical harm, state intervention may be necessary to protect the child.

Illustration:

13. Same facts as Illustration 8. Donna instructing her adult son to whip Donna's eight-year-old daughter with an electrical cord is physical abuse by Donna.

If a parent, guardian, or custodian permits another person to physically abuse a child, and the parent knew or should have known of the danger to the child, this constitutes physical neglect for failure to protect the child. Section 3.25 addresses this circumstance in detail.

For a discussion of who qualifies as a parent, guardian, or custodian, see ___ [*cross-reference definitions Section*].

i. Intervention by the child welfare system—substantial deviation from the standard of care exercised by a reasonable parent. In addition to satisfying the harm standard, the factfinder must determine that the parent's conduct substantially deviates from the standard of care exercised by a reasonable parent. This requirement limits the reach of state intervention. Without this requirement, permissible state intervention would be too open-ended. This requirement also ensures there is not strict liability for injuries to children. Often a past injury will mean there is reason to be concerned about future injuries, but in some circumstances, where the parent did not substantially deviate from the standard of care exercised by a reasonable parent, the circumstances indicate that the parent is an adequate caregiver and the child is not at risk in the future and thus is not in need of state intervention.

As explained in Comment *c*, child-protection proceedings are not focused on the fault of the parent and instead inquire about the future safety of the child. Asking whether the conduct of the parent substantially deviates from the conduct of a reasonable parent helps the state ascertain whether the child is at risk for harm. If the child was seriously physically harmed by the conduct of a parent, but the parent has not substantially deviated from the standard of care exercised by a reasonable parent, there is likely not a need for state intervention.

Illustrations:

14. George is driving his three-year-old daughter, Alice, home from day care. George has no known history of heart disease, but he suddenly has a heart attack and crashes the car, severely injuring Alice. George has not physically abused Alice because George's conduct was not a substantial deviation from the standard of care exercised by a reasonable parent.

15. Same facts as Illustration 14, but George suffers from severe epilepsy and has frequent seizures. His doctor has instructed George never to drive. George could have asked his husband to pick up Alice from day care, but George chooses to do so, even though George has not been taking his anti-seizure medication. George has a seizure and crashes the car, severely injuring Alice. George has physically abused Alice because his conduct was a substantial deviation from the standard of care exercised by a reasonable parent.

16. Twelve-year-old Jaivon interrupts his father's nap three times because Jaivon needs help with the computer. After the third interruption, the father, Michael, loses his temper, gets up, and kicks a footstool toward the couch, believing it will only hit, not clear, the couch. Instead, Michael's kick propels the footstool over the couch, and the footstool hits Jaivon in the face. Michael takes Jaivon to the hospital. Jaivon receives three stitches. Michael has not physically abused Jaivon if the factfinder concludes that Michael's conduct was not a substantial deviation from the standard of care exercised by a reasonable parent.

In Illustration 14, George has seriously harmed Alice, but the injury was purely accidental, and a reasonable parent would not have anticipated it. By contrast, in Illustration 15, a reasonable parent would have anticipated the harm, and thus George's conduct was a substantial deviation. Illustration 16 is a closer case, and the factfinder must determine whether, given all the circumstances in the case, the parent's conduct was a substantial deviation.

j. Intervention by the child welfare system—rebuttable presumption of parental responsibility. When the injuries to the child are such that the injury would not have occurred but for the conduct of the parent, the injuries establish a prima facie case of physical abuse.

Illustration:

17. Six-year-old Shauna spends the day at home alone with her mother, Toni. At the end of the day, Shauna has a deep burn on her palm in the pattern of the electrical coils on the stovetop. In a child-protection proceeding, the injuries establish a prima facie case of physical abuse.

This finding shifts the burden of proof to the parent to show that the parent was not responsible for the injuries.

A parent may rebut the presumption by showing the parent was not caring for the child when the child was injured.

Illustration:

18. Same facts as Illustration 17, but this time the child-protection petition names both parents as respondents, alleging that they are both responsible for the injuries to the child. The other parent, Mary, can rebut the presumption that she was responsible for causing the injury by introducing evidence that Mary was out of the state during the relevant time frame and thus was not caring for Shauna when the injury occurred.

The presumption is particularly important when multiple responsible adults might have inflicted the injury. In these cases, the presumption shifts the burden of proof to all of the adults legally responsible for the child.

Illustration:

19. A pediatrician finds a deep laceration nearly halfway around the base of the penis of 21-month-old Joshua. In a child-protection proceeding, the rebuttable presumption can be used to find that both the mother and father, who live with Joshua, are responsible for the physical abuse. The mother and father can each introduce evidence to rebut this presumption.

The presumption applies when there is evidence that both parents acted in concert, when there is evidence that both parents separately inflicted abuse, or when there is evidence that one parent inflicted the abuse and the other parent allowed the abuse. The presumption does not apply, however, when only one parent likely inflicted the abuse but there is no evidence about which

parent might have done it, and further, there is no reason to believe that each parent should have known of the other parent's propensity to inflict the abuse. In this situation, the court should not simply find both parents responsible merely because the court is uncertain which parent abused the child. Instead, the court must make a finding as to which parent is responsible.

k. Expert medical testimony regarding physical abuse—criminal proceedings and civil child-protection proceedings. Whether a parent has physically abused a child is a legal determination to be made by the factfinder. Expert medical testimony may be relevant to factual issues underlying the ultimate legal issue of physical abuse. Expert medical testimony may include diagnosis of the child's medical conditions, including for example, broken bones, bruising, internal bleeding, and swelling, as well as the medical consequences of those conditions for the child.

Illustration:

20. As punishment for misbehavior, Peter hits his nine-year-old son, Evan, with a belt on five occasions. Evan suffers from arthrogryposis, a congenital muscular condition that requires him to wear a brace on his back and legs. In a criminal proceeding to determine whether Peter's actions were physical abuse or privileged corporal punishment, a medical expert may testify to Evan's medical diagnosis and to express an opinion regarding whether Peter's use of corporal punishment caused serious physical harm or created a substantial risk of serious physical harm to Evan in light of his medical condition.

In this Illustration, the court properly admitted the expert medical testimony because it concerned a diagnosis of the child's bodily condition and an opinion about the effect of the father's actions on the child's bodily condition.

In addition to allowing a medical expert to render opinions regarding diagnoses of the child's bodily condition, a court may also allow a medical expert to render opinions regarding the external forces that may have caused the child's conditions. A medical expert may testify, for example, about whether a child's injuries are consistent with a parent's testimony that the child was injured while playing or whether the injuries are consistent with blunt force trauma inflicted by the parent. Determinations regarding the external forces that may have caused the child's condition exceed the scope of a diagnostic determination, however, and therefore the court must

separately ascertain that the medical expert has appropriate expertise to render an opinion on such issues and that the opinion is adequately grounded in science.

In cases in which the allegations of physical abuse involve a parent's seeking unnecessary medical treatment for a child, whether the parent's actions constitute physical abuse is a determination to be made by the factfinder. Expert medical testimony may be relevant to factual issues that underlie the determination of physical abuse, including whether the child possessed genuine medical diagnoses, as well as whether the child received unnecessary medical treatment given the child's genuine medical diagnoses. As described in § 2.30, parents have the authority to make health-care decisions for their children. As elaborated in § 2.30, Comment *c*, a parent's decision about the proper course of treatment is entitled to deference when licensed medical doctors disagree about the diagnosis or appropriate course of treatment and there is substantial medical support for the parent's choice of treatment. Similarly, a parent may choose to seek the opinion of additional licensed medical doctors even if the child's current doctors disagree. Neither parental choice constitutes physical abuse.

REPORTERS' NOTE

a. Guiding principles. For sources supporting the discussion in the Comments, see Part I, Reporters' Note to Introductory Note, and Chapter 3, Reporters' Note to Introductory Note.

b. Limited privilege to use corporal punishment. See § 3.24 for an extended discussion of the limited privilege to use corporal punishment.

c. Criminal liability and intervention by the child welfare system—state goals. For examples of state statutes imposing criminal liability for physical abuse of a child, see ARIZ. REV. STAT. ANN. § 13-3623(A) ("Under circumstances likely to produce death or serious physical injury, any person who causes a child or vulnerable adult to suffer physical injury or, having the care or custody of a child or vulnerable adult, who causes or permits the person or health of the child or vulnerable adult to be injured or who causes or permits a child or vulnerable adult to be placed in a situation where the person or health of the child or vulnerable adult is endangered is guilty of an offense as follows: 1. If done intentionally or knowingly, the offense is a class 2 felony and if the victim is under fifteen years of age it is punishable pursuant to § 13-705; 2. If done recklessly, the offense is a class 3 felony; 3. If done with criminal negligence, the offense is a class 4 felony."); CAL. PENAL CODE ANN. § 273a(a) ("Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered, shall be punished by imprisonment in a county jail not exceeding one year, or in

the state prison for two, four, or six years."); CAL. PENAL CODE ANN. § 273a(b) ("Any person who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health may be endangered, is guilty of a misdemeanor."); D.C. CODE ANN. § 22-1101(a) (2013) ("A person commits the crime of cruelty to children in the first degree if that person intentionally, knowingly, or recklessly tortures, beats, or otherwise willfully maltreats a child under 18 years of age or engages in conduct which creates a grave risk of bodily injury to a child, and thereby causes bodily injury."); N.C. GEN. STAT. ANN. § 14-318.2(a) (2009) ("Any parent of a child less than 16 years of age, or any other person providing care to or supervision of such child, who inflicts physical injury, or who allows physical injury to be inflicted, or who creates or allows to be created a substantial risk of physical injury, upon or to such child by other than accidental means is guilty of the Class A1 misdemeanor of child abuse."); R.I. GEN. LAWS § 11-9-5.3(b) ("Whenever a person having care of a child, as defined by § 40-11-2(2), whether assumed voluntarily or because of a legal obligation, including any instance where a child has been placed by his or her parents, caretaker, or licensed or governmental child placement agency for care or treatment, knowingly or intentionally: (1) Inflicts upon a child serious bodily injury, shall be guilty of first degree child abuse. (2) Inflicts upon a child any other physical injury, shall be guilty of second degree child abuse.").

For a basic overview of the child welfare system, see U.S. DEP'T HEALTH & HUM. SERVS., CHILDREN'S BUR., HOW THE CHILD WELFARE SYSTEM WORKS, available at https://www.childwelfare.gov/pubpdfs/cpswork.pdf. For a case explaining the forward-looking nature of the child welfare system, see In re Rocco M., 1 Cal. App. 4th 814, 824 (Cal. Ct. App. 1991) ("While evidence of past conduct may be probative of current conditions, the question under [the statute] is whether circumstances *at the time of the hearing* subject the minor to the defined risk of harm. Thus, the past infliction of physical harm by a caretaker, standing alone, does not establish a substantial risk of physical harm; [t]here must be some reason to believe the acts may continue in the future") (internal quotations and citations omitted) (emphasis in original); see also New Jersey Div. of Youth & Family Servs. v. S.H., 106 A.3d 1256, 1261 (N.J. Super. Ct. App. Div. 2015) (noting that child welfare proceedings "should focus on harm to the child, rather than intent of the caregiver").

For state statutes authorizing intervention by the child welfare system for cases of physical abuse, see ALASKA STAT. ANN. § 47.10.011 ("the court may find a child to be a child in need of aid if it finds by a preponderance of the evidence that the child has been subjected to any of the following: . . . (6) the child has suffered substantial physical harm, or there is a substantial risk that the child will suffer substantial physical harm, as a result of conduct by or conditions created by the child's parent, guardian, or custodian or by the failure of the parent, guardian, or custodian to supervise the child adequately"); CAL. WELF. & INST. CODE § 300 ("A child who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge

that person to be a dependent child of the court: (a) The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm inflicted nonaccidentally upon the child by the child's parent or guardian . . . . (e) The child is under the age of five years and has suffered severe physical abuse by a parent, or by any person known by the parent, if the parent knew or reasonably should have known that the person was physically abusing the child. . . . (f) The child's parent or guardian caused the death of another child through abuse or neglect. . . . (i) The child has been subjected to an act or acts of cruelty by the parent or guardian or a member of his or her household, or the parent or guardian has failed to adequately protect the child from an act or acts of cruelty when the parent or guardian knew or reasonably should have known that the child was in danger of being subjected to an act or acts of cruelty."); KY. REV. STAT. ANN. § 600.020(1) (2010) ("'Abused or neglected child' means a child whose health or welfare is harmed or threatened with harm when: (a) His or her parent, guardian, person in a position of authority or special trust, as defined in KRS 532.045, or other person exercising custodial control or supervision of the child: 1. Inflicts or allows to be inflicted upon the child physical or emotional injury as defined in this section by other than accidental means"); LA. CHILD. CODE ANN. ART. 603(2) (2015) ("'Abuse' means any one of the following acts which seriously endanger the physical, mental, or emotional health and safety of the child: (a) The infliction, attempted infliction, or, as a result of inadequate supervision, the allowance of the infliction or attempted infliction of physical or mental injury upon the child by a parent or any other person."); N.Y. FAM. CT. ACT § 1012(e) ("'Abused child' means a child less than eighteen years of age whose parent or other person legally responsible for his care (i) inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ, or (ii) creates or allows to be created a substantial risk of physical injury to such child by other than accidental means which would be likely to cause death or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ").

d. Criminal liability and intervention by the child welfare system—differences and similarities. For sources addressing the covered adults, see Reporters' Notes to Comments *f* and *h*. For sources addressing the culpability requirements for criminal liability and the substantial deviation requirement for a civil child-protection proceeding, see Reporters' Notes to Comments *g* and *i*. For sources discussing serious physical harm and the substantial risk of serious physical harm, see Reporters' Note to Comment *e*.

e. Serious physical harm or the substantial risk of serious physical harm. For criminal statutes defining physical abuse as the infliction of serious physical harm (or similar terms), see, e.g., MISS. CODE. ANN. § 97-5-39(2) (2013) ("Any person shall be guilty of felonious child abuse in the following circumstances . . . (c) If serious bodily harm to any child actually occurs, and if the person shall intentionally, knowingly or recklessly: (i) Strike any child on the face or head; (ii) Disfigure or scar any child; (iii) Whip, strike, or otherwise abuse any child."); MISS. CODE. ANN. § 97-5-39(f) (2013) ("'serious bodily harm' means any serious bodily injury to a child and

includes, but is not limited to, the fracture of a bone, permanent disfigurement, permanent scarring, or any internal bleeding or internal trauma to any organ, any brain damage, any injury to the eye or ear of a child or other vital organ, and impairment of any bodily function."); N.C. GEN. STAT. ANN. § 14-318.4(a) (2013) ("A parent or any other person providing care to or supervision of a child less than 16 years of age who intentionally inflicts any serious physical injury upon or to the child or who intentionally commits an assault upon the child which results in any serious physical injury to the child is guilty of a Class D felony"); N.C. GEN. STAT. ANN. § 14-318.4(d)(2) (2013) ("Serious physical injury.—Physical injury that causes great pain and suffering. The term includes serious mental injury."); N.C. GEN. STAT. ANN. § 14-318.4(a3) (2013) ("A parent or any other person providing care to or supervision of a child less than 16 years of age who intentionally inflicts any serious bodily injury to the child or who intentionally commits an assault upon the child which results in any serious bodily injury to the child, or which results in permanent or protracted loss or impairment of any mental or emotional function of the child, is guilty of a Class B2 felony."); N.C. GEN. STAT. ANN. § 14-318.4(d)(1) (2013) ("Serious bodily injury.—Bodily injury that creates a substantial risk of death or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization.").

For criminal cases finding serious physical harm, see, e.g., Gauvin v. State, 883 N.E.2d 99 (Ind. 2008) (affirming murder conviction of stepmother who often tied up four-year-old child and put duct tape over her mouth, bound her to a play gate or booster seat using zip-ties, struck the child with her hand or with pieces of wooden cutting board, and bit the child; the stepmother killed the child when she fed her blended rice, which the child vomited, and the stepmother covered the child's mouth with duct tape and put her in her room, strapped to the booster seat); State v. Watkins, 659 N.W.2d 526 (Iowa 2003) (affirming the conviction and finding that allegations of child endangerment arising from skeletal injuries to defendant's three-year-old child were not inconsistent with any theory of prosecution pursued in separate prosecution of defendant's former live-in boyfriend); Staples v. Com., 454 S.W.3d 803 (Ky. 2014) (affirming the conviction of defendant who caused multiple fractures in his girlfriend's two-year-old daughter as well as severe head trauma, likely caused by severe blunt-force trauma); Comm. v. Chapman, 744 N.E.2d 14 (Mass. 2001) (holding that crime for inflicting "substantial bodily injury" does not include death, but that death may be evidence of a substantial bodily injury, and thus finding that asphyxiation by drowning constituted substantial bodily injury where a mother left her 10-month-old infant unattended in the bath and the infant subsequently drowned and died).

For a criminal case discussing the harm standard, see State v. Kimberly B., 699 N.W.2d 641, 648 (Wis. Ct. App. 2005) (rejecting the argument "that for the bodily harm element to be met, the harm to the victim must be severe enough that he or she receives some form of medical treatment," and instead holding that "bodily harm" "merely requires a showing of physical pain or injury, illness, or any impairment of physical condition"; further finding that this standard was satisfied when mother repeatedly hit her nine-year-old daughter with a closed fist and hit the child

with an umbrella, causing a bruise and swelling beneath the eye, marks on the child's arm, and a portion of skin to peel off) (internal quotations deleted).

Illustration 1 is loosely based on State v. Alderete, 172 P.3d 27 (Kan. 2007). Illustration 2 is based on Doug Y. v. Dep't of Health & Soc. Servs., Office of Children's Servs., 243 P.3d 217 (Alaska 2010). Illustration 3 changes the facts to make clear the kinds of physical contact that would not qualify as physical abuse. Illustration 4 is based on In re Isabella F., 226 Cal. App. 4th 128 (Cal. Ct. App. 2014).

For examples of state statutes making conduct that does not result in serious physical harm a lesser criminal offense, see NEB. REV. STAT. ANN. § 28-707(3) (2015) ("Child abuse is a Class I misdemeanor if the offense is committed negligently and does not result in serious bodily injury as defined in section 28-109 or death."); NEB. REV. STAT. ANN. § 28-707(4) (2015) ("Child abuse is a Class IIIA felony if the offense is committed knowingly and intentionally and does not result in serious bodily injury as defined in section 28-109 or death."); NEB. REV. STAT. ANN. § 28-109(21) ("Serious bodily injury shall mean bodily injury which involves a substantial risk of death, or which involves substantial risk of serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body."); N.C. GEN. STAT. ANN. § 14-318.2(a) (2009) ("Any parent of a child less than 16 years of age, or any other person providing care to or supervision of such child, who inflicts physical injury, or who allows physical injury to be inflicted, or who creates or allows to be created a substantial risk of physical injury, upon or to such child by other than accidental means is guilty of the Class A1 misdemeanor of child abuse.").

For an example of a state criminalizing specific actions, see MISS. CODE. ANN. § 97-5-39(2) (2013) ("Any person shall be guilty of felonious child abuse in the following circumstances: (a) Whether bodily harm results or not, if the person shall intentionally, knowingly or recklessly: (i) Burn any child; (ii) Physically torture any child; (iii) Strangle, choke, smother or in any way interfere with any child's breathing; (iv) Poison a child; (v) Starve a child of nourishments needed to sustain life or growth; (vi) Use any type of deadly weapon upon any child").

At least one state explicitly criminalizes shaking a baby in a manner that causes serious physical injury to the child. See KAN. STAT. ANN. § 21-5602(a) (2011) ("Abuse of a child is knowingly: . . . (2) shaking any child under the age of 18 years which results in great bodily harm to the child"). And for examples of statutes referencing specific symptoms, see R.I. GEN. LAWS § 11-9-5.3(c) ("For the purposes of this section, 'serious bodily injury' means physical injury that . . . (4) Evidences subdural hematoma, intercranial hemorrhage and/or retinal hemorrhages as signs of 'shaken baby syndrome' and/or 'abusive head trauma'"); Utah Code Ann. § 76-5-109(1)(f)(ii) ("'Serious physical injury' includes . . . (B) intracranial bleeding, swelling or contusion of the brain, whether caused by blows, shaking, or causing the child's head to impact with an object or surface").

For a review of the medical literature finding that abusive head trauma can cause permanent injuries and death, see U.S. CTRS. DISEASE CONTROL & PREVENTION, PEDIATRIC ABUSIVE HEAD TRAUMA: RECOMMENDED DEFINITIONS FOR PUBLIC HEALTH SURVEILLANCE AND RESEARCH (2012), available at https://www.cdc.gov/violenceprevention/pdf/PedHeadTrauma-a.pdf.

In the typical case involving shaking a baby, prosecutors introduce evidence of three factors—retinal bleeding, bleeding in the protective layer of the brain, and brain swelling—as proof that a caregiver caused the injury or death by shaking the child. For a critical review of the practice of relying on this triad of symptoms to establish guilt and causation, see DEBORAH TURKHEIMER, FLAWED CONVICTIONS: "SHAKEN BABY SYNDROME" AND THE INERTIA OF INJUSTICE 1-66 (2014); Maxine Eichner, *Bad Medicine: Parents, the State, and the Charge of "Medical Child Abuse,"* 50 U.C. DAVIS L. REV. 205, 273-278 (2016) (discussing the role of pediatricians in supporting the research and the legal reliance on the triad of symptoms). As these authors describe, recent research casts doubt on the importance of the three clinical findings; instead, research suggests that most child deaths may well have been the result of other causes, particularly underlying conditions or older brain injuries, not the proximate shaking. A federal court vacated the murder conviction of a caregiver on actual innocence grounds, concluding that the evidence to support shaken baby syndrome is "more an article of faith than a proposition of science." Del Prete v. Thompson, 10 F. Supp. 3d 907, 957 n.10 (N.D. Ill. 2014). For further discussion, see Reporters' Note for Comment *k*.

For examples of state statutes adopting a relatively high threshold of harm to trigger state intervention through the child welfare system—generally "serious physical harm" or "substantial physical harm"—see ALASKA STAT. ANN. § 47.10.011 ("the court may find a child to be a child in need of aid if it finds by a preponderance of the evidence that the child has been subjected to any of the following: . . . (6) the child has suffered substantial physical harm, or there is a substantial risk that the child will suffer substantial physical harm, as a result of conduct by or conditions created by the child's parent, guardian, or custodian"); CAL. WELF. & INST. CODE ANN. § 300 ("A child who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge that person to be a dependent child of the court: (a) The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm inflicted non-accidentally upon the child by the child's parent or guardian. . . . The child is under the age of five years and has suffered severe physical abuse by a parent, or by any person known by the parent, if the parent knew or reasonably should have known that the person was physically abusing the child. For the purposes of this subdivision, 'severe physical abuse' means any of the following: any single act of abuse which causes physical trauma of sufficient severity that, if left untreated, would cause permanent physical disfigurement, permanent physical disability, or death; any single act of sexual abuse which causes significant bleeding, deep bruising, or significant external or internal swelling; or more than one act of physical abuse, each of which causes bleeding, deep bruising, significant external or internal swelling, bone fracture, or unconsciousness; or the willful, prolonged failure to provide adequate food."); FLA. STAT. ANN. § 39.01(2) (2016) ("'Abuse' means any willful act or threatened act that results in any physical, mental, or sexual abuse, injury, or harm that causes or is likely to cause the child's physical, mental, or emotional health to be significantly impaired."); IND. CODE ANN. § 31-34-1-2(2)(a) (2005) ("A child is a child in need of services if before the child becomes eighteen (18) years of age: (1) the child's physical or mental health is seriously endangered due to injury by the act or omission of the child's parent, guardian,

or custodian; and (2) the child needs care, treatment, or rehabilitation that: (A) the child is not receiving; and (B) is unlikely to be provided or accepted without the coercive intervention of the court."); KY. REV. STAT. ANN. § 600.020 (2010) ("(1) 'Abused or neglected child' means a child whose health or welfare is harmed or threatened with harm when: (a) His or her parent, guardian, person in a position of authority or special trust, as defined in KRS 532.045, or other person exercising custodial control or supervision of the child: 1. Inflicts or allows to be inflicted upon the child physical or emotional injury as defined in this section by other than accidental means; . . . (48) 'Physical injury' means substantial physical pain or any impairment of physical condition"); LA. CHILD. CODE ANN. ART. 603(2) (2015) ("'Abuse' means any one of the following acts which seriously endanger the physical . . . health and safety of the child: (a) The infliction, attempted infliction, or, as a result of inadequate supervision, the allowance of the infliction or attempted infliction of physical . . . injury upon the child by a parent or any other person."); TEX. CODE ANN. FAM. CODE § 261.001(1) ("'Abuse' includes the following acts or omissions by a person: . . . (C) physical injury that results in substantial harm to the child, or the genuine threat of substantial harm from physical injury to the child").

For examples of courts applying this relatively high standard, see Carter v. State, 195 So. 3d 238, 243-244 (Miss. Ct. App. 2016) (noting that in the "context of felony child abuse, 'serious bodily harm' is defined as 'bodily injury which creates a substantial risk of death, or permanent or temporary disfigurement, or impairment of any bodily organ or function.' Substantial harm, by contrast, does not necessarily implicate a substantial risk of death, and includes harm to mental and emotional health."); In re L.Z., 111 A.3d 1164 (Pa. 2015) (applying state statute requiring "serious physical injur[y]" to find two injuries satisfied the standard: a deep laceration nearly halfway around the base of the penis of a 21-month-old child and a dark bruise above the jawbone and below the cheekbone on each side, consistent with an adult grabbing the child's face and squeezing it hard); In re S.A., 708 N.W.2d 673 (S.D. 2005) (applying state's "substantial harm" statute and finding that repeated incidents of parents hitting four children with belts, flyswatters, and spatulas constituted physical abuse); In re Mariah T., 71 Cal. Rptr. 3d 542 (Cal. Ct. App. 2008) (finding that a parent using a belt to hit a three-year-old child's forearms and stomach hard enough to produce deep purple bruises satisfied the "serious physical harm" standard).

For definitions of "substantial risk," see Ohio Rev. Code Ann. § 2901.01(8) (West 2017) ("Substantial risk' means a strong possibility, as contrasted with a remote or significant possibility, that a certain result may occur or that certain circumstances may exist."); WYO. STAT. ANN. § 14-3-202(a)(ii)(C) (West) ("'Substantial risk' means a strong possibility as contrasted with a remote or insignificant possibility"); Lybarger v. People, 807 P.2d 570, 578 (Colo. 1991) ("By a substantial risk of serious bodily harm we mean those conditions which if medically untreated may result in a significant impairment of vital physical or mental functions, protracted disability, permanent disfigurement, or similar defects or infirmities.").

Illinois and New York formulate the serious-harm standard somewhat differently and arguably impose an even higher standard. See 325 ILL. COMP. STAT. ANN. 5/3 (2016) ("'Abused child' means a child whose parent or immediate family member, or any person responsible for the

child's welfare, or any individual residing in the same home as the child, or a paramour of the child's parent: (a) inflicts, causes to be inflicted, or allows to be inflicted upon such child physical injury, by other than accidental means, which causes death, disfigurement, impairment of physical or emotional health, or loss or impairment of any bodily function"); N.Y. FAM. CT. ACT § 1012(e) ("'Abused child' means a child less than eighteen years of age whose parent or other person legally responsible for his care (i) inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ, or (ii) creates or allows to be created a substantial risk of physical injury to such child by other than accidental means which would be likely to cause death or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ").

For an example of a court applying New York's standard, see Matter of Angelique H., 215 A.D.2d 318, 320 (N.Y. 1995) (finding that a mother placing a four-year-old's hand over a burning stove and causing second-degree burns "demonstrated that the child was sufficiently injured to warrant a finding of abuse under [New York statute]. It shows that the child sustained an injury which, if it did not actually cause serious impairment of his right hand and fingers, 'create[d] a substantial risk of . . . protracted loss or impairment of the function of any bodily organ'") (internal citations omitted).

For examples of state statutes adopting a lower threshold of harm to trigger state intervention, see CONN. GEN. STAT. ANN. § 46b-120(7) (2017) ("A child or youth may be found 'abused' who (A) has been inflicted with physical injury or injuries other than by accidental means, (B) has injuries that are at variance with the history given of them"); IOWA CODE ANN. § 232.68(2)(a)(1) (2016) ("'Child abuse' or 'abuse' means: (1) Any nonaccidental physical injury, or injury which is at variance with the history given of it, suffered by a child as the result of the acts or omissions of a person responsible for the care of the child."); NEV. REV. STAT. ANN. § 432B.020(1) (2004) ("'Abuse or neglect of a child' means . . . (a) Physical or mental injury of a nonaccidental nature"); 33 VT. STAT. ANN. § 4912(1) ("'Abused or neglected child' means a child whose physical health . . . is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare.").

In states with this lower standard, it is not clear from reported appellate cases that the courts extend jurisdiction over families for lesser injuries than in states with a higher standard. Reported cases tend to involve a fairly high level of physical harm. See, e.g., Winston v. State Dept. Soc. & Rehabilitation Servs., 49 P.3d 1274 (Kan. 2002) (applying Kansas's statute, which defines physical abuse as "non-accidental or intentional action or inaction that results in bodily injury or that presents a likelihood of death or of bodily injury," and finding that the statute does not require bruising or other marks and that the father's conduct constituted physical abuse where there was evidence that the father picked his nine-year-old son up by the neck, pushed the son's face into the corner, and the son said he had a hard time breathing; the father also hit the son several times with his fists and tennis shoe; the daughter reported that the father hit her brother hard, sat on her

brother, strangled him, and put a pillow on his face); G.A.C. v. State ex rel. Juv. Dep't. Polk Cty., 182 P.3d 223, 228 (Or. Ct. App. 2008) (applying Oregon's statutes—which define child abuse as "any physical injury to a child which has been caused by other than accidental means," and which permit jurisdiction over a child "[w]hose condition or circumstances are such as to endanger the welfare of the person"—to find the court should exercise jurisdiction over a 15-year-old child whose mother hit her multiple times with a long wooden spoon, producing welts and deep bruising; concluding that "[i]f a parent causes physical injury to a child by nonaccidental means, the parent has physically abused the child," at least with these kinds of injuries). More minor injuries, such as bruising, are often at issue in determining conduct that falls within the limited parental privilege to use reasonable corporal punishment. For cases discussing bruising and other more minor injuries in this context, see § 3.24.

Some states specify that certain injuries, such as a broken bone, constitute child abuse, if the court also finds that the injury is not adequately explained, the explanation is at odds with the medical evidence, or the circumstances indicate that the injury was not accidental. See, e.g., COLO. REV. STAT. ANN. § 19-1-103(1)(a) (2016) ("'Abuse' or 'child abuse or neglect' . . . means an act or omission in one of the following categories that threatens the health or welfare of a child: (I) Any case in which a child exhibits evidence of skin bruising, bleeding, malnutrition, failure to thrive, burns, fracture of any bone, subdural hematoma, soft tissue swelling, or death and either: Such condition or death is not justifiably explained; the history given concerning such condition is at variance with the degree or type of such condition or death; or the circumstances indicate that such condition may not be the product of an accidental occurrence"); FLA. STAT. ANN. § 39.01(30) (2016) ("'Harm' to a child's health or welfare can occur when any person: (a) Inflicts or allows to be inflicted upon the child physical, mental, or emotional injury. In determining whether harm has occurred, the following factors must be considered in evaluating any physical, mental, or emotional injury to a child: the age of the child; any prior history of injuries to the child; the location of the injury on the body of the child; the multiplicity of the injury; and the type of trauma inflicted. Such injury includes, but is not limited to: 1. Willful acts that produce the following specific injuries: a. Sprains, dislocations, or cartilage damage. B. Bone or skull fractures. C. Brain or spinal cord damage. D. Intracranial hemorrhage or injury to other internal organs. E. Asphyxiation, suffocation, or drowning. F. Injury resulting from the use of a deadly weapon. G. Burns or scalding. H. Cuts, lacerations, punctures, or bites. i. Permanent or temporary disfigurement. J. Permanent or temporary loss or impairment of a body part or function."); HAW. REV. STAT. ANN. § 587A-4 (2013) ("'Harm' means damage or injury to a child's physical or psychological health or welfare, where: (1) The child exhibits evidence of injury, including, but not limited to: (A) Substantial or multiple skin bruising; (B) Substantial external or internal bleeding; (C) Burn or burns; (D) Malnutrition; (E) Failure to thrive; (F) Soft tissue swelling; (G) Extreme pain; (H) Extreme mental distress; (I) Gross degradation; (J) Poisoning; (K) Fracture of any bone; (L) Subdural hematoma; or (M) Death; and the injury is not justifiably explained, or the history given concerning the condition or death is not consistent with the degree or type of the condition or death, or there is evidence that the condition

or death may not be the result of an accident"); N.M. STAT. ANN. § 32A-4-2(G) (2016) ("'physical abuse' includes but is not limited to any case in which the child exhibits evidence of skin bruising, bleeding, malnutrition, failure to thrive, burns, fracture of any bone, subdural hematoma, soft tissue swelling or death and: (1) there is not a justifiable explanation for the condition or death; (2) the explanation given for the condition is at variance with the degree or nature of the condition; (3) the explanation given for the death is at variance with the nature of the death; or (4) circumstances indicate that the condition or death may not be the product of an accidental occurrence").

For examples of child-protection cases where there is no question that the injuries satisfied any standard of physical abuse, see In re S.B.C., 64 P.3d 1080 (Okla. 2002) (finding parents physically abused an infant when the child had numerous, serious injuries sustained at different times including a skull fracture within the last 24 hours, a 10-to-14-day-old healing rib fracture, and a metaphyseal lesion commonly called a "bucket handle fracture," which is consistent with shaken baby syndrome); In re Chester J., 754 A.2d 772 (R.I. 2000) (finding 17-year-old parents abused a seven-month-old infant when the infant had bone fractures of different ages, including fractures to the ribs, swelling and healing fractures on the tibia and ulna bones, fluid in the abdominal cavity, an enlarged liver, and bruises all over the body consistent with adult bite marks).

Illustration 5 is based on Chabolla v. Virginia Dept. of Soc. Services, 687 S.E.2d 85 (Va. Ct. App. 2010), although the Illustration changes the facts so the father is pointing the gun at the daughter to make the risk higher.

Illustration 6 is based on In re CS, 143 P.3d 918 (Wyo. 2006). Some states require that the action be accompanied by an injury. See, e.g., ARK. CODE ANN. § 12-18-103(3)(A) ("'Abuse' means any of the following acts or omissions . . . : (vi) Any of the following intentional or knowing acts, with physical injury and without justifiable cause: (a) Throwing, kicking, burning, biting, or cutting a child; (b) Striking a child with a closed fist; (c) Shaking a child; or (d) Striking a child on the face or head"); 23 PA. CONSOL. STAT. ANN. § 6303(b-1) ("Child abuse.—The term 'child abuse' shall mean intentionally, knowingly or recklessly doing any of the following: (8) Engaging in any of the following recent acts: (i) Kicking, biting, throwing, burning, stabbing or cutting a child in a manner that endangers the child."). Other states do not require an injury, although sometimes there are specific age requirements. See, e.g., ARK. CODE ANN. § 12-18-103(3)(A) ("'Abuse' means any of the following acts or omissions . . . : (vii) Any of the following intentional or knowing acts, with or without physical injury: (a) Striking a child six (6) years of age or younger on the face or head; (b) Shaking a child three (3) years of age or younger; (c) Interfering with a child's breathing; (d) Pinching, biting, or striking a child in the genital area; (e) Tying a child to a fixed or heavy object or binding or tying a child's limbs together"); 23 PA. CONSOL. STAT. ANN. § 6303(b-1) ("Child abuse.—The term 'child abuse' shall mean intentionally, knowingly or recklessly doing any of the following: (8) Engaging in any of the following recent acts: . . . (ii) Unreasonably restraining or confining a child, based on consideration of the method, location or the duration of the restraint or confinement. (iii) Forcefully shaking a child under one year of age. (iv) Forcefully slapping or otherwise striking a child under one year of age. (v) Interfering with the breathing of a child").

f. Criminal liability—covered adults. The vast majority of states do not limit criminal liability for physical abuse to specified adults and instead impose criminal liability broadly. See, e.g., ARIZ. REV. STAT. ANN. § 13-3623(A) ("Under circumstances likely to produce death or serious physical injury, any person who causes a child or vulnerable adult to suffer physical injury or, having the care or custody of a child or vulnerable adult, who causes or permits the person or health of the child or vulnerable adult to be injured or who causes or permits a child or vulnerable adult to be placed in a situation where the person or health of the child or vulnerable adult is endangered is guilty of an offense as follows . . . ; CAL. PENAL CODE ANN. § 273a ("(a) Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered, shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years; (b) Any person who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health may be endangered, is guilty of a misdemeanor."); COLO. REV. STAT. ANN. § 18-6-401(1)(a) (2014) ("A person commits child abuse if such person causes an injury to a child's life or health"); IDAHO CODE ANN. § 18-1501(1) (2005) ("Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering . . . is punishable by imprisonment"); MISS. CODE. ANN. § 97-5-39(2) (2013) (Any person shall be guilty of felonious child abuse in the following circumstances . . . ."); N.Y. PENAL LAW § 260.10 (2010) ("A person is guilty of endangering the welfare of a child when: 1. He or she knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old or directs or authorizes such child to engage in an occupation involving a substantial risk of danger to his or her life or health").

A few states have a more limited reach for criminal child-abuse statutes. See, e.g., ALA. CODE § 26-15-3 (imposing criminal liability on a "responsible person" defined in § 26-15-2 as "[a] child's natural parent, stepparent, adoptive parent, legal guardian, custodian, or any other person who has the permanent or temporary care or custody or responsibility for the supervision of a child"); R.I. GEN. LAWS § 11-9-5.3(b) (imposing criminal liability "[w]henever a person having care of a child, as defined by § 40-11-2(2), whether assumed voluntarily or because of a legal obligation, including any instance where a child has been placed by his or her parents, caretaker, or licensed or governmental child placement agency for care or treatment, knowingly or intentionally" commits specified acts).

For examples of statutes specifying when a person is criminally liable for causing or permitting another person to physically abuse a child, see ARIZ. REV. STAT. ANN. § 13-3623(A)

("Under circumstances likely to produce death or serious physical injury, any person who . . . having the care or custody of a child or vulnerable adult, who causes or permits the person or health of the child or vulnerable adult to be injured or who causes or permits a child or vulnerable adult to be placed in a situation where the person or health of the child or vulnerable adult is endangered is guilty of an offense as follows . . . ."); CAL. PENAL CODE ANN. § 273a(a) ("Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered, shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years."); COLO. REV. STAT. ANN. § 18-6-401(1)(a) (2014) ("A person commits child abuse if such person causes an injury to a child's life or health, or permits a child to be unreasonably placed in a situation that poses a threat of injury to the child's life or health, or engages in a continued pattern of conduct that results in malnourishment, lack of proper medical care, cruel punishment, mistreatment, or an accumulation of injuries that ultimately results in the death of a child or serious bodily injury to a child."); MINN. STAT. ANN. § 609.378(a)(2) (2005) ("A parent, legal guardian, or caretaker who knowingly permits the continuing physical or sexual abuse of a child is guilty of neglect of a child and may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than $3,000, or both."); MINN. STAT. ANN. § 609.378(b) (2005) ("A parent, legal guardian, or caretaker who endangers the child's person or health by: (1) intentionally or recklessly causing or permitting a child to be placed in a situation likely to substantially harm the child's physical, mental, or emotional health or cause the child's death . . . is guilty of child endangerment and may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than $3,000, or both. If the endangerment results in substantial harm to the child's physical, mental, or emotional health, the person may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both."); N.Y. PENAL LAW § 260.10 (2010) ("A person is guilty of endangering the welfare of a child when: . . . 2. Being a parent, guardian or other person legally charged with the care or custody of a child less than eighteen years old, he or she fails or refuses to exercise reasonable diligence in the control of such child to prevent him or her from becoming an 'abused child,' a 'neglected child,' a 'juvenile delinquent' or a 'person in need of supervision,' as those terms are defined in articles ten, three and seven of the family court act.").

Illustration 9 is based loosely on State v. Watkins, 659 N.W.2d 526 (Iowa 2003), but the facts are changed to make it clear that the mother knew of the danger posed by the boyfriend.

g. Criminal liability—culpability requirements. For examples of state statutes differentiating crimes by mental state, see ARIZ. REV. STAT. ANN. § 13-3623(A) ("Under circumstances likely to produce death or serious physical injury, any person who causes a child or vulnerable adult to suffer physical injury or, having the care or custody of a child or vulnerable adult, who causes or permits the person or health of the child or vulnerable adult to be injured or

who causes or permits a child or vulnerable adult to be placed in a situation where the person or health of the child or vulnerable adult is endangered is guilty of an offense as follows: 1. If done intentionally or knowingly, the offense is a class 2 felony and if the victim is under fifteen years of age it is punishable pursuant to § 13-705; 2. If done recklessly, the offense is a class 3 felony; 3. If done with criminal negligence, the offense is a class 4 felony."); KY. REV. STAT. ANN. § 508.100(1) (2017) ("A person is guilty of criminal abuse in the first degree when he intentionally abuses another person or permits another person of whom he has actual custody to be abused"); KY. REV. STAT. ANN. § 508.110(1) (2017) ("A person is guilty of criminal abuse in the second degree when he wantonly abuses another person or permits another person of whom he has actual custody to be abused"); KY. REV. STAT. ANN. § 508.120(1) (2017) ("A person is guilty of criminal abuse in the third degree when he recklessly abuses another person or permits another person of whom he has actual custody to be abused").

Illustration 10 is based on Payton v. State, 642 So. 2d 1328 (Miss. 1994). It uses the purposeful and knowing culpability standards in the Model Penal Code. See Model Penal Code § 2.02(2)(a) and (2)(b) (AM. LAW INST. 1962). States typically do not separate intentional and knowing acts of child abuse and instead group them together. See, e.g., ARIZ. REV. STAT. ANN. § 13-3623(A)(1) ("If done intentionally or knowingly, the offense is a class 2 felony"); MICH. COMP. LAWS ANN. § 750.136b(2) (2012) ("A person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical or serious mental harm to a child.").

Illustration 11 is based on State v. Williams, 723 N.W.2d 719 (Wis. Ct. App. 2006). It uses the criminal recklessness culpability standard in the Model Penal Code. See Model Penal Code § 2.02(2)(c) (AM. LAW INST. 1962).

The black letter does not impose criminal liability for negligent actions. Some state statutes contemplate such liability, see, e.g., ARIZ. REV. STAT. ANN. § 13-3623(A) ("Under circumstances likely to produce death or serious physical injury, any person who causes a child or vulnerable adult to suffer physical injury or, having the care or custody of a child or vulnerable adult, who causes or permits the person or health of the child or vulnerable adult to be injured or who causes or permits a child or vulnerable adult to be placed in a situation where the person or health of the child or vulnerable adult is endangered is guilty of an offense as follows: . . . If done with criminal negligence, the offense is a class 4 felony."); GA. CODE ANN. § 16-5-70(c) (2004) ("Any person commits the offense of cruelty to children in the second degree when such person with criminal negligence causes a child under the age of 18 cruel or excessive physical or mental pain."); NEB. REV. STAT. ANN. § 28-707(1) (2015) ("A person commits child abuse if he or she knowingly, intentionally, or negligently causes or permits a minor child to be: (a) Placed in a situation that endangers his or her life or physical or mental health; (b) Cruelly confined or cruelly punished"); N.M. STAT. ANN. § 30-6-1(A) (2009) ("As used in this section: (3) "negligently" refers to criminal negligence and means that a person knew or should have known of the danger involved and acted with a reckless disregard for the safety or health of the child"), but courts generally do not impose it.

Illustration 12 demonstrates that accidental injuries are not considered crimes or the basis for a civil child-protection proceeding, generally speaking. See, e.g., N.C. GEN. STAT. ANN. § 14-318.2(a) (2009) ("Any parent of a child less than 16 years of age, or any other person providing care to or supervision of such child, who inflicts physical injury, or who allows physical injury to be inflicted, or who creates or allows to be created a substantial risk of physical injury, upon or to such child by other than accidental means is guilty of the Class A1 misdemeanor of child abuse."); TENN. CODE ANN. § 39-15-401(a) ("Any person who knowingly, other than by accidental means, treats a child under eighteen (18) years of age in such a manner as to inflict injury commits a Class A misdemeanor; provided, however, that, if the abused child is eight (8) years of age or less, the penalty is a Class D felony.").

For other cases addressing the culpability required for criminal child abuse, see State v. Olbricht, 885 N.W.2d 699 (Neb. 2016) (holding that circumstantial evidence is sufficient to support conviction for knowing and intentional child abuse resulting in serious bodily injury); State v. Payne, 314 P.3d 1239 (Ariz. 2013) (in a statute imposing criminal liability for intentional and knowing acts, the state needed to prove only that "the defendant intended to cause or knew that he would cause . . . injury," not that he also "intended or knew that the circumstances were likely to produce death or serious injury") (internal quotations and citation omitted); Sullivan v. Kemp, 749 S.E.2d 721, 725 (Ga. 2013) (finding, in an appeal of a habeas corpus petition, that "it was erroneous for the trial court to give instructions regarding the definition of criminal negligence when it did not also specifically instruct . . . that conviction for aggravated assault requires a finding of criminal intent").

For examples of state statutes imposing a criminal negligence standard, see ARIZ. REV. STAT. ANN. § 13-3623(A) ("Under circumstances likely to produce death or serious physical injury, any person who . . . having the care or custody of a child or vulnerable adult, . . . causes or permits the person or health of the child or vulnerable adult to be injured or who causes or permits a child or vulnerable adult to be placed in a situation where the person or health of the child or vulnerable adult is endangered is guilty of an offense as follows: . . . If done with criminal negligence, the offense is a class 4 felony."); NEB. REV. STAT. ANN. § 28-707(1) (2015) ("A person commits child abuse if he or she knowingly, intentionally, or negligently causes or permits a minor child to be: (a) Placed in a situation that endangers his or her life or physical or mental health; (b) Cruelly confined or cruelly punished"); N.M. STAT. ANN. § 30-6-1(A) (2009) ("As used in this section: (3) 'negligently' refers to criminal negligence and means that a person knew or should have known of the danger involved and acted with a reckless disregard for the safety or health of the child"); N.M. STAT. ANN. § 30-6-1(D) (2009) ("Abuse of a child consists of a person knowingly, intentionally or negligently, and without justifiable cause, causing or permitting a child to be: (1) placed in a situation that may endanger the child's life or health; (2) tortured, cruelly confined or cruelly punished"); UTAH CODE ANN. 1953 § 76-5-109(2) ("Any person who . . . having the care or custody of such child, causes or permits another to inflict serious physical injury upon a child is guilty of an offense as follows: . . . (c) if done with criminal negligence, the offense is a class A misdemeanor").

For a case discussing the culpability needed for causing or permitting another person to inflict physical abuse, see People v. Pollock, 780 N.E.2d 669, 684-685 (Ill. 2002) (applying Illinois law, which recognizes only intentional or knowing conduct and does not impose criminal liability when a parent should have known the child was being abused; "Even in situations where the parent is not present at the time when the abuse resulting in death takes place, the parent may be held accountable for the criminal conduct resulting in death, if it is proved that the parent knew that the child had been abused by the principal in the past and, because of the nature of previous injuries sustained by the child, also knew there was a substantial risk of serious harm, yet took no action to protect the child from future injury by the abuser.")

h. Intervention by the child welfare system—covered adults. For examples of statutes specifying which adults are covered by civil child welfare provisions, see ALASKA STAT. ANN. § 47.10.011 ("the court may find a child to be a child in need of aid if it finds by a preponderance of the evidence that the child has been subjected to any of the following: . . . (6) the child has suffered substantial physical harm, or there is a substantial risk that the child will suffer substantial physical harm, as a result of conduct by or conditions created by the child's parent, guardian, or custodian or by the failure of the parent, guardian, or custodian to supervise the child adequately"); CAL. WELF. & INST. CODE ANN. § 300 ("A child who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge that person to be a dependent child of the court: (a) The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm inflicted non-accidentally upon the child by the child's parent or guardian"); GA. CODE ANN. § 19-15-1(3) (2016) ("'Child abuse' means: (A) Physical injury or death inflicted upon a child by a parent or caretaker thereof by other than accidental means"); KY. REV. STAT. ANN. § 600.020(1) (2010) ("'Abused or neglected child' means a child whose health or welfare is harmed or threatened with harm when: (a) His or her parent, guardian, person in a position of authority or special trust, as defined in KRS 532.045, or other person exercising custodial control or supervision of the child: 1. Inflicts or allows to be inflicted upon the child physical or emotional injury as defined in this section by other than accidental means"); N.J. STAT. ANN. § 9:6-8.9 (2017) ("For purposes of this act: 'Abused child' means a child under the age of 18 years whose parent, guardian, or other person having his custody and control: a. Inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ; b. Creates or allows to be created a substantial or ongoing risk of physical injury to such child by other than accidental means which would be likely to cause death or serious or protracted disfigurement, or protracted loss or impairment of the function of any bodily organ"); N.Y. FAM. CT. ACT § 1012(e) ("'Abused child' means a child less than eighteen years of age whose parent or other person legally responsible for his care (i) inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any

bodily organ, or (ii) creates or allows to be created a substantial risk of physical injury to such child by other than accidental means which would be likely to cause death or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ").

i. Intervention by the child welfare system—substantial deviation from the standard of care exercised by a reasonable parent. Illustration 16 is based on Taylor v. Harford Cty. Dep't of Soc. Servs., 862 A.2d 1026 (Md. 2004). Some states draw this line by counting only reckless parental behavior as child abuse, not negligent parental behavior. See id. (rejecting a foreseeability standard and instead requiring that a parent's behavior must be either deliberate or reckless; in that case, finding the parent's conduct—kicking a footstool toward a child but not intending to hit the child—was not reckless); P.R. v. Com., Dept. of Pub. Welfare, 801 A.2d 478, 487 (Pa. 2002) (finding mother's conduct—dispensing corporal punishment with a belt and accidentally hitting her daughter in the eye with the belt buckle, causing an eye injury that needed surgery to treat—did not constitute civil child abuse; holding that, at least in the context of corporal punishment, civil child abuse turns on whether the parent's behavior constituted criminal negligence (defined as "a gross deviation from the standard of care a reasonable parent would observe in the same situation") rather than mere foreseeability).

j. Intervention by the child welfare system—rebuttable presumption of parental responsibility. The presumption provides a way for the child welfare authorities who are uncertain precisely what happened to the child to present sufficient evidence to survive a motion to dismiss the petition for failing to present a prima facie case against either parent. Statutory provisions addressing this evidentiary issue fill in the absence of direct proof of culpability. See, e.g., N.Y. FAM. CT. ACT § 1046(a)(ii) ("proof of injuries sustained by a child or of the condition of a child of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent or other person responsible for the care of such child shall be prima facie evidence of child abuse or neglect, as the case may be, of the parent or other person legally responsible"); 23 PA. CONSOL. STAT. § 6381(d) ("Evidence that a child has suffered child abuse of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent or other person responsible for the welfare of the child shall be prima facie evidence of child abuse by the parent or other person responsible for the welfare of the child."). As the New York Court of Appeals explained in Matter of Philip M., the presumption "attempts to strike a fair and reasonable balance between a parent's right to care for a child and the child's right to be free from harm. The establishment of a prima facie case does not require the court to find that the parents were culpable; it merely establishes a rebuttable presumption of parental culpability which the court may or may not accept based upon all the evidence in the record. Before relying upon its provisions, the court should consider such factors as the strength of the prima facie case and the credibility of the witnesses testifying in support of it, the nature of the injury, the age of the child, relevant medical or scientific evidence and the reasonableness of the caretaker's explanation in light of all the circumstances. In weighing the caretaker's explanation, the court may consider the inferences reasonably drawn from their actions upon learning of the injury. Certainly, the

caretaker's failure to offer any explanation for the child's injuries, to treat the child, or to show how future injury could be prevented are factors to be considered by the court, for they reflect not only upon the caretaker's fault and competence but also the strength of the caretaker's rebuttal evidence." 624 N.E.2d 168, 246 (1993); see also id. at 244 ("The application of the statute . . . permits a finding of abuse or neglect based upon evidence of an injury to a child which would ordinarily not occur absent acts or omissions of the responsible caretaker. It authorizes a method of proof which is closely analogous to the negligence rule of res ipsa loquitur.").

Once the state is able to survive a motion to dismiss for failing to prove who did exactly what, the respondent has the choice to present evidence or not. If the respondent does present evidence, the respondent may try to show that no injury was sustained, that it was more likely than not caused by an accident, that it is more likely than not that the injury was inflicted by someone else, that the injury occurred when the respondent was not present, or something else.

For a case discussing the inapplicability of the presumption when the parent is not caring for the child, see Matter of Zachary MM, 276 A.D.2d 876 (N.Y. App. Div. 2000) (dismissing child-protection proceeding against the parents where the evidence established that the child's injuries occurred while the child was under the sole care of the babysitter and the parents had no reason to suspect abuse).

Illustration 19 is based on In re L.Z., 111 A.3d 1164 (Pa. 2015), although the facts are changed to a mother and father to avoid any question about who is responsible for the child. Courts disagree about whether it is proper to apply the presumption when the court is reasonably certain that only one adult inflicted the abuse, but the court does not know which adult is responsible. Compare Matter of Zachary MM, 276 A.D.2d 876 (N.Y. App. Div. 2000) (finding trial court properly dismissed petition against the parents when the evidence showed that the child more likely than not was injured by a babysitter), with In re Interest of Sarah C., 626 N.W.2d 637 (Neb. 2001) (finding that the state need not establish the identity of the abuser as between two responsible parents when the injuries are clearly nonaccidental—there, a four-month-old child had multiple fractures and no underlying condition to explain the injuries—and there are no other likely adults who inflicted the abuse). This Section adopts the position that the presumption does not apply when the court is reasonably certain that only one adult inflicted the abuse, but the court does not know which adult is responsible. This approach is more consistent with the principles of the child welfare system, which does not adopt strict liability for a child's injuries.

k. Expert medical testimony regarding physical abuse—criminal proceedings and civil child-protection proceedings. In both criminal and civil child-protection proceedings, courts often allow medical experts to testify to their conclusion that physical abuse has occurred. See, e.g., People v. Weeks, 369 P.3d 699 (Colo. App. 2015) (a medical expert may express a medical opinion that the child's injuries were caused by intentional child abuse "so long as (1) he or she does not give an opinion on whether or not the defendant inflicted the injuries or whether the injuries fit the *legal* definition of child abuse and (2) the jury is properly instructed that it may accept or reject the opinion."). This Section adopts a more constrained role for medical expert testimony, limiting it to the child's diagnoses, the effects of the diagnoses for the child, and, where reliable, the medical

expert's opinion of the external forces believed responsible for the child's diagnoses. The conclusion that the child's diagnoses were the result of abuse is a decision that should be left solely to the trier of fact.

Illustration 20 is based on Cobble v. Commissioner of Dept. of Social Services, 430 Mass. 385 719 N.E.2d 500 (1999), although the context was changed to a criminal proceeding.

Some courts have recognized that the diagnostic inquiry in which physicians are trained, called "differential diagnosis," involves a search for abnormal underlying conditions or diseases in the patient. These courts have distinguished diagnostic inquiries from the search for causal explanations external to the patient's body, which they call "differential etiology." As the New Mexico Supreme Court stated, "the process whereby doctors attempt to determine the external, nonmedical cause of the injury, [is] a legal [rather than a medical] construct called 'differential etiology' . . . . Importantly, 'physicians receive more formal training in differential diagnosis than in differential etiology.'" The Court continued that "the determination of the external cause of a patient's disease is a complex process that is unrelated to diagnosis and treatment, and which requires specialized scientific knowledge regarding the external agents involved." State v. Consaul, 332 P.3d 850 (N.M. 2014). A federal district judge put the matter this way: "The differential diagnosis method has an inherent reliability; the differential etiology method does not." Bowers v. Norfolk S. Corp., 537 F. Supp. 2d 1343, 1360 (M.D. Ga. 2007) ("The distinction is more than semantic; it involves an important difference."), aff'd, 300 F. App'x 700 (11th Cir. 2008); see also McClain v. Metabolife Int'l, Inc., 401 F.3d 1233, 1252 (11th Cir. 2005) ("Differential diagnosis . . . leads to the diagnosis of the patient's condition, not necessarily the cause of that condition. [D]ifferential etiology . . . describe[s] the investigation and reasoning that leads to the determination of external causation, sometimes more specifically described by the witness or court as a process of identifying external causes by a process of elimination.").

Etiological conclusions of child-abuse experts regarding "shaken baby syndrome," now often called "abusive head trauma," were for decades routinely accepted by courts and resulted in a multitude of criminal convictions for child abuse. In the typical case involving allegations of shaken baby syndrome, medical experts testified that a particular triad of diagnostic signs—retinal bleeding, bleeding in the protective layer of the brain, and brain swelling—could only be produced through the child having been severely shaken in the period immediately before the signs appeared. See, e.g., United States v. Wright, No. ACM32089, 1998 WL 14232, at *3 (A.F. Ct. Crim. App. Mar. 13, 1998) ("A forensic pathologist . . . concluded that the combination of subdural hematoma, cerebral edema, and the retinal hemorrhaging is characteristic of a severely shaken baby"). In recent years, however, significant challenges have been made to the soundness of the science on which this expert testimony was based. See Mark Donohoe, *Evidence-Based Medicine and Shaken Baby Syndrome Part I: Literature Review*, 1966-68, 24 AM. J. FORENSIC MED. PATHOLOGY 239, 241 (2003) ("[T]he data available in the medical literature by the end of 1998 were inadequate to support any standard case definitions, or any standards for diagnostic assessment. Before 1999, there existed serious data gaps, flaws of logic, inconsistency of case definition, and a serious lack of tests capable of discriminating [shaken baby syndrome cases] from natural injuries."); Patrick

D. Barnes, *Imaging of Nonaccidental Injury and the Mimics: Issues and Controversies in the Era of Evidence-Based Medicine*, RADIOL. CLIN. N. AMER. 205, 206 (2011) ("EBM [Evidence Based Medicine] analysis reveals that few published reports in the traditional NAI/SBS literature merit a quality-of-evidence rating above class IV (eg, expert opinion alone). Such low ratings do not meet EBM recommendations for standards (eg, level A) or for guidelines (eg, level B)."). Most recently, the Swedish Agency for Health Technology Assessment and Assessment of Social Services (SBU) undertook an exhaustive review of the scientific literature in the field. See Niels Lynøe, Göran Elinder. Boubou Hallberg, Måns Rosén. Pia Sundgren & Anders Eriksson, *Insufficient Evidence for "Shaken Baby Syndrome"—A Systematic Review*, ACTA PAEDIATR, 1021, 1025-26 (2017), DOI: 10.1111/apa.13760. The review found that although there were many studies of shaken baby syndrome, only two studies in this entire body of research could be characterized as of even "moderate quality;" all others were deemed methodologically flawed or marked by circular reasoning when classifying shaken baby cases and controls. Id. at 1024. The SBU concluded that "there is *insufficient* scientific evidence on which to assess the diagnostic accuracy of the triad in identifying traumatic shaking (*very low-quality* evidence). Furthermore, there is *limited* scientific evidence to support the claim that the traditional diagnostic "triad" or its components can be associated with traumatic shaking [at all] (*low quality* evidence)." Id. at 1025-1026.

In response to the emerging scientific evidence, courts have begun to recognize that the triad of signs used to identify shaken baby syndrome can result from some organic illnesses, as well as from accidental injuries that occurred well before the signs appeared. This has led to a rising number of shaken baby syndrome convictions being overturned. For a recent case, see People v. Bailey, 999 N.Y.S.2d 713, 726 (Co. Ct. 2014), aff'd, 41 N.Y.S.3d 625 (N.Y. App. Div. 2016) (overturning conviction of a babysitter who had spent more than a decade in prison on the ground "that a significant and legitimate debate in the medical community has developed in the past 13 years over whether young children can be fatally injured by means of shaking"); id. at 724 (finding that "a significant change in medical science relating to head injuries in children, generally, and the Shaken Baby Syndrome hypothesis, in particular [has occurred in recent years]. New research into the biomechanics of head injury reveals that the doctors who testified on behalf of the Prosecution at Trial misinterpreted the medical evidence to conclude that shaking, or shaking with impact, was the only mechanism capable of causing . . . [the medical findings attributed to violent shaking]; *id.* at 726 ("key medical propositions relied upon by the Prosecution at Trial were either demonstrably wrong, or are now subject to new debate"). The appellate court affirmed, finding that the "defendant established . . . that the newly discovered evidence would probably change the result if a new trial were held today. . . . Here, the cumulative effect of the research and findings on retinal hemorrhages, subdural hematomas or hemorrhages and cerebral edemas as presented in [shaken baby syndrome] cases and short-distance fall cases supports the court's ultimate decision that, had this evidence been presented at trial, the verdict would probably have been different."). For other cases, see State v. Edmunds, 746 N.W.2d 590, 596 (Wis. Ct. App. 2008) ("a significant and legitimate debate in the medical community has developed in the past ten years over whether infants [and toddlers] can be fatally injured through shaking alone, . . . and

whether other causes [such as short-distance falls] may mimic the symptoms traditionally viewed as indicating shaken baby or shaken impact syndrome"); Commonwealth v. Millien, 50 N.E.3d 808, 820 (Mass. 2016) (granting new trial based on ineffective assistance since counsel "could have cited to numerous scientific studies supporting the view that shaking alone cannot produce injuries of the type and severity suffered by [the decedent]"). As a federal judge who granted *habeas* relief 10 years after a conviction concluded, the expert opinions on shaken baby syndrome that the jury used to convict turned out to be based on "more an article of faith than a proposition of science." Del Prete v. Thompson, 10 F. Supp. 3d 907, 957 n.10 (N.D. Ill. 2014). For a critical review of medical experts' relying on this triad of symptoms to establish abuse in criminal proceedings, see DEBORAH TURKHEIMER, FLAWED CONVICTIONS: "SHAKEN BABY SYNDROME" AND THE INERTIA OF INJUSTICE 1-66 (2014).

In recent years, courts have allowed medical experts to testify to a relatively new medical determination that they refer to as a diagnosis of medical child abuse or, alternatively, as pediatric falsification condition. Medical child abuse is often considered to be a related diagnosis to Munchausen Syndrome by Proxy, a condition in which a parent deliberately induces or falsifies medical symptoms in a child in order to get them unnecessary medical treatment. In contrast to Munchausen Syndrome by Proxy, medical child abuse is conceptualized as a physical diagnosis of the child rather than as a psychological diagnosis of the parent, and it applies to a larger array of parental conduct. A diagnosis of medical child abuse is based on the medical expert's determination that "a child receives unnecessary and potentially harmful medical care at the instigation" of a parent. THOMAS ROESLER & CAROLE JENNY, MEDICAL CHILD ABUSE: BEYOND MUNCHAUSEN SYNDROME BY PROXY 43 (2009). Several appellate courts have affirmed civil or criminal determinations of child abuse based on such testimony, although only one of these cases directly considered the admissibility of the diagnosis. See Delaware v. McMullen, 900 A.2d 103 (Del. Super. Ct. 2006) (finding that medical experts' testimony about pediatric condition falsification passed the state's *Daubert* test).

Courts should not admit expert medical testimony regarding the medical child abuse diagnosis. As Comment *k* explains, expert testimony regarding diagnoses properly pertains to the child's bodily conditions. In contrast to traditional medical diagnoses, the determination of medical child abuse is not centered on assessing an underlying bodily condition, but instead represents a determination that the parent's actions in obtaining medical care or a child should be considered physical abuse. THOMAS ROESLER & CAROLE JENNY, MEDICAL CHILD ABUSE: BEYOND MUNCHAUSEN SYNDROME BY PROXY 43 (2009) at 55 ("[medical] child abuse is not an illness or a syndrome in the traditional sense but an event that happens in the life of the child"). Whether the parent's conduct constituted physical abuse is a legal question to be determined by the factfinder.

The admission of expert medical testimony about the diagnosis of medical child abuse in a legal proceeding threatens the balance between the goal of protecting children from harm and the goals of respecting family integrity, pluralism, and parental decisionmaking about children because it is based on less stringent standards than the legal standards for abuse. The determination of medical child abuse requires neither that a parent **"**purposely, knowingly, or recklessly" inflict

harm, as the legal abuse determination requires in a criminal proceeding, nor that the parent's conduct constituted a "substantial deviation from the standard of care exercised by a reasonable parent," as the legal abuse determination requires in a civil proceeding. See ROESLER & JENNY, supra, at 43-44 ("[W]ith this definition it is not necessary to determine the parent's motivation to know that a child is being harmed.") In addition, medical child abuse requirements are met when a child is exposed to any level of potential risk of harm, no matter how remote, in contrast with the legal definition of child abuse, which requires the child be subjected to "a substantial risk of serious physical harm." See Reena Isaac & Thomas Roesler, *Medical Child Abuse*, in A PRACTICAL GUIDE TO THE EVALUATION OF CHILD PHYSICAL ABUSE AND NEGLECT 291 (Eileen R. Giardino ed., 2d ed. 2010) ("Any medical procedure, for example, a blood draw, or a trial of medication that is potentially harmful, could be considered abusive if there was no clear medical reason for it to happen."). Finally, while many states impose a standard of abuse in civil child abuse proceedings of "clear and convincing evidence," and all require proof in a criminal child abuse proceeding "beyond a reasonable doubt," the diagnostic standards used by doctors to assess medical child abuse incorporate no such heightened standards of proof. See State v. Consaul, 332 P.3d 850, 864 (N.M. 2014) (noting that physicians use of the phrase "reasonable medical certainty" is equivalent to a "preponderance of the evidence test"). For a critique of the medical child abuse diagnosis, see Maxine Eichner, *Bad Medicine: Parents, the State, and the Charge of "Medical Child Abuse,"* 50 U.C. DAVIS L. REV. 205 (2016).

The science underlying the related diagnosis of Munchausen Syndrome by Proxy (MSBP) has also been the subject of controversy. The condition was first included by the American Psychiatric Association in its diagnostic manual in 2013 under the label "factitious disorder imposed on another." See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSIS AND STATISTICAL MANUAL OF MENTAL DISORDERS 325 (5th ed. 2013). Yet debate exists regarding whether it is truly a disorder involving an underlying psychological disease process, or whether the label simply describes parents who have committed abusive behavior. See Geoffrey C. Fisher & Ian Mitchell, *Is Munchausen Syndrome by Proxy Really a Syndrome?*, 72 ARCHIVES DISEASE CHILDHOOD 530 (1995); Richard Rogers, *Diagnostic, Explanatory, and Detection Models of Munchausen by Proxy: Extrapolations from Malingering and* Deception, 28 CHILD ABUSE & NEGLECT 225 (2004). As with shaken baby syndrome, critics contend that the diagnostic standards used to identify the condition have never been adequately scientifically tested, resulting in high rates of false-positive diagnoses. See ERIC MART, MUNCHAUSEN'S SYNDROME BY PROXY RECONSIDERED (2002); Loren Pankratz, *Persistent Problems with the "Munchausen Syndrome by Proxy" Label*, 34 J. AM. ACAD. PSYCHIATRY & LAW 90 (January 2006).

§3.24. Defenses: Parental Privilege to Use Reasonable Corporal Punishment

(a) In the context of criminal proceedings, the use of corporal punishment by a parent, guardian, or other adult acting as a parent is privileged, provided that such punishment is reasonable, determined in part by whether the corporal punishment caused, or created a substantial risk of causing, serious physical harm or gross degradation.

(b) In the context of civil child-protection proceedings, the use of corporal punishment by a parent, guardian, or other adult acting as a parent is privileged, provided that such punishment is reasonable, determined in part by whether the corporal punishment caused, or created a substantial risk of causing, physical harm beyond minor pain or transient marks.

Comment:

a. Privilege to discipline a child. Parents, guardians, and adults acting as parents regularly make disciplinary decisions about children. These adults use a variety of methods of discipline, including time-outs and the restriction of privileges. Some adults also use spanking or other forms of corporal punishment. Every jurisdiction recognizes a parental privilege to use reasonable corporal punishment to discipline a child. This privilege applies in criminal cases and in civil child-protection proceedings, although the reasonableness standard is somewhat different depending on the context, as elaborated in Comment *d*. Some states have codified the privilege and others have recognized the privilege in judicial opinions. The standard adopted in the black letter is consistent with the rule in the majority of states. This Section does not address the role of disciplinary decisions in private custody disputes and instead describes the privilege as it applies to criminal proceedings and child-protection proceedings.

b. History of parental privilege to use corporal punishment. The common law recognized the privilege of the male head of the household to discipline his wife, children, servants, and apprentices. Blackstone stated that a parent had the power to "lawfully correct his child, being under age, in a reasonable manner; for this is for the benefit of his education." 1 WILLIAM BLACKSTONE, COMMENTARIES *440. Thus, corporal punishment was an exception to liability for battery. Historically, the state played almost no role in protecting children from harm inflicted by parents, and instead a broad conception of parental rights permitted parents to exercise near

complete control of their children. As described in Comment *c*, this is no longer the justification for the privilege.

As elaborated in the Introductory Note to this Chapter, see [*cross-reference Introduction to Chapter 3*], since the Progressive Era, the state has taken a more active role in protecting children from harm inflicted by parents, intervening in families through the criminal justice system and child welfare system. There are limits on this state intervention, however, and the parental privilege to use reasonable corporal punishment is one such limit.

c. Modern rationales for parental privilege to use corporal punishment. There are several modern rationales for the privilege. First, as explained in the Introductory Note to this Chapter, see [*cross-reference Introduction to Chapter 3*], state intervention in cases of child maltreatment balances the twin goals of protecting children from harm while respecting family integrity, pluralism, and parental decisionmaking about children. The standards adopted in this Section mean that the state cannot intervene in cases in which a parent's care is merely suboptimal or does not conform to mainstream parenting practices. Instead, to warrant intervention, the corporal punishment must be unreasonable, determined in part by whether the harm exceeded the relevant harm standard. This protection for family integrity and parental decisionmaking is rooted in the Constitution.

Second, the privilege recognizes that state intervention imposes its own costs on the family and thus requires substantial justification. Criminal proceedings may lead to the incarceration of a parent, and civil proceedings initiated by the child welfare system may lead to the removal of the child from the home. Both forms of state intervention constitute a serious interference with family integrity and parental autonomy and can harm children. The privilege thus constrains state intervention to those cases where the use of corporal punishment is unreasonable and the harm satisfies the relevant standard.

Third, the privilege protects families with a range of values. Raising a child entails myriad choices, and parental freedom to raise a child according to a family's value system is deeply rooted in the Constitution. The standards adopted in this Section protect parental decisionmaking by restraining courts and other legal actors from second-guessing parents and imposing their own values and judgments about appropriate childrearing. This constraint on state intervention is particularly important for families of diverse backgrounds. A substantial percentage of parents still spank their children, with higher rates among low-income parents and some racial minorities. Low-

income families and Black families are already disproportionately represented in the child welfare system, and the privilege thus protects these families from additional state interference. Allowance for diverse parenting values and practices, as well as avoiding disproportionate intervention, are important goals for the legal system.

Finally, raising a child is difficult and often involves considerable stress. Parents should be held accountable when their actions seriously harm a child, but parents need latitude to make mistakes. The privilege acknowledges that even when a parent's behavior may be suboptimal, parents still need some protection from state scrutiny. The standards adopted in this Section protect children by restraining the conduct of parents and limiting the use of corporal punishment, but the standards also constrain the state, allowing intervention only when the use of corporal punishment is unreasonable and the harm satisfies the relevant standard.

The privilege does not rest on evidence that corporal punishment is an effective means of discipline. The American Academy of Pediatrics (AAP) has concluded that "spanking is a less effective strategy than time-out or removal of privileges for reducing undesired behavior in children." Comm. on Psychosocial Aspects of Child & Family Health, Am. Acad. of Pediatrics, *Guidance for Effective Discipline*, 101 PEDIATRICS 723, 726 (1998). The AAP encourages parents not to spank their children and advises parents never to use harsh forms of corporal punishment, such as hitting a child with an object. Id. Public support for corporal punishment is also decreasing, if still widespread.

Similarly, the privilege does not rest on the view that corporal punishment causes no harm. There is considerable evidence that harsh forms of corporal punishment are correlated with negative outcomes for children. Social scientists disagree, however, about whether there is sufficient evidence to establish that spanking preadolescent children older than 18 months is also correlated with negative outcomes.

The privilege is somewhat out of step with other countries, which increasingly prohibit corporal punishment, including spanking, largely because of obligations under the U.N. Convention on the Rights of the Child. The U.N. Committee on the Rights of the Child has interpreted the Convention to prohibit all forms of corporal punishment. The United States has signed but not ratified the Convention.

d. Parental privilege in a criminal proceeding and a child-protection proceeding—difference and similarity. As described in § 3.20, Comment *c*, the state can use either the criminal

justice system or the child welfare system, or both, to respond to the physical abuse of a child. In a criminal proceeding, the state seeks to punish the adult perpetrator for causing serious harm and to deter the adult and others from acting in a similar manner. In a civil child-protection proceeding, the state is focused on the prospective safety and well-being of the child and the ability of the parent to care for the child without inflicting harm; the state also seeks to express condemnation of the conduct and engage a regulatory system that deters similar conduct in the future.

In both a criminal proceeding and a child-protection proceeding, the general inquiry is whether the corporal punishment was reasonable. With the exception of the level of harm, the reasonableness inquiry in a criminal proceeding and a civil child-protection proceeding turns on similar factors. This Section, however, separately describes the reasonableness factors in the two contexts, because the purpose of each proceeding is different, and because courts generally consider reasonableness in light of the overall context, typically giving more leeway to parental decisionmaking when a parent faces criminal liability.

The primary difference between the parental privilege in a criminal proceeding and the parental privilege in a child-protection proceeding is the extent of the harm covered by the privilege. In a criminal proceeding, whether the corporal punishment is reasonable and thus privileged turns in part on whether it caused, or created a substantial risk of causing, serious physical harm or gross degradation. In the criminal context, the parent's liberty is at stake, and the need for clear rules and greater protection of parental decisionmaking is paramount. Thus, courts generally apply a relatively high threshold for state intervention, and the privilege covers more behavior.

In a civil child-protection proceeding, whether the corporal punishment is reasonable and thus privileged turns in part on whether it caused, or created a substantial risk of causing, physical harm beyond minor pain or transient marks. The civil consequences are potentially significant and include losing custody of a child to the state, but this relatively low threshold for state intervention is consistent with the case law in most states. Moreover, as noted above, in a child-protection proceeding, the state is focused on the prospective safety and well-being of the child. A parent's use of corporal punishment is some basis for concern about the parent's ability to care for the child, and thus the privilege covers less parental behavior than in a criminal proceeding.

e. Parental privilege in a criminal proceeding—a consideration of the harm. In a criminal proceeding, the degree of harm to the child is central to the existence of the privilege. As described

in Comment *d*, in a criminal proceeding, the privilege has a higher harm threshold and thus covers more behavior than in a civil child-protection proceeding.

Illustrations:

1. Ten-year-old Mary sneaks out of the house at night to meet her friends. Her mother finds out and uses a belt to discipline Mary. The mother takes Mary into her bedroom and strikes Mary with the belt four or five times on her naked buttocks, creating bruises that last for several days. The mother's conduct is protected by the privilege.

2. Eight-year-old Ethan is fighting with his older brother. His mother tells him to stop, but he does not. The mother takes Ethan into the bathroom, forcefully removes his pants and underwear, hits his naked buttocks with a belt, throws him on the bathroom floor, and then repeatedly punches his body all over. The mother's conduct is not protected by the privilege.

In Illustration 1, the mother's conduct is protected by the privilege because the bruising did not constitute serious physical harm and the circumstances were not grossly degrading in light of Mary's age and the private location used for the corporal punishment. By contrast, in Illustration 2, the mother's conduct clearly caused serious physical harm to Ethan and thus is not covered by the privilege.

The harm standard also includes the substantial risk of serious physical harm.

Illustration:

3. Sixteen-year-old Amy disobeys her father's directions about buying a car. In response, the father chokes Amy, restricting her breathing for an extended period of time. The father's conduct is not protected by the privilege.

As described in Comment *f*, some forms of corporal punishment are presumed unreasonable because of the potential harm to the child. Part of the reason for this presumption is the substantial risk of serious physical harm to the child. There need not be actual harm.

The harm standard in a criminal proceeding places grossly degrading corporal punishment outside the privilege.

Illustration:

4. Fifteen-year-old Theresa is caught shoplifting at a local store. Her parents decide to punish her severely. Her father tells her to strip naked and come into the living room, where her teenage brothers are gathered. The father tells Theresa to get on all fours, and then he hits her with a belt several times. The father's conduct is not protected by the privilege.

Regardless of any physical pain or marks left by the use of the belt, multiple factors make this corporal punishment grossly degrading: the girl's age, nakedness, position on all fours, the public location within the home, and the audience of male family members.

f. Parental privilege in a criminal proceeding—other reasonableness factors. If the corporal punishment exceeds the harm standard in a criminal proceeding, then other factors will not make the corporal punishment reasonable. But if the corporal punishment does not exceed the harm standard, the corporal punishment might still be unreasonable depending on other factors: the existence of a disciplinary purpose; the type of corporal punishment; the amount of force used; the location of any injury; and the age, size, and physical and mental condition of the child. The consideration of these other factors is a holistic, objective, fact-specific inquiry, and the factors can weigh differently in each case. Apart from harm, no single factor is ordinarily dispositive. The Illustrations in this Comment demonstrate the context-specific nature of the reasonableness inquiry in a criminal proceeding.

As an initial matter, the privilege applies only if the parent is trying to prevent or punish misconduct or, more generally, promote the welfare of the child. When a parent's conduct is unrelated to the child's behavior, the parent is not acting with a disciplinary purpose and the privilege is not available.

Illustration:

5. Sarah's father comes home from work one night, extremely angry because he has been laid off from his job. When he sees eight-year-old Sarah, he lashes her with a belt. The absence of a disciplinary purpose renders the privilege unavailable.

Apart from any physical harm, the father has no disciplinary purpose in hitting Sarah, and thus his conduct is not privileged. The factfinder does not probe the parent's subjective belief that

corporal punishment is necessary. Instead, the factfinder engages in an objective inquiry into the nexus between the child's conduct and the parent's response. If the parent is not attempting to address the child's misconduct or behavior more generally, the privilege is unavailable.

The type of corporal punishment is relevant to reasonableness. Some types of corporal punishment pose such a risk to the child, and are so far afield from the kinds of corporal punishment protected by case law, that they are presumed unreasonable. These actions include throwing, kicking, burning, or cutting a child; interfering with a child's breathing; and threatening a child with a deadly weapon.

Illustration:

6. Same facts as Illustration 3. The father's conduct is not protected by the privilege.

Choking a child clearly presents a significant danger to the child, and it is highly unlikely that other factors would weigh in favor of reasonableness. In this context, the state's interest in protecting the child from serious physical harm takes precedence over family privacy and autonomy.

For types of corporal punishment that fall short of these behaviors—such as a parent using an object to hit a child or using a closed fist rather than an open hand—other factors determine reasonableness.

Illustrations:

7. Maya, a 12-year-old girl, is doing poorly in school, expressing an interest in gangs, and repeatedly lying to her parents. The parents have warned Maya that they will use corporal punishment for future misconduct, with one spank on the buttocks for each infraction. Typically, the father dispenses the punishment, hitting Maya on her fully clothed buttocks with an open hand. One day, the father is unavailable, so the mother dispenses the punishment. The mother cannot use her hand because of a previous injury, so she uses a wooden spoon to spank Maya's fully clothed buttocks. The mother's conduct is protected by the privilege.

8. Joe, a 10-year-old child with a history of misconduct—including beating a dog with a golf club, lying, and stealing—holds a younger child underwater in a pool to make

her release a toy. As punishment, his mother uses plastic zip ties to attach Joe to his bed at night. The mother's conduct is not protected by the privilege.

In Illustration 7, although the mother has used an object to hit the child, the corporal punishment is reasonable in light of the child's deeply troubling behavior, the concrete plan the parents have communicated in advance to the child, the fact that the child is clothed, and the moderate amount of force used. By contrast, in Illustration 8, although Joe's misconduct is very serious, and although Joe has a history of misconduct, the type of corporal punishment is unreasonable because it presents a significant safety risk to Joe and is far afield from the types of corporal punishment courts consider reasonable.

The amount of force used and the location of the injury are relevant to reasonableness of the corporal punishment.

Illustrations:

9. Twelve-year-old Louise disobeys her father. The father squeezes her shoulder, leaving a dime-sized bruise. The father's conduct is protected by the privilege.

10. Nine-year-old Jason hits another child and pulls merchandise from the shelves of a store. His mother punches Jason with a closed fist in the face and on his body multiple times, causing bruises and a badly swollen eye. The mother's conduct is not protected by the privilege.

In Illustration 9, the privilege applies because of the moderate amount of force used, the minor injury, and the location of the injury. By contrast, in Illustration 10, the mother has used much more force and has hit her child in the eye, potentially damaging his vision.

Finally, the age, size, and physical and mental condition of the child are relevant to reasonableness. A very young child will not have the developmental capacity to understand the connection between the corporal punishment and the disciplinary action, and therefore corporal punishment is more likely to be unreasonable. An older child, including a preschool-age child, is more likely to have the capacity to understand the reason for the punishment. Conversely, the older the child, the greater the risk that the punishment will be grossly degrading and therefore unreasonable. For a discussion of gross degradation, see Comment *e*.

A parent is presumed to know a child's physical and mental conditions.

Illustration:

11. Ten-year-old Patrice is disruptive in school. At home, her mother hits Patrice repeatedly and pushes her in the face, causing a nosebleed and extensive bruising on Patrice's face and body and causing pain that Patrice feels the next day. As the mother knows, Patrice is taking asthma medication that makes her bruise more easily. The mother's conduct is not protected by the privilege.

The mother knew Patrice's medication made her more susceptible to bruising and she should have acted accordingly.

One factor that is not relevant to the reasonableness standard is the parent's emotional state. Unreasonable discipline can be administered calmly, and reasonable discipline can be administered in anger. The question for the factfinder is whether the use of corporal punishment was reasonable, not whether the parent was motivated by anger or another emotion.

g. Parental privilege in a civil child-protection proceeding—a consideration of the harm. In a civil child-protection proceeding, harm to the child is also central to the existence of the privilege, but the harm threshold is lower than in a criminal proceeding, and thus less behavior is covered by the privilege. In the typical case, corporal punishment that causes more than minor pain or transient marks is not privileged.

Illustrations:

12. Same facts as Illustration 1, except that the state initiates a civil child-protection proceeding to determine whether the mother abused Mary and thus Mary should be subject to the jurisdiction of the court. The mother's conduct is not protected by the privilege.

13. Ten-year-old Shaquan lies to his father about his report card, saying that it will not be sent home but that he has done well in all of his classes. When Shaquan's father finds out this is not true, he hits Shaquan twice with an open hand using moderate force on his fully clothed buttocks. The spanking leaves no mark. The father's conduct is protected by the privilege.

In Illustration 12, the mother's conduct is not protected by the privilege, because the corporal punishment caused physical harm to Mary beyond minor pain or transient marks. Mary felt considerable pain and the marks persisted for several days. By contrast, in Illustration 13 the

father's conduct caused only minor pain and left no marks. As explained in Comment *c*, a parent's use of corporal punishment such as spanking is privileged because of the importance of protecting family privacy and autonomy and because of the concerns about state intervention. The privilege is not based on evidence that spanking is an effective means of discipline or is harmless.

The harm standard also includes the substantial risk of physical harm beyond minor pain or transient marks.

Illustration:

14. The father of six-year-old Brittany is trying to discipline her with a belt, forcefully swinging the exposed buckle at her. Brittany flails her limbs and the father is unable to hit her. The father's conduct is not protected by the privilege.

The father did not cause any physical harm to the child, but his conduct is not protected by the privilege because forcefully swinging a belt with an exposed buckle created a substantial risk of physical harm beyond minor pain or transient marks.

h. Parental privilege in a civil child-protection proceeding—other reasonableness factors. If the corporal punishment exceeds the harm standard in a civil child-protection proceeding, then other factors typically will not make the corporal punishment reasonable. But if the corporal punishment does not exceed the harm standard, the corporal punishment might still be unreasonable depending on other factors: the existence of a disciplinary purpose; the type of corporal punishment; the amount of force used; the location of any injury; and the age, size, and physical and mental condition of the child. As in a criminal proceeding, the consideration of the factors is a holistic, objective, fact-specific inquiry, and the factors can weigh differently in each case. Ordinarily no single factor is dispositive.

Apart from harm, courts do not generally define reasonableness differently in a criminal proceeding and a civil child-protection proceeding, but the focus in a civil child-protection proceeding is on the prospective safety and well-being of the child. The court thus looks at the use of corporal punishment with this question in mind, asking whether the parent's use of corporal punishment in the past gives the court reason to believe that child may not be safe in the care of the parent and thus state intervention may be necessary.

Beginning with disciplinary purpose, the privilege is available only if the parent is trying to prevent or punish misconduct or, more generally, promote the welfare of the child. When a

parent's conduct is unrelated to the child's behavior, the parent is not acting with a disciplinary purpose, and the privilege is not available.

Illustration:

15. Same facts as Illustration 5, but this time the father slaps Sarah in the face, leaving a slightly reddened mark that quickly disappears. The absence of a disciplinary purpose renders the privilege unavailable.

The father had no disciplinary purpose in hitting Sarah and thus his conduct is not privileged. The factfinder does not probe the parent's subjective belief that corporal punishment is necessary. Instead, the factfinder engages in an objective inquiry into the nexus between the child's conduct and the parent's response.

The type of corporal punishment is relevant to reasonableness. Spanking a child on fully clothed buttocks using only moderate force and an open hand is presumed reasonable.

Illustration:

16. Same facts as Illustration 13. The father's conduct is protected by the privilege.

As explained in Comment *c*, the parent's use of corporal punishment in this situation is privileged because of the importance of protecting family privacy and autonomy and because of the concerns about state intervention. The privilege is not based on evidence that spanking is an effective means of discipline or is harmless.

Other forms of corporal punishment, such as requiring a child to hold an uncomfortable position for a period of time or using an object to strike a child, may fall within the parental privilege, depending on the context and a consideration of the other factors.

Illustrations:

17. Ten-year-old Ina lies to her mother about an incident at school. The mother requires Ina to hold a push-up position for a minute. The mother's conduct is protected by the privilege.

18. Nine-year-old Juan ignores his father's express instructions and goes to the house of a family friend. The father finds Juan at the house, takes him home, tells him to

undress, and then hits Juan hard with a belt multiple times on Juan's arms, back, and legs, producing bruising and welts. The father's conduct is not protected by the privilege.

The difference in the two Illustrations is the extent of the harm as well as the other factors. In Illustration 17, the corporal punishment is reasonable because of its mild nature and short duration. In Illustration 18, the corporal punishment is unreasonable because of the extent of the harm, the use of an object, the amount of force, and the injuries to multiple parts of the body.

Some types of corporal punishment pose such a risk to the child, and are so far afield from the kinds of corporal punishment protected by case law, that they are presumed unreasonable. These actions include throwing, kicking, burning, or cutting a child; interfering with a child's breathing; and threatening a child with a deadly weapon.

The privilege protects corporal punishment that involves only mild or moderate force. The two extremes are relatively easy to identify.

Illustrations:

19. Same facts as Illustration 13. The father's conduct is protected by the privilege.

20. Same facts as Illustration 2. The mother's conduct is not protected by the privilege.

In a case that falls between these poles, determining whether the parent's conduct is privileged is based on a consideration of all the circumstances. A particularly relevant factor is the physical harm to the child. This factor is discussed in Comment *g*.

The location of any injury is also relevant to the reasonableness of the corporal punishment. Hitting a child on the buttocks with an open hand is presumed to fall within the privilege. Privileged corporal punishment, however, is not limited to hitting the buttocks. When a parent hits another part of the body, it is important to consider the other factors closely.

Illustration:

21. Nine-year-old Shanille steals money from her mother and then lies about it. Her mother lightly slaps her on the face, leaving a slightly reddened mark that quickly disappears. The mother's conduct is protected by the privilege.

The Illustration demonstrates how other factors interact with the location factor. The conduct of the mother in Illustration 21 is protected because, although the mother hit the child in a location other than the buttocks, the mother used only a small amount of force and left only a slight mark that disappeared quickly.

Finally, the child's age, size, and physical and mental condition are all relevant to the reasonableness of the corporal punishment. As with the other factors, there are no bright-line rules, and instead these factors are part of a holistic inquiry. Age is relevant to reasonableness because an older child, including a preschool-age child, is more likely to have the capacity to understand the reason for the punishment. For a child too young to comprehend the reason for the punishment, the parent's conduct cannot have a disciplinary purpose. Size is relevant to a child's ability to withstand physical force. Typically, a larger child can withstand more force and a smaller child is more vulnerable to force. Similarly, the mental and physical condition of a child is relevant to reasonableness. A physically fragile child is more susceptible to injury, and corporal punishment may be particularly unreasonable when used on a child with developmental delays.

In a civil child-protection proceeding, there are additional factors that may be relevant to the reasonableness inquiry. The frequency of a parent's use of corporal punishment can be relevant to the reasonableness of the corporal punishment. When a parent uses corporal punishment sparingly, this weighs in favor of reasonableness, so long as the harm is lower than the threshold in a civil child-protection proceeding. A parent's attempt to use noncorporal forms of punishment before using corporal punishment may be relevant, but the initial use of noncorporal punishment does not insulate the parent from liability for later corporal punishment. Finally, the proportionality between the child's misconduct and the punishment may be relevant to reasonableness, but a consideration of proportionality does not entitle a parent to use excessive corporal punishment if the misconduct is egregious.

There are two factors that are irrelevant. The parent's emotional state—particularly, whether the parent acted calmly or out of anger—typically is not relevant. An overly harsh punishment can be administered calmly, and a minor punishment can be administered in anger. Parents can be emotionally distraught by their children's behavior, and some parental anger and frustration is to be expected. The question for the factfinder is whether the use of corporal punishment was reasonable, not whether the parent was motivated by anger or another emotion.

Additionally, the child's sex is irrelevant to the reasonableness of the corporal punishment. Allowing harsher corporal punishment for boys, or assuming girls are more vulnerable to corporal punishment than boys, is based on outdated stereotypes and is not part of the reasonableness inquiry.

i. Actor. In both criminal proceedings and civil child-protection proceedings, a legal parent, a legal guardian, and an adult "acting as a parent" may exercise the parental discipline privilege. The legal term for acting as a parent is *in loco parentis*, which Black's Law Dictionary defines as "in the place of a parent." *In loco parentis*, BLACK'S LAW DICTIONARY (10th ed. 2014). A person acting as a parent assumes parental responsibilities but has not legally formalized the parent–child relationship.

Two Illustrations demonstrate the difference between an adult who is acting as a parent and an adult who is not.

Illustrations:

22. Steve lives with Kylie, who has a son from a previous relationship. Together, Steve and Kylie have a daughter. Steve has been living in the house for seven years, working together with Kylie to raise both children. When he moved in, Kylie agreed that Steve should have the authority to discipline both children. If Kylie is present, they discuss how to discipline the children, but if Kylie is not present, Steve makes independent decisions about discipline. Steve hits the boy on his buttocks. In either a criminal proceeding or a civil child-protection proceeding, Steve can invoke the parental discipline privilege because he has acted as a parent toward the boy.

23. John lives in a room in Bethany's house. In exchange for room and board, John agrees to babysit Bethany's two children while she is at work. Bethany leaves directions for John about what to do with the children. John does not make decisions about the children, either alone or with Bethany. Bethany disciplines the children when needed. One day, while Bethany is at work, John uses physical force to discipline one of the children. In either a criminal proceeding or a civil child-protection proceeding, John cannot invoke the parental discipline privilege because he has not been acting as a parent.

In Illustration 22, Steve has acted as a parent by taking on the responsibilities of caring for his nonbiological child. Additionally, with Kylie's permission, he has assumed the responsibility

and authority to make independent decisions about discipline. By contrast, in Illustration 23, John did not take on the responsibilities of being a parent and instead was caring for the children in exchange for room and board. The arrangement with Bethany never included John making parenting decisions and did not include the authority to discipline the children. He was a babysitter, not a parent, and therefore the privilege does not apply.

Limiting the privilege to parents, guardians, and adults acting as parents furthers the goals of the privilege—balancing the protection of children and deference to parental decisionmaking. An adult who does not have the authority to make decisions about the child does not need, and has not earned, the same deference from the state as a person who has assumed this responsibility. Limiting the privilege to parents, guardians, and adults acting as parents is consistent with constitutional doctrine, which does not grant parental rights to babysitters and others similarly situated.

In addition to the adults listed in the Section, a parent, guardian, or adult acting as a parent may delegate to a third party the authority to discipline a child. This delegate is then subject to the same limits as parents.

Illustration:

24. Patrice tells her regular babysitter that the babysitter should spank five-year-old April if she misbehaves in specified ways. When April does misbehave, the babysitter hits April with an open hand on April's fully clothed buttocks. The babysitter's conduct is protected by the privilege.

j. Burden of proof. In a criminal proceeding, the privilege is an affirmative defense. In a civil child-protection proceeding, the burden is on the state to establish that the child was abused within the meaning of the state statute governing child abuse and that the conduct did not fall within the parental privilege to use reasonable corporal punishment.

k. Question of fact. The question whether a parent's conduct falls within the privilege is a question of fact, not law, except when the conduct clearly falls outside the scope of the privilege because of the extreme nature of the force, such as choking a child to the point of unconsciousness or beating a child to a point near death.

REPORTERS' NOTE

a. Privilege to discipline a child. In a criminal proceeding, every jurisdiction recognizes a parental privilege to use corporal punishment to discipline a child. The majority of states have codified the privilege. Some states codify the privilege as an affirmative defense to a criminal prosecution. See, e.g., ALASKA STAT. § 11.81.430 (2014); ARIZ. REV. STAT. ANN. § 13-403 (2015); COLO. REV. STAT. § 18-1-703(1) (2015); CONN. GEN. STAT. § 53a-18(6) (2015); GA. CODE ANN. § 16-3-20 (2015); KY. REV. STAT. ANN. § 503.110(1)(b) (West 2015); MO. REV. STAT. § 563.061(1) (2015); N.Y. PENAL LAW § 35.10(1) (McKinney 2014); OR. REV. STAT. § 161.205 (2013); 18 PA. CONS. STAT. § 509(1) (2015); TEX. PENAL CODE ANN. § 9.61(a) (West 2015). Some states codify the privilege as part of the definition of criminal child abuse. See, e.g., MICH. COMP. LAWS § 750.136b(9) (2015) ("This section does not prohibit a parent or guardian, or other person permitted by law or authorized by the parent or guardian, from taking steps to reasonably discipline a child, including the use of reasonable force."); MISS. CODE ANN. § 97-5-39(2)(g) (2015) ("Nothing [in] this subsection shall preclude a parent or guardian from disciplining a child of that parent or guardian, or shall preclude a person in loco parentis to a child from disciplining that child, if done in a reasonable manner"); OHIO REV. CODE ANN. § 2919.22(B) (LexisNexis 2015) ("No person shall . . . (3) Administer corporal punishment or other physical disciplinary measure, or physically restrain the child in a cruel manner or for a prolonged period, which punishment, discipline, or restraint is excessive under the circumstances and creates a substantial risk of serious physical harm to the child"); OKLA. STAT. tit. 21, § 843.5(L) (2015) (nothing shall prohibit a parent "using reasonable and ordinary force" to discipline a child); 11 R.I. GEN. LAWS § 11-9-5.3(d) (2015) ("For the purpose of this section, 'other physical injury' is defined as any injury, other than a serious bodily injury, which arises other than from the imposition of nonexcessive corporal punishment."); S.C. CODE ANN. § 16-3-95(D) (2014) ("This section may not be construed to prohibit corporal punishment or physical discipline which is administered by a parent or person *in loco parentis* in a manner which does not cause great bodily injury upon a child."); WYO. STAT. ANN. § 6-2-503(b)(i) (2015) ("Physical injury . . . exclud[es] reasonable corporal punishment").

In the states without an express statutory definition of the privilege, courts have found the privilege in common law. See, e.g., People v. Clark, 136 Cal. Rptr. 3d 10, 21 (Ct. App. 2011); People v. Roberts, 814 N.E.2d 174, 178 (Ill. App. Ct. 2004); Willis v. State, 888 N.E.2d 177 (Ind. 2008); Bowers v. State, 389 A.2d 341 (Md. 1978); Commonwealth v. Dorvil, 32 N.E.3d 861 (Mass. 2015); Newman v. State, 298 P.3d 1171 (Nev. 2013); State v. Lefevre, 117 P.3d 980 (N.M. Ct. App. 2005); Campbell v. Commonwealth, 405 S.E.2d 1 (Va. Ct. App. 1991), or read the privilege into an existing statute, see, for example, State v. Peters, 780 P.2d 602, 606 (Idaho Ct. App. 1989) (interpreting statute imposing criminal liability on a parent for failure to protect child from "great bodily injury" to include exception for "using a reasonable amount of force to safeguard and promote the child's welfare").

In the civil child-protection context, all states distinguish permissible corporal punishment from impermissible child abuse. Some states do this through the statutory definition of child abuse, explicitly excluding reasonable corporal punishment. See, e.g., ARK. CODE ANN. § 9-27-303(3)(C)

(2014) ("'Abuse' shall not include: (i) Physical discipline of a child when it is reasonable and moderate and is inflicted by a parent or guardian for purposes of restraining or correcting the child"); COLO. REV. STAT. § 19-1-103(1)(b) (2015) (excluding from the definition of abuse "acts that could be construed to be a reasonable exercise of parental discipline"); FLA. STAT. § 39.01(2) (2015) ("Corporal discipline of a child by a parent or legal custodian for disciplinary purposes does not in itself constitute abuse when it does not result in harm to the child."); IND. CODE § 31-34-1-15(1) (2015) (provisions governing child abuse do not "[l]imit the right of a parent, guardian, or custodian of a child to use reasonable corporal punishment when disciplining the child"); NEV. REV. STAT. § 432B.260(3) (2015) (explaining "an investigation is not warranted if . . . (d) The agency determines that the: (1) Alleged abuse or neglect was the result of the reasonable exercise of discipline by a parent or guardian of the child involving the use of corporal punishment; and (2) Corporal punishment so administered was not so excessive as to constitute abuse or neglect as described" elsewhere); OHIO REV. CODE ANN. § 2151.031(C) (LexisNexis 2015) (defining child abuse but excluding "a child exhibiting evidence of corporal punishment or other physical disciplinary measure by a parent, guardian, custodian, person having custody or control, or person in loco parentis" if the discipline satisfies the standard codified elsewhere).

Some states protect reasonable corporal punishment by prohibiting only "excessive" corporal punishment. See, e.g., 325 ILL. COMP. STAT. 5/3(e) (2015) (defining abuse to include the infliction of "excessive corporal punishment"); NEV. REV. STAT. § 432B.150 (2015) ("Excessive corporal punishment may result in physical or mental injury constituting abuse or neglect of a child"); W. VA. CODE § 49-1-201(A) (2015) ("Physical injury may include an injury to the child as a result of excessive corporal punishment"). Courts have interpreted these provisions to permit parents to use reasonable corporal punishment. See In re J.B., 19 N.E.3d 1273 (Ill. App. Ct. 2014).

States also interpret civil statutes to include an exception for reasonable corporal punishment. Some domestic-violence statutes, for example, allow a parent or other adult to seek an order of protection on behalf of a child. See KAN. STAT. ANN. § 60-3104(b) (2014); 23 PA. CONS. STAT. § 6106(a) (2015). In these instances, courts typically read the parental discipline privilege into the statute. See Paida v. Leach, 917 P.2d 1342, 1349 (Kan. 1996) (domestic-violence statute "is not intended to dictate acceptable parental discipline or unnecessarily interfere in the parent/child relationship absent a clear need to protect the child" and therefore interpreting "bodily injury" requirement to exclude "minor or inconsequential injury" and reach only instances involving "substantial physical pain or an impairment of physical condition").

Finally, some states have a broad grant of authority for parents to discipline a child. See, e.g., LA. CIV. CODE ANN. art. 218 (2015) ("An unemancipated minor cannot quit the parental house without the permission of his father and mother, who have the right to correct him, provided it be done in a reasonable manner."); UTAH CODE ANN. § 62A–4a–201(1)(d)(i) (LexisNexis 2015) ("[A] parent has the right, obligation, responsibility, and authority to raise, manage, train, educate, provide and care for, and reasonably discipline the parent's children").

Courts address the lawfulness of a parent's use of corporal punishment in several different contexts. This Section addresses the privilege in a criminal proceeding. For examples of criminal

cases, see State v. Matavale, 166 P.3d 322 (Haw. 2007) (finding no criminal liability for striking 14-year-old with various objects for lying); Willis v. State, 888 N.E.2d 177 (Ind. 2008) (finding no criminal liability for a single mother with an 11-year-old child with history of lying and stealing); State v. Wilder, 748 A.2d 444 (Me. 2000) (adopting the standard of "transient pain or minor temporary marks" and finding the father's actions did not exceed the standard and thus the criminal conviction could not stand); Commonwealth v. Dorvil, 32 N.E.3d 861, 870 (Mass. 2015) (adopting the privilege in a criminal case as a matter of common law "provided that (1) the force used against the minor child is reasonable; (2) the force is reasonably related to the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of the minor's misconduct; and (3) the force used neither causes, nor creates a substantial risk of causing, physical harm (beyond fleeting pain or minor, transient marks), gross degradation, or severe mental distress").

This Section also addresses the use of the privilege in a civil child-protection proceeding. For examples of civil child-abuse cases, see Charles Cnty. Dep't of Soc. Servs. v. Vann, 855 A.2d 313, 320 (Md. 2004) (interpreting Maryland's statute governing civil child abuse, which carves out "reasonable corporal punishment, in light of the age and condition of the child," to mean that the child protection agency "assesses the reasonableness of the punishment not only in light of the child's misbehavior and whether it warranted physical punishment, but also in view of the surrounding circumstances in which the punishment took place, including the child's age, size, ability to understand the punishment, as well as, in the instant case, the minor's capacity to obey his parent's order to stand still while being struck by the belt"); Cobble v. Comm'r of Dep't of Soc. Servs., 719 N.E.2d 500 (Mass. 1999) (finding that the conduct of a father did not fall within definition of abuse when the father spanked his nine-year-old son with a belt for misbehaving in school); In re Welfare of Children of N.F., 749 N.W.2d 802 (Minn. 2008) (parent's use of a paddle 36 times to hit a 12-year-old child who was 5'2" and weighed 195 pounds was not unreasonable, in part because there was no evidence of injury, the child had repeatedly run away from home, and the parent had warned the child that the next infraction would result in corporal punishment); N.J. Div. of Youth & Family Servs. v. P.W.R., 11 A.3d 844, 855 (N.J. 2011) (slapping a 16-year-old on the face a few times was not excessive corporal punishment where the slaps left no marks; use of "excessive" in the statute "plainly recognizes the need for some parental autonomy in the child-rearing dynamic").

Although not addressed in this Section, in a private custody dispute, one parent may raise allegations of child abuse and the other parent may argue that the conduct was permissible corporal punishment. A court may consider these allegations when conducting a holistic best-interests-of-the-child inquiry. For examples, see R.M. v. S.G., 13 P.3d 747 (Alaska 2000) (upholding supervised visitation for the mother and change of custody from mother to father after the court found that the stepfather engaged in inappropriate corporal punishment by spanking children with objects including a belt, metal spoon, and spatula, and that one child had been spanked hard enough to draw blood); Mason v. Hadnot, 6 So. 3d 256 (La. Ct. App. 2009) (not reasonable discipline when a father hit 11-year-old daughter with a belt 10-15 times on her buttocks and legs, producing

deep bruises, for lying to him about cell-phone use; mother thus not in contempt of court for blocking father's visitation); Scroggins v. Riley, 758 So. 2d 467 (Miss. Ct. App. 2000) (no evidence that father's use of corporal punishment was abusive and thus a basis for modifying the custody order); Burns v. Burns, 737 N.W.2d 243 (N.D. 2007) (although the father's discipline—"knuckling" a special-needs child on the head and spanking causing bruising—was "inappropriate," this factor alone did not mean the trial court's award of custody to the father should be reversed); Dinius v. Dinius, 564 N.W.2d 300 (N.D. 1997) (reconciling the state domestic-violence statute with the broad justification provision permitting parents to use reasonable force to discipline a child and finding that the father's use of force against the daughter did not constitute domestic violence as defined by the statute and thus should not affect the custody determination).

Additionally, some state-specific statutes define child abuse for varied purposes, such as creating a registry for substantiated cases of child abuse and neglect, and courts thus need to distinguish impermissible child abuse from permissible corporal punishment. For an example of a case discussing a state-specific statute, see Gonzalez v. Santa Clara Cnty. Dep't of Soc. Servs., 167 Cal. Rptr. 3d 148 (Ct. App. 2014) (addressing California's Child Abuse and Neglect Reporting Act, which creates a centralized registry for individuals with cases of substantiated child abuse and neglect).

Finally, some state domestic-violence laws cover physical force between parents and children but exclude reasonable discipline, and thus courts must determine which acts are covered by the statute. For examples of cases discussing the privilege in the context of domestic-violence laws, see Paida v. Leach, 917 P.2d 1342, 1349 (Kan. 1996) (domestic-violence statute "is not intended to dictate acceptable parental discipline or unnecessarily interfere in the parent/child relationship absent a clear need to protect the child" and therefore interpreting "bodily injury" requirement to exclude "minor or inconsequential injury" and reach only instances involving "substantial physical pain or an impairment of physical condition"); Dinius, 564 N.W.2d at 303 (reconciling the state domestic-violence statute with the broad justification provision permitting parents to use reasonable force to discipline a child and finding that the father's use of force against the daughter did not constitute domestic violence as defined by the statute and thus should not affect the custody determination); State v. Rosa, 6 N.E.3d 57 (Ohio Ct. App. 2013) (discussing at length the relationship between the state domestic-violence law and the parental discipline privilege); Beermann v. Beermann, 559 N.W.2d 868 (S.D. 1997) (case brought by child against father under state domestic violence statute seeking an injunction for father's use of physical force during child's visits to his home); John P.W. ex rel. Adam W. v. Dawn D.O., 591 S.E.2d 260 (W. Va. 2003) (civil protection order brought against the mother for grabbing the shirt and pants of a 16-year-old child running away after talking back to her, resulting in scratches and bruises; reversing trial court's summary conclusion that this constituted domestic violence; to constitute domestic violence parent's act should not be momentary act of parent in midst of attempting to control child within proper boundaries of parental control).

If a child can overcome the parental-immunity defense, the child could bring a tort action for intentional battery. There are rarely tort cases, but for one case discussing the standard in the tort context, see Gonzalez v. Santa Clara Cnty. Dep't of Soc. Servs., 167 Cal. Rptr. 3d 148 (Ct. App. 2014). For an older case, see Gibson v. Gibson, 479 P.2d 648, 652 (Cal. 1971) ("[T]he parent-child relationship is unique in some aspects, and [] traditional concepts of negligence cannot be blindly applied to it. Obviously, a parent may exercise certain authority over a minor child which would be tortious if directed toward someone else. For example, a parent may spank a child who has misbehaved without being liable for battery"); id. at 653 ("[A]lthough a parent has the prerogative and the duty to exercise authority over his minor child, this prerogative must be exercised within reasonable limits. The standard to be applied is the traditional one of reasonableness, but viewed in light of the parental role. Thus, we think the proper test of a parent's conduct is this: what would an ordinarily reasonable and prudent parent have done in similar circumstances?").

b. History of parental privilege to use corporal punishment. The parental discipline privilege has deep roots in the common law, as documented by Blackstone. The common law recognized the privilege of the male head of the household to discipline his wife, see 1 WILLIAM BLACKSTONE, COMMENTARIES *433 (stating that "the old law" permitted a husband to "give his wife moderate correction," that "in the politer reign of Charles the second, this power of correction began to be doubted," but that "the lower rank of people, who were always fond of the old common law, still claim and exert their ancient privilege: and the courts of law will still permit a husband to restrain a wife of her liberty, in case of any gross misbehavior"), and servants and apprentices, see id. at *416 ("A master may by law correct his apprentice or servant for negligence or other misbehavior, so it be done with moderation"). For a discussion of a father's power to use corporal punishment, see id. at *440 (describing ancient Roman law that permitted a father to kill his child but noting that English law permitted a father only to "lawfully correct his child, being under age, in a reasonable manner; for this is for the benefit of his education"). Parental rights were understood as a corollary to parental duties and an exchange for the care of children. See id. ("The power of parents over their children is derived from . . . their duty; this authority being given them, partly to enable the parent more effectually to perform his duty, and partly as a recompense for his care and trouble in the faithful discharge of it.").

For Blackstone's statement that corporal punishment was an exception to liability for battery, see 3 WILLIAM BLACKSTONE, COMMENTARIES *120 ("[B]attery is, in some cases, justifiable or lawful; as where one who hath authority, a parent . . . gives moderate correction to his child").

For a discussion of the broad conception of parental rights, including the idea that children were akin to property and thus could be treated as parents saw fit, see Barbara Bennett Woodhouse, *Who Owns the Child:* Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992).

c. Modern rationales for parental privilege to use corporal punishment. For a discussion of the idea that protecting family privacy and parental authority usually furthers the interests of

children, see Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995); Emily Buss, *Adrift in the Middle: Parental Rights After* Troxel v. Granville, 2000 SUP. CT. REV. 279.

As explained in the Introduction to this Part, the U.S. Supreme Court has held that the 14th Amendment protects the right of a parent to raise a child without undue interference from the state. See Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-535 (1925) (recognizing "the liberty of parents and guardians to direct the upbringing and education of children under their control"); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) ("While this court has not attempted to define with exactness the liberty thus guaranteed [under the 14th Amendment] . . . [w]ithout doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to . . . establish a home and bring up children"). This right is balanced against the state interest in protecting the welfare of children, which gives the state some ability to limit the autonomy of parental authority. See Prince v. Massachusetts, 321 U.S. 158, 167 (1944) (holding that the "state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare"). The parental discipline privilege is grounded in these constitutional principles, balancing the parental right to autonomy in childrearing and the state interest in protecting children from abuse.

The U.S. Supreme Court has not addressed the use of corporal punishment by parents, but it has held that the use of corporal punishment in public schools does not violate the Eighth Amendment or the Fourteenth Amendment. See Ingraham v. Wright, 430 U.S. 651 (1977). (Corporal punishment in schools is discussed in § [*cross-reference xxxx*]).

Drawing on the seminal parental rights cases, many courts have derived a constitutional right of a parent to use reasonable corporal punishment. See, e.g., Doe v. Heck, 327 F.3d 492, 522 (7th Cir. 2003) (citation omitted) ("[T]he fundamental right of parents to direct the upbringing of their children includes the right to discipline them."); id. at 523 ("[T]he [] parents' liberty interest in directing the upbringing and education of their children includes the right to discipline them by using reasonable, nonexcessive corporal punishment, and to delegate that parental authority to private school officials."); J.C. v. Dep't of Children & Families, 773 So. 2d 1220, 1222 (Fla. Dist. Ct. App. 2000) (holding that the evidence in a civil case was "insufficient to authorize state intrusion on the parents' fundamental right to discipline their children"); People v. Green, 957 N.E.2d 1233, 1237 (Ill. App. Ct. 2011) ("A parent's right to corporally punish his or her child is derived from the right to privacy, which is viewed as implicit in the U.S. Constitution. This right encompasses the right to care for, control, and discipline one's own children."); State v. Wilder, 748 A.2d 444, 449 (Me. 2000) (finding that a parent's fundamental right to raise a child "includ[es] the use of reasonable or moderate force to control behavior" and this finds expression in the parental discipline privilege codified in Maine law); State v. Lefevre, 117 P.3d 980 (N.M. Ct. App. 2005) (recognizing that determining which conduct is criminal and which is privileged pits the right of the parent in raising a child against the right of the state to limit parental discretion when the welfare of the child is at stake); State v. Rosa, 6 N.E.3d 57, 59 (Ohio Ct. App. 2013) (noting "a parent's fundamental constitutional right to child-rearing, which includes a right to impose reasonable discipline, including the use of corporal punishment"); State v. Hart, 673 N.E.2d 992,

994 (Ohio Ct. App. 1996) ("The application of a simple 'physical harm' standard is overbroad and the trier of fact ignored the constitutional and common-law right of a parent to utilize corporal punishment in the discipline of his child."); Wood ex rel. Eddy v. Eddy, 833 A.2d 1243, 1245 (Vt. 2003) (citation omitted) (holding that a narrow definition of child abuse was applicable to father's conduct and not a broader definition of physical abuse in a domestic violence statute in part because the narrower definition "preserve[s] some degree of natural parents' 'fundamental liberty interest' in custody and management of their children").

Some courts frame the permissible use of corporal punishment as a privilege that "accords with important constitutional values." Commonwealth v. Dorvil, 32 N.E.3d 861, 866-867 (Mass. 2015).

A small number of state statutes invoke the U.S. Constitution or a state constitution. See, e.g., OR. REV. STAT. § 419B.090(4) (2013) ("It is the policy of the State of Oregon to guard the liberty interest of parents protected by the Fourteenth Amendment to the United States Constitution and to protect the rights and interests of children . . . . The provisions of this chapter [on dependency] shall be construed and applied in compliance with federal constitutional limitations on state action . . . with respect to interference with the rights of parents to direct the upbringing of their children, including, but not limited to, the right to . . . (c) Discipline their children."); UTAH CODE ANN. § 62A–4a–201(1)(a) (LexisNexis 2015) ("Under both the United States Constitution and the constitution of this state, a parent possesses a fundamental liberty interest in the care, custody, and management of the parent's children."); id. § 62A–4a–201(1)(d)(i) ("[A] parent has the right, obligation, responsibility, and authority to raise, manage, train, educate, provide and care for, and reasonably discipline the parent's children").

Even if understood as a right to use corporal punishment, however, this right is not absolute and must be balanced against the state interest in protecting children from harm. See Sweaney v. Ada Cnty., 119 F.3d 1385, 1391 (9th Cir. 1997) (holding that parents do not have an "unlimited right to inflict corporal punishment on their children," and therefore dismissing a section 1983 action against government officials for investigating a possible occurrence of child abuse because the right to use corporal punishment is not "clearly established" or absolute and instead has limits); Willis v. State, 888 N.E.2d 177 (Ind. 2008) (finding that a parent has a right to use corporal punishment to discipline the child, but this right is weighed against the state's interest in protecting the child from maltreatment, so is not an absolute right and has limits); Dorvil, 32 N.E.3d at 868 (alteration in original) (citations omitted) ("The parental right to direct the care and upbringing of children, however, is far from absolute. . . . Accordingly, this court has recognized that a parent's right to direct the care and upbringing of minor children may be limited in light of the State's 'compelling interest [in] protect[ing] children from actual or potential harm.' This interest is particularly powerful in the context of corporal punishment, given the risk that the parental privilege defense will be used as a cover for instances of child abuse."); State v. Sinica, 372 N.W.2d 445 (Neb. 1985) (finding that the distinction between impermissible child abuse and permissible parental discipline does not infringe on the constitutionally protected right of parents to direct the upbringing of their children because child abuse is not protected by the Constitution).

As a mirror to the parental privilege to use corporal punishment, at least one court has found that a child has no legally protected interest in being free from reasonable parental discipline. See State v. Suchomski, 567 N.E.2d 1304 (Ohio 1991).

For cases discussing the balancing of parental rights and the state interest in protecting children, see United States v. Rivera, 54 M.J. 489, 491 (C.A.A.F. 2001) ("In this area of law there is an inherent tension between the privacy and sanctity of the family, including the freedom to raise children as parents see fit, and the interest of the state in the safety and well-being of children. The affirmative defense of parental discipline resides at the crossroad of these two significant interests."); State v. Matavale, 166 P.3d 322 (Haw. 2007) (finding that the state and federal constitution protect the right of a parent to direct the upbringing of a child, but to protect a child's welfare, the state can limit parental freedom); Commonwealth v. Dorvil, 32 N.E.3d 861, 868 (Mass. 2015) ("[T]he parental privilege defense must strike a balance between protecting children from punishment that is excessive in nature, while at the same time permitting parents to use limited physical force in disciplining their children without incurring criminal sanction."); N.J. Div. of Youth & Family Servs. v. P.W.R., 11 A.3d 844, 855 (N.J. 2011) (slapping a 16-year-old on the face a few times was not excessive corporal punishment where the slaps left no marks; use of "excessive" in the statute "plainly recognizes the need for some parental autonomy in the child-rearing dynamic").

For cases discussing the importance of courts not second-guessing parents and imposing their own values and judgments about appropriate childrearing, see Paida v. Leach, 917 P.2d 1342, 1349 (Kan. 1996) ("[I]t would be undesirable to have each judge freely imposing his or her own morality, own concept of what is acceptable, own notions of child rearing . . . on the circumstances of the litigants."); In re J.A.J., 225 S.W.3d 621 (Tex. App. 2006) (noting that the court should not hold parents to an ideal standard, and should focus instead on the child's welfare); Wood ex rel. Eddy v. Eddy, 833 A.2d 1243, 1245–46 (Vt. 2003) (citation omitted) (holding that a narrow definition of child abuse, not a broader definition of physical abuse in a domestic-violence statute, was applicable to father's conduct, in part because in adopting the narrower definition "the Legislature acknowledged the impracticality of substituting the judgment of a court for that of a parent who observes his children on a regular basis and better knows their particular disciplinary needs. Accordingly, a court must employ some level of deference when evaluating child-rearing preferences to maximize child welfare").

There are several sources of information on the use of corporal punishment, including the variation by race and class. A 2013 national survey found that 67 percent of parents had spanked a child at some point, as compared with 80 percent of parents in 1995. The 2013 and the 1995 surveys were conducted by the Harris Poll, with the basic data available at Regina A. Corso, *Four in Five Americans Believe Parents Spanking Their Children Is Sometimes Appropriate*, THE HARRIS POLL, Sept. 26, 2013, http://www.theharrispoll.com/health-and-life/Four_in_Five_Americans_Believe_Parents_Spanking_Their_Children_is_Sometimes_Appropriate.html. The reports of these surveys contain few details, therefore it is difficult to draw insights. The Harris Poll released the following statement about the methodology: "This Harris

Poll was conducted online within the United States between August 14 to 19, 2013, among 2,286 adults (aged 18 and over). Figures for age, sex, race/ethnicity, education, region and household income were weighted where necessary to bring them into line with their actual proportions in the population. Propensity score weighting was also used to adjust for respondents' propensity to be online." Id.

In the 2013 survey, younger parents—those aged 18 to 36 at the time of the survey—were far less likely to have spanked their children. Only 50 percent of these parents reported spanking a child as compared with 70 percent of parents aged 37 to 48, 72 percent of parents aged 49 to 67, and 76 percent of parents aged 68 or older. The survey did not define spanking.

A different 1995 survey was conducted by Gallup, and it contains considerable detail. See Murray A. Straus & Julie H. Stewart, *Corporal Punishment by American Parents: National Data on Prevalence, Chronicity, Severity, and Duration, in Relation to Child and Family Characteristics*, 2 CLINICAL CHILD & FAM. PSYCHOL. REV. 55 (1999). The 1995 Gallup survey was conducted by phone and included only households with a child under the age of 18. The sample was representative of all "telephone households" in the United States, which accounts for 94 percent of all households, but households with college-educated parents were overrepresented and households with parents having less than a high school diploma were underrepresented. For a discussion of the methodology, see id.

The data are somewhat old, but they provide insight into the demographic characteristics that tend to accompany the use of corporal punishment as well as the types, severity, and frequency of corporal punishment. For all questions, the survey asked about acts within the previous year. Beginning with the type of corporal punishment, 65 percent of parents said they had spanked a child on the buttocks with a bare hand; 29 percent said they had slapped a child on the hand, arm, or leg; 11 percent said they had hit a child on the buttocks with a hard object; 3 percent said they slapped a child on the face, head, or ears; and 3 percent said they had pinched a child.

Thirty-two percent of parents reported spanking a child under age one, 72 percent of parents reported spanking a child aged two to four, and 14 percent of parents reported spanking a child aged 13 to 17. The kind of corporal punishment also varied by age of the child. Parents were far more likely to use a hard object to hit a child's buttocks if the child was aged five to 12 (approximately 28 percent of parents reported doing so) as compared with only 3 percent of parents with a child younger than one and 16 percent of parents with a child aged 13 to 17.

Turning to the frequency of corporal punishment, for the parents who reported using corporal punishment at least once in the previous year, they were most likely to use it frequently for young children, with an average of 18 times for parents of two-year-old children and declining to an average of six times a year for children aged 14 to 16.

The age of the parent did not affect the use of corporal punishment, but it did affect the frequency: parents aged 18 to 29 used corporal punishment an average of 17 times in the previous year, as compared with 13 times for parents aged 30 to 39 and nine times for parents aged 40 or older. These statistics controlled for the age of the child, so the difference was not because younger parents are more likely to have younger children.

The parent's socioeconomic status was correlated with the use of corporal punishment, but only for parents aged 30 and older. The use of corporal punishment by younger parents (aged 18 to 29) was not correlated with socioeconomic status. For parents aged 30 and older, the highest use of corporal punishment was by parents in the lowest quintile of socioeconomic status, with decreasing rates as socioeconomic status rose. These statistics control for age of the parent, age of the child, race, region of the country, and so on.

Race was also correlated with the use of corporal punishment. Seventy-seven percent of African American parents had used corporal punishment in the previous year, as compared with 60 percent of European Americans. Due to the sample size, all other minorities were put in one category, with 62 percent of "other minority" parents reporting the use of corporal punishment in the previous year. These statistics controlled for socioeconomic status, age of the parent, age of the child, region of the country, and so on. The frequency of the use of corporal punishment was not correlated with race.

Finally, the use of corporal punishment varied by region, with 69 percent of parents in the South reporting the use of corporal punishment in the previous year, as compared with 53 percent in the Northeast.

For a good summary of the surveys conducted through 2002, including the 1995 Gallup poll, see Adam J. Zolotor et al., *Speak Softly—and Forget the Stick*, 35 AM. J. PREVENTIVE MED. 364, 366 & tbl.2 (2008).

A 2015 study by the Pew Research Center found much lower rates of corporal punishment. PEW RESEARCH CENTER, PARENTING IN AMERICA: OUTLOOK, WORRIES, ASPIRATIONS ARE STRONGLY LINKED TO FINANCIAL SITUATION (2015). In their survey of 1,807 parents, 53 percent of parents said they never spanked a child, 28 percent said they rarely spanked a child, and 17 percent said they often or sometimes spanked a child. Id. at 12 tbl. There were differences by race and socioeconomic status. Of the white parents, 55 percent said they never spanked a child, 28 percent said they rarely spanked a child, and 14 percent said they often or sometimes spanked a child. Id. By contrast, of the black parents, 31 percent said they never spanked a child, 32 percent said they rarely spanked a child, and 32 percent said they often or sometimes spanked a child. Id. Of the Hispanic parents, 58 percent said they never spanked a child, 22 percent said they rarely spanked a child, and 19 percent said they often or sometimes spanked a child. Id. Of the parents with a graduate degree, only 8 percent said they often or sometimes spanked a child as compared with 15 percent of parents with a college degree, 18 percent of parents with some college, and 22 percent of parents with a high diploma or less. Id.

For a discussion of the disproportionate number of families of color in the child welfare system and the potentially harmful effects of interference with family integrity and placement of a child in foster care, see Chapter 3, Introductory Note, and Reporters' Note thereto.

As noted in Comment *c*, the modern rationale for the privilege does not rest on evidence that corporal punishment is an effective means of discipline. In 1998, the American Academy of Pediatrics (AAP) adopted the following guidance on discipline:

> When advising families about discipline strategies, pediatricians should use a comprehensive approach that includes consideration of the parent-child relationship, reinforcement of desired behaviors, and consequences for negative behaviors. Corporal punishment is of limited effectiveness and has potentially deleterious side effects. The American Academy of Pediatrics recommends that parents be encouraged and assisted in the development of methods other than spanking for managing undesired behavior.

Comm. on Psychosocial Aspects of Child & Family Health, Am. Acad. of Pediatrics, *Guidance for Effective Discipline*, 101 PEDIATRICS 723, 723 (1998). The AAP took a stronger stance on forms of corporal punishment other than spanking, advising that parents should not use such methods:

> [S]triking a child with an object, striking a child on parts of the body other than the buttocks or extremities, striking a child with such intensity that marks lasting more than a few minutes occur, pulling a child's hair, jerking a child by the arm, shaking a child, and physical punishment delivered in anger with intent to cause pain, are unacceptable and may be dangerous to the health and well-being of the child. These types of physical punishment should never be used.

Id. at 726.

In 1975, the American Psychological Association (APA) adopted a resolution against the use of corporal punishment "in schools, juvenile facilities, child care nurseries, and all other institutions, public or private, where children are cared for or educated." *Corporal Punishment*, AM. PSYCHOL. ASS'N, http://www.apa.org/about/policy/corporal-punishment.aspx (last visited Dec. 31, 2015). Notably, the APA resolution does not mention parents but it does provide arguments against the use of corporal punishment, concluding that corporal punishment is not necessary for moral development, that it can negatively affect a child's self-esteem, and that it can teach a child that violence is an acceptable method for controlling the behavior of others. See id.

More recently, two divisions of the APA have adopted a Statement Regarding Hitting Children, which states that "[h]undreds of research studies have clearly and consistently found that spanking does not make children better behaved and in fact has the opposite effect of increasing their aggressive and problem behaviors over time." See Div. 7 & Div. 37 of the Am. Psychological Ass'n, Task Force on Physical Punishment of Children, *Statement Regarding Hitting Children*, DEVELOPMENTAL PSYCHOL., http://www.apadivisions.org/division-7/news-events/physical-punishment.aspx (last visited Dec. 27, 2015). The Statement concludes that "[r]egardless of one's childhood, race, culture or religion, good parenting does not require hitting a child." See id. This Statement, however, has not been adopted by the APA.

There is evidence that public support of corporal punishment is waning somewhat, although it is still strong. In the 2013 Harris Poll survey, 81 percent of all respondents said that

spanking is "sometimes appropriate," as compared with 87 percent of respondents in the 1995 Harris Poll survey. See Regina A. Corso, *Four in Five Americans Believe Parents Spanking Their Children Is Sometimes Appropriate*, THE HARRIS POLL, Sept. 26, 2013, http://www.theharrispoll.com/health-and-life/Four_in_Five_Americans_Believe_Parents_Spanking_Their_Children_is_Sometimes_Appropriate.html. The 2013 survey found that support for spanking differs by age of the respondent as well as region, political party, and political philosophy. Seventy-two percent of the respondents aged 18 to 36 said spanking was sometimes appropriate, as compared with 82 percent of respondents aged 37 to 48, 85 percent of respondents aged 49 to 67, and 88 percent of respondents aged 68 or older. Twenty-eight percent of the respondents aged 18 to 36 said spanking was never appropriate, as compared with 18 percent of respondents aged 37 to 48, 15 percent of respondents aged 49 to 67, and 12 percent of respondents aged 68 or older.

Respondents in the South and Midwest were more supportive of spanking (86 percent and 83 percent, respectively, saying spanking is sometimes appropriate) than respondents in the East and West (75 percent and 76 percent, respectively). Support also differed by political party and political philosophy, with 87 percent of Republicans saying spanking is sometimes appropriate as compared with 78 percent of Democrats, and 87 percent of those identifying as conservative saying spanking is sometimes appropriate as compared with 81 percent of those identifying as moderates and 71 percent of those identifying as liberals.

The privilege continues despite concern that corporal punishment harms children. There is a consensus among social scientists that harsh forms of corporal punishment that amount to abuse are detrimental to children. See Diana Baumrind et al., *Ordinary Physical Punishment: Is It Harmful? Comment on Gershoff (2002)*, 128 PSYCHOL. BULL. 580 (2002) (discussing studies). There is not a consensus, however, about the use of spanking. An oft-cited meta-analysis of corporal-punishment studies found that corporal punishment is correlated with increased aggression by the child, increased delinquent and antisocial behavior, a decrease in the quality of the parent–child relationship, increased mental-health problems for the child, increased incidence of physical abuse of the child, aggression as an adult, and more. See Elizabeth Thompson Gershoff, *Corporal Punishment by Parents and Associated Behaviors and Experiences: A Meta-Analytic and Theoretical Review*, 128 PSYCHOL. BULL. 539 (2002). Gershoff's meta-analysis has been criticized, however, because the underlying studies addressed both spanking and harsh forms of corporal punishment, such as hitting a child with an object, slapping on the face, and shaking. See Baumrind et al., supra. After isolating only the spanking results, the correlation with negative outcomes was significantly lowered. See id. Additionally, some researchers found that the detrimental impact of spanking disappeared in the Gershoff meta-analysis after controlling for other variables, such as the age of the child (particularly for children ages two to six) and the cultural norms of the family's social group (in contexts where spanking is more accepted). See Robert E. Larzelere et al., *The Intervention Selection Bias: An Underrecognized Confound in Intervention Research*, 130 PSYCHOL. BULL. 289 (2004).

As characterized by some researchers, the disagreement among social scientists is whether "mild to moderate disciplinary spanking (in the years between 18 months and puberty) has been shown to be harmful," but that there is a consensus that "overly severe forms of corporal punishment" are detrimental and should be prohibited, that parents should be discouraged from spanking adolescents and children younger than 18 months, and that spanking should not be used as the sole means of discipline. See Baumrind et al., supra, at 581.

Gershoff and a coauthor addressed some of the criticisms in a subsequent study. See Elizabeth T. Gershoff & Andrew Grogan-Kaylor, *Spanking and Child Outcomes: Old Controversies and New Meta-Analyses*, 30 J. FAM. PSYCHOL. 453 (2016). To address the concern that the earlier meta-analysis drew on studies of both spanking and harsher forms of corporal punishment, the authors analyzed only behaviors characterized as spanking. They also addressed various methodological concerns with the underlying studies. In the new meta-analysis, Gershoff and her coauthor found a correlation between spanking and detrimental outcomes for children, including "aggression, antisocial behavior, externalizing behavior problems, internalizing behavior problems, mental health problems, negative parent-child relationships, impaired cognitive ability, low self-esteem, and risk of physical abuse from parents." Id. at 457. The strongest correlation was between spanking and the risk of physical abuse. The meta-analysis could establish only a correlation, not causation, in part because a child's behavior may create a selection bias, with children with more behavioral issues eliciting more spanking than children without behavioral issues.

As noted in the second Gershoff meta-analysis, one concern about spanking is that it might lead to harsher forms of corporal punishment. Some social scientists are skeptical, see Baumrind et al., supra, but in addition to Gershoff's meta-analysis, a study in North and South Carolina found a correlation between spanking (defined in the study as hitting a child with an open hand, usually on the buttocks) and parental behavior considered abusive (including beating, burning, kicking, or hitting a child with an object in a location other than the buttocks, and shaking a child under the age of two). See Adam J. Zolotor et al., *Speak Softly—and Forget the Stick*, 35 AM. J. PREVENTIVE MED. 364 (2008). The study also found an association between the frequency of spanking and abusive behavior. See id.

Internationally, the United States is the only country in the world that has not ratified the U.N. Convention on the Rights of the Child. The Convention does not explicitly address corporal punishment, but it does provide that "no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment," see United Nations Convention on the Rights of the Child art. 37, Nov. 20, 1989, 1577 U.N.T.S. 3, and that "States Parties shall take all appropriate . . . measures to protect the child from all forms of physical . . . violence, injury or abuse . . . while in the care of parent(s), legal guardian(s) or any other person who has the care of the child." Id. art. 19(1).

In 2006, the U.N. Committee on the Rights of the Child adopted a comment addressing corporal punishment. In the view of the Committee, corporal punishment is inherently degrading and violates principles of human dignity. The Committee thus adopted an absolutist view that all

instances of hitting are degrading. It stated that "[t]he Committee is issuing this general comment to highlight the obligation of all States parties to move quickly to prohibit and eliminate all corporal punishment and all other cruel or degrading forms of punishment of children and to outline the legislative and other awareness-raising and educational measures that States must take." Comm. on the Rights of the Child, General Comment No. 8 of its Forty-Second Session, U.N. Doc. CRC/C/GC/8, at 3 (2007). It further stated that "[a]ddressing the widespread acceptance or tolerance of corporal punishment of children and eliminating it, in the family, schools and other settings, is not only an obligation of States parties under the Convention. It is also a key strategy for reducing and preventing all forms of violence in societies." Id. The Committee adopted a capacious definition of corporal punishment: "The Committee defines 'corporal' or 'physical' punishment as any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light." Id. at 4. The Committee further stated that freedom of religion is not a basis for permitting corporal punishment: "practice of a religion or belief must be consistent with respect for others' human dignity and physical integrity. Freedom to practise one's religion or belief may be legitimately limited in order to protect the fundamental rights and freedoms of others." Id. at 8.

The Committee found that it would not be enough for countries to repeal the justification provisions, and instead concluded that "in the view of the Committee, given the traditional acceptance of corporal punishment, it is essential that the applicable sectoral legislation—e.g. family law, education law, law relating to all forms of alternative care and justice systems, employment law—clearly prohibits its use in the relevant settings." Id. at 9. Further, countries should adopt legislation to make it "explicitly clear that the criminal law provisions on assault also cover all corporal punishment, including in the family." Id. at 10.

Addressing concerns about intrusion into the family, the Committee clarified that prohibiting corporal punishment "does not mean that all cases of corporal punishment of children by their parents that come to light should lead to prosecution of parents. The *de minimis* principle—that the law does not concern itself with trivial matters—ensures that minor assaults between adults only come to court in very exceptional circumstances; the same will be true of minor assaults on children." Id. Similarly, the Committee stated that the prohibition on corporal punishment does not mean that the child welfare system should intervene in all cases. See id. at 11 ("It is the Committee's view that prosecution and other formal interventions (for example, to remove the child or remove the perpetrator) should only proceed when they are regarded both as necessary to protect the child from significant harm and as being in the best interests of the affected child.").

The United Nations reports that "47 countries have comprehensive and explicit legal bans on all forms of violence against children, tripling the number in place since 2006." General Assembly, Annual report of the Special Representative of the Secretary-General on Violence against Children, U.N. Doc. A/70/289, at 5 (2015). Listed in the order from the country earliest to ban corporal punishment in all settings including the family to the most recent, the countries are as follows: Sweden, Finland, Norway, Austria, Cyprus, Denmark, Latvia, Croatia, Germany, Israel, Bulgaria, Turkmenistan, Iceland, Romania, Ukraine, Hungary, Greece, Togo, Spain,

Venezuela, Uruguay, Portugal, New Zealand, Netherlands, Liechtenstein, Luxembourg, Republic of Moldova, Costa Rica, Albania, Republic of Congo, Kenya, Tunisia, Poland, South Sudan, Cabo Verde, Honduras, Macedonia, Andorra, Estonia, Nicaragua, San Marino, Argentina, Bolivia, Brazil, Malta, Benin, Ireland. The United Nations does not specify the extent to which these states have explicitly prohibited corporal punishment or merely withdrawn the justification defense, but the Global Initiative to End all Corporal Punishment of Children, an advocacy group, has a useful website, listing the 47 countries and providing links to the underlying legal regime in each country. See *States Which Have Prohibited All Corporal Punishment*, GLOBAL INITIATIVE TO END ALL CORPORAL PUNISHMENT OF CHILD., http://www.endcorporalpunishment.org/progress/prohibiting-states/ (last visited Dec. 29, 2015). The United Nations has found that despite these protections, "almost 1 billion children between the ages of 2 and 14 are subject to physical punishment by their caregiver." General Assembly, supra, at 2.

d. Parental privilege in a criminal proceeding and a child-protection proceeding—difference and similarity. Most states have adopted reasonableness as the heart of the standard. For examples in the criminal context, see MICH. COMP. LAWS ANN. § 750.136b(9) (carving out an exception to the criminal definition of child abuse: "This section does not prohibit a parent or guardian, or other person permitted by law or authorized by the parent or guardian, from taking steps to reasonably discipline a child, including the use of reasonable force."); WASH. REV. CODE § 9A.16.100 (2015) ("[T]he physical discipline of a child is not unlawful when it is reasonable and moderate and is inflicted by a parent, teacher, or guardian for purposes of restraining or correcting the child."); Commonwealth v. Dorvil, 32 N.E.3d 861, 870 (Mass. 2015) (recognizing the privilege as a matter of common law and adopting a "reasonable force and reasonable belief" standard); State v. Lefevre, 117 P.3d 980, 984 (N.M. Ct. App. 2005) (adopting as a matter of common law the standard of "reasonable and moderate force").

For examples in the civil child-protection context, see COLO. REV. STAT. § 19-1-103(1)(b) (2015) (excluding from the definition of civil abuse "acts that could be construed to be a reasonable exercise of parental discipline"); D.C. CODE § 16-2301(23)(B)(i) (2014) (for civil child abuse, carving out "discipline [that] is reasonable in manner and moderate in degree"); IND. CODE § 31-34-1-15(1) (2015) (recognizing "the right of a parent, guardian, or custodian of a child to use reasonable corporal punishment when disciplining the child"); MD. CODE ANN., FAM. LAW § 4-501 ("Nothing in this subtitle shall be construed to prohibit reasonable punishment, including reasonable corporal punishment, in light of the age and condition of the child, from being performed by a parent or stepparent of the child."); S.C. CODE ANN. § 63-7-20(4)(a)(iii) (2014) (excluding from the civil definition of child abuse corporal punishment that "is reasonable in manner and moderate in degree").

Some states have no statutory harm standard in either the criminal or civil context, and a very few states have the same statutory standard in both contexts. See, e.g., COLO. REV. STAT. § 18-1-703(1) (2015) ("The use of physical force . . . is justifiable and not criminal [when] . . . (a) A parent . . . use[s] reasonable and appropriate physical force . . . to maintain discipline"); id. § 19-1-103(1)(b) (in civil child abuse provisions, "[n]othing in this subsection (1) shall refer to acts that

could be construed to be a reasonable exercise of parental discipline"); LA. STAT. ANN. § 14:18 (2015) ("The fact that an offender's conduct is justifiable, although otherwise criminal, shall constitute a defense to prosecution" and "can be claimed . . . (4) When the offender's conduct is reasonable discipline of minors by their parents"); LA. CIV. CODE ANN. art. 218 (2015) ("An unemancipated minor cannot quit the parental house without the permission of his father and mother, who have the right to correct him, provided it be done in a reasonable manner."); LA. CHILD. CODE ANN. art. 615(A) ("In determining the disposition of the report, the agency shall take into account, in mitigation . . . that the injury resulted from what might be considered a reasonable exercise of discipline for the child's misbehavior."). Some states without statutory standards have adopted the same harm standard in both contexts. See, e.g., State v. Martin, 751 A.2d 769, 771 (Vt. 2000) (upholding a jury instruction in a criminal trial that stated that a parent was permitted to use corporal punishment "that it is not excessive or otherwise unreasonably inflicted").

The majority of states, however, distinguish criminal and civil proceedings, adopting a higher harm standard in the criminal context and thus allowing parents greater leeway when criminal liability is at stake. For cases and statutes addressing the harm standard in a criminal proceeding, see the Reporters' Note to Comment *e*, and for cases and statutes addressing the harm standard in a civil child-protection proceeding, see the Reporters' Note to Comment *g*. For cases and statutes addressing the other factors in the reasonableness standard in a criminal proceeding, see the Reporters' Note to Comment *f*, and for cases and statutes addressing the other factors in the reasonableness standard in a civil child-protection proceeding, see the Reporters' Note to Comment *h*.

For criminal proceedings, this Section declines to follow the Model Penal Code, which states that a parent's use of force is justifiable if: "(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." MODEL PENAL CODE § 3.08(1) (AM. LAW INST. 1985). As the comments to the Model Penal Code clarify, the standard does not require that the force be reasonable. See id. § 3.08, Comment 2. This Section adopts the reasonableness standard—which is a more encompassing, fact-specific inquiry—because this standard is consistent with the majority of states and because it better balances the goals of parental autonomy and the protection of children.

Only two states, Nebraska and Pennsylvania, have adopted the Model Penal Code's provision on parental discipline in its entirety. See NEB. REV. STAT. § 28-1413 (2014); 18 PA. CONS. STAT. § 509 (2015). A few states have adopted it in a modified form. See HAW. REV. STAT. § 703-309(1) (2015) ("(a) The force is employed with due regard for the age and size of the minor and is reasonably related to the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of the minor's misconduct; provided that there shall be a rebuttable presumption that the following types of force are not justifiable for purposes of this [paragraph]: throwing, kicking, burning, biting, cutting, striking with a closed fist, shaking a minor under three years of age, interfering with breathing, or threatening with a deadly weapon; and (b)

The force used does not intentionally, knowingly, recklessly, or negligently create a risk of causing substantial bodily injury, disfigurement, extreme pain or mental distress, or neurological damage."); KY. REV. STAT. ANN. § 503.110(1) (West 2015) ("(a) The defendant believes that the force used is necessary to promote the welfare of a minor . . . and (b) The force that is used is not designed to cause or known to create a substantial risk of causing death, serious physical injury, disfigurement, extreme pain, or extreme mental distress."); MO. REV. STAT. § 563.061(1) (2015) ("(1) The actor reasonably believes that the force used is necessary to promote the welfare of a minor . . . and (2) The force used is not designed to cause or believed to create a substantial risk of causing death, serious physical injury, disfigurement, extreme pain or extreme emotional distress."). For a useful description of the states that have adopted the Model Penal Code or a close variant, see Kandace K. Johnson, *Crime or Punishment: The Parental Corporal Punishment Defense—Reasonable and Necessary, or Excused Abuse?*, 1998 U. ILL. L. REV. 413, 484-486.

Case law from the Model Penal Code states suggests that the Model Penal Code standard allows parents to use more force and thus permits somewhat greater harm to the child than states that use the reasonableness standard, but the fact-specific nature of the inquiry makes it difficult to isolate the effect of the standard on the outcome. See Commonwealth v. Laskey, 15 Pa. D. & C.4th 416 (Pa. Ct. Comm. Pleas 1992) (finding that hitting an 11-year-old child on the buttocks 10 times with a paddle, causing bruising and soreness, did not meet the standard of "extreme pain" in the statute). The Model Penal Code states still have limits, however, and some instances of corporal punishment fall outside the privilege. See, e.g., State v. Beins, 456 N.W.2d 759 (Neb. 1990) (father choking 15-year-old-daughter and hitting her multiple times in the face, causing cuts, bruising, and swelling, for failure to obey his direction was not protected parental discipline); Commonwealth v. Aukstakalnis, 25 Pa. D. & C.4th 139, 148 (Pa. Ct. Comm. Pleas 1995) (stepfather beat 14-year-old boy for not coming home even though he was grounded, leaving him feeling degraded and worthless as well as physically bruised and cut; holding that "the jury could find that defendant did not use force for the purpose of safeguarding or promoting Jason's welfare. The number and severity of the blows, the resulting injuries, and defendant's other acts during the beating permit the inference that the defendant did not act" to safeguard or promote boy's welfare, and further finding that "even if such facts and inferences were not sufficient . . . the facts and inferences were sufficient to establish that the force employed exceeded" the standard of harm).

When adopting the privilege in common law, some state supreme courts have explicitly declined to follow the Model Penal Code, in part because it insufficiently protects children. See Willis, 888 N.E.2d at 181-182 (declining to follow the Model Penal Code because of the absence of a reasonableness requirement: "First, the [Model Penal] Code does not explicitly demand that the use of force be reasonable. Second, under the [Model Penal] Code, so long as a parent acts for the purpose of safeguarding or promoting the child's welfare (including the specific purpose of preventing or punishing misconduct), the parent is privileged in using force, unless the force creates a substantial risk of death or excessive injuries. Neither of these two propositions finds support in Indiana's common law. We conclude therefore that the Model Penal Code is not a helpful source to inform our decision on the law in this area"); Commonwealth v. Dorvil, 32

N.E.3d 861, 870 (Mass. 2015) (choosing not to adopt the Model Penal Code and instead adopting the approach of reasonable force and reasonable belief along with a low standard of harm because this "approach best balances the parental right to direct the care and upbringing of a child with the Commonwealth's interest in protecting children from abuse").

For civil child-protection proceedings, the standard adopted in this Section differs somewhat from the standard in the Second Restatement of Torts, which states that "[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." Restatement Second, Torts § 147(1) (AM. LAW INST. 1965). There are three main differences between the standard adopted in this Section and the Restatement Second. First, this Section does not adopt the language that the parent must believe the corporal punishment is necessary. Most states have not adopted this language and instead simply require the corporal punishment to be reasonable. As elaborated in Comment *h*, reasonableness requires a disciplinary purpose. This objective inquiry avoids an assessment of the parent's belief and does not imply that corporal punishment is ever necessary.

Second, the Restatement Second lists, in the black letter, the following factors:

> (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.

Id. § 150. This Section does not incorporate the factors into the black letter because the list implies that a factfinder should give greater consideration to each factor than is reflected in the case law. The reasonableness standard adopted in this Section better reflects the holistic, case-specific inquiry that is the hallmark of these cases, with some factors weighing more than others depending on the circumstances. Courts generally do not rest on any one specific factor, although, as discussed in Comment *g*, the harm to the child is highly influential.

Finally, this Section adopts some but not all the Restatement Second factors. The principal difference is that the standard adopted in this Section has a lower threshold for harm in the civil context, directing a factfinder to consider "whether the corporal punishment caused, or created a substantial risk of causing, physical harm beyond minor pain or transient marks." By contrast, the Restatement Second standard asks whether the force "is disproportionate to the offense, unnecessarily degrading, or likely to cause serious or permanent harm."

The harm standard in the Restatement Second provides insufficient protection for children and is not supported by the case law in civil child-protection proceedings. Under the Restatement

Second standard, a serious offense by the child could justify a parent's use of considerable force. The comments make this clear. See id. § 150, Comment *c* ("Thus a more severe punishment may be imposed for a serious offense, or an intentional one, than for a minor offense, or one resulting from a mere error of judgment or careless inattention."). The reasonableness standard adopted in this Section takes the child's behavior into account but sets an upper limit on the amount of force and the extent of the injury. Additionally, in the civil child-protection context, courts generally do not use the "serious or permanent harm" standard and instead are less tolerant of physical harm to children. See Comment *g*.

The commentary for this Section omits the reference to the influence of the child's example on other children because most courts do not weigh this as a relevant factor. This Section also omits the reference to the child's sex as a relevant factor. Courts do not use this factor to determine reasonableness, and the rationale cited in the Second Restatement is no longer applicable in light of evolving notions of sex equality. See Restatement Second, Torts, supra, at § 150, Comment *c* ("Likewise it may be excessive to punish a girl for a particular offense in a manner which would be permissible as a punishment for the same offense committed by a boy of the same age.").

[Update with Restatement Third, when it is finished.]

With respect to the requirement in the Restatement Second of Torts that the parent reasonably believe the corporal punishment is necessary, only a minority of states have adopted this requirement, and these states do so only in the criminal context. See, e.g., ALA. CODE § 13A-3-24(1) (2014) ("A parent, guardian or other person responsible for the care and supervision of a minor or an incompetent person . . . may use reasonable and appropriate physical force upon the minor or incompetent person when and to the extent that he reasonably believes it necessary and appropriate to maintain discipline or to promote the welfare of the minor or incompetent person."); CONN. GEN. STAT. § 53a-18(1) (2015) ("A parent, guardian or other person entrusted with the care and supervision of a minor or an incompetent person, except a person entrusted with the care and supervision of a minor for school purposes . . . may use reasonable physical force upon such minor . . . when and to the extent that he reasonably believes such to be necessary to maintain discipline or to promote the welfare of such minor or incompetent person."); KY. REV. STAT. ANN. § 503.110(1) (West 2015) ("(a) The defendant believes that the force used is necessary to promote the welfare of a minor . . . and (b) The force that is used is not designed to cause or known to create a substantial risk of causing death, serious physical injury, disfigurement, extreme pain, or extreme mental distress."); MO. REV. STAT. § 563.061(1) (2015) ("(1) The actor reasonably believes that the force used is necessary to promote the welfare of a minor . . . and (2) The force used is not designed to cause or believed to create a substantial risk of causing death, serious physical injury, disfigurement, extreme pain or extreme emotional distress."); N.H. REV. STAT. ANN. § 627:6(I) (2015) ("A parent, guardian or other person responsible for the general care and welfare of a minor is justified in using force against such minor when and to the extent that he reasonably believes it necessary to prevent or punish such minor's misconduct."); N.Y. PENAL LAW § 35.10(1) (McKinney 2014) ("A parent . . . may use physical force, but not deadly physical force, upon such person when and to the extent that he reasonably believes it necessary to maintain discipline or to

promote the welfare of such person."); OR. REV. STAT. § 161.205(1)(a) (2013) ("A parent, guardian or other person entrusted with the care and supervision of a minor or an incompetent person may use reasonable physical force upon such minor or incompetent person when and to the extent the person reasonably believes it necessary to maintain discipline or to promote the welfare of the minor"); Dorvil, 32 N.E.3d at 870 (adopting as a matter of common law the reasonable force and reasonable belief test).

e. Parental privilege in a criminal proceeding—a consideration of the harm. For criminal proceedings, this Section adopts the harm standard used in a number of states—serious physical harm or gross degradation. See, e.g., MISS. CODE ANN. § 97-5-39(2)(h) (2015) ("Reasonable discipline and reasonable corporal punishment shall not be a defense . . . if a child suffers serious bodily harm"); N.D. CENT. CODE § 12.1-05-05(1) (2015) ("The force used must not create a substantial risk of death, serious bodily injury, disfigurement, or gross degradation."); OHIO REV. CODE ANN. § 2919.22(B)(3) (LexisNexis 2015) (criminalizing corporal punishment that "is excessive under the circumstances and creates a substantial risk of serious physical harm to the child"); Willis v. State, 888 N.E.2d 177, 183 (Ind. 2008) (adopting the Restatement Second of Torts standard: whether the physical force is "likely to cause serious or permanent harm").

The "serious physical harm" standard draws a workable distinction between incontrovertible child abuse on the one hand, see, for example, Buffington v. State, 824 So. 2d 576, 580 (Miss. 2002) (applying the standard of serious bodily harm and temporary disfigurement to uphold a criminal conviction where the mother had beaten a two-year-old child all over her body, leaving multiple bruises as well as other indicia of maltreatment), and discipline within parental discretion on the other, see, for example, State v. Seay, 256 S.W.3d 197 (Mo. Ct. App. 2008) (applying the "serious bodily injury" or "extreme pain" standard and finding that slapping a child on the face and producing bruising and swelling was not, as a matter of law, outside the justification defense, and therefore the issue should go to the jury); State v. Lefevre, 117 P.3d 980, 984 (N.M. Ct. App. 2005) (adopting as a matter of common law the standard of "reasonable and moderate force" and finding that an "isolated incident" of a father squeezing his 12-year-old daughter's hand because she disobeyed him and leaving a dime-sized bruise was within the privilege).

For additional cases addressing the harm standard and identifying conduct that falls outside the privilege, see State v. Morgan, 824 N.W.2d 98 (S.D. 2012) (grabbing and squeezing the face of a six-year-old as discipline for arguing with her brother and failing to complete her homework was not privileged where the conduct caused bruising along face and neck, a contusion on the upper lip and inside of the mouth, and a subconjunctival hemorrhage in one eye); State v. Kimberly B., 699 N.W.2d 641 (Wis. Ct. App. 2005) (unreasonable where the mother punched a nine-year-old girl with a closed fist in the face and body six to nine times, causing bruises, swollen eye, and marks on arm).

There are some cases that may seem to come closer to the line, but the higher harm standard protects a parent from criminal liability where there are extenuating factors weighing in favor of parental discretion. See, e.g., Willis, 888 N.E.2d at 180, 183 (adopting as a matter of common law

the standard of "likely to cause serious or permanent harm" and finding no criminal liability for a single mother with an 11-year-old child with history of lying and stealing where the mother struck the child five to seven times with a belt or an extension cord, resulting in bruises; the blows were aimed at the buttocks, but some hit the child's arm and leg; the mother had spent two days considering disciplinary options and had used noncorporal methods before but without success).

Key factual differences distinguish permissible from impermissible discipline. For example, an intermediate appellate court in Indiana distinguished *Willis*, supra, by focusing on the amount of force, the way it was meted out, and the resulting injuries. See Hunter v. State, 950 N.E.2d 317 (Ind. Ct. App. 2011). The child's conduct was relatively similar to the child in *Willis*: a 14-year-old girl was doing poorly in school, was lying, was sneaking out of the home, and was expelled from after-school programs. The father had tried different forms of discipline first, but when he turned to corporal punishment, his use was qualitatively and quantitatively different from the parent in *Willis*. The father in Hunter told the girl to remove all of her clothing except her undergarments and made her come into the living room. The father then hit the girl with a belt approximately 20 times, creating a scab on her thigh and hurting one of her fingers so much that it was still swollen several months later. The court concluded that "the arguably degrading and long-lasting physical effects of [the girl's] injuries differentiate the instant matter from *Willis*, and lead us to conclude that the force employed by Hunter was unreasonable." Id. at 321.

Illustration 1 is not based on a particular case, but for criminal cases involving corporal punishment with a belt, see Reporters' Note to Comment *f*. Illustration 2 is based on is based on In re J.B., 19 N.E.3d 1273 (Ill. App. Ct. 2014). Illustration 3 is loosely based on State v. Beins, 456 N.W.2d 759 (Neb. 1990).

Three states are far more protective of children than the standard adopted in this Section, extending the privilege in the criminal context only if the force creates no more than transient pain and minor temporary marks. See ME. STAT. tit. 17-A, § 106(1-A) (2015) ("To constitute a reasonable degree of force, the physical force applied to the child may result in no more than transient discomfort or minor temporary marks on that child."); WASH. REV. CODE § 9A.16.100 (2015) ("The following actions are presumed unreasonable when used to correct or restrain a child: . . . (6) doing any other act that is likely to cause and which does cause bodily harm greater than transient pain or minor temporary marks."); Commonwealth v. Dorvil, 32 N.E.3d 861, 870 (Mass. 2015) (permitting reasonable corporal punishment that "neither causes nor creates a substantial risk of causing physical harm (beyond fleeting pain or minor transient marks), gross degradation, or severe mental distress"). Further, the criminal child-abuse statute in Delaware defines abuse as "causing any physical injury to a child through unjustified force as defined in § 468(1)(c)." DEL. CODE ANN. tit. 11, § 1100(1) (2015). Section 468 allows reasonable and moderate force, but the state legislature recently amended the definition of physical injury to be "any impairment of physical condition or pain." Id. § 1100(5). There is no case law yet determining whether the amendment means a parent can still use reasonable and moderate force, or whether a parent can do so only if that force also causes no pain.

At the other end of the continuum, Texas gives parents the greatest leeway by specifying that the force only be "nondeadly." TEX. PENAL CODE ANN. § 9.61(a) (West 2015) ("The use of force, but not deadly force, against a child younger than 18 years is justified"). One state requires that the force be nondeadly and that the parent reasonably believe the force is necessary. N.Y. PENAL LAW § 35.10(1) (McKinney 2014) ("A parent . . . may use physical force, but not deadly physical force, upon such person when and to the extent that he reasonably believes it necessary to maintain discipline or to promote the welfare of such person."). And one state requires that the force be both reasonable and nondeadly, see ALASKA STAT. § 11.81.430(a)(1) (2014) ("[A] parent . . . may use reasonable and appropriate nondeadly force").

Courts, however, do not appear to apply the nondeadly standard literally and instead impose some limits. In Texas, the court inquires whether the force was reasonable, even though this is not in the statute. See Goulart v. State, 26 S.W.3d 5, 10 (Tex. App. 2000) (reviewing the jury finding for sufficiency of the evidence and inquiring whether "the force used was unreasonable"). In New York, the standard jury instruction in a criminal case involving the parental privilege is as follows: "if the force employed by the defendant was in excess of, or out of proportion to, that which was reasonably necessary under the circumstances, then he cannot claim that his conduct was justified." 1 CHARGES TO JURY & REQUESTS TO CHARGE IN A CRIMINAL CASE IN NEW YORK § 5:24, Westlaw (database updated October 2015); cf. People v. Prue, 632 N.Y.S.2d 347 (App. Div. 1995) (citing with approval a jury instruction containing the reasonable-force requirement). In short, the states that set the standard at nondeadly force, with or without additional requirements, do not allow parents to use to use anything close to that level of force and still focus on reasonableness more broadly.

In states that have adopted the Model Penal Code, which does not use the reasonableness standard, the harm threshold is similar to that adopted in this Section. See, e.g., HAW. REV. STAT. § 703-309(1)(b) (2015) ("The force used does not intentionally, knowingly, recklessly, or negligently create a risk of causing substantial bodily injury, disfigurement, extreme pain or mental distress, or neurological damage."); KY. REV. STAT. ANN. § 503.110(1)(b) (West 2015) ("The force that is used is not designed to cause or known to create a substantial risk of causing death, serious physical injury, disfigurement, extreme pain, or extreme mental distress."); MO. REV. STAT. § 563.061(1)(2) (2015) ("The force used is not designed to cause or believed to create a substantial risk of causing death, serious physical injury, disfigurement, extreme pain or extreme emotional distress."); 18 PA. CONS. STAT. § 509(1)(ii) (2015) (protecting parental discipline if "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").

The relatively high harm standard does not mean that all force short of this standard is reasonable. Wisconsin has clarified in its statute that the standard sets a ceiling, not a safe harbor, for any harm that falls short of the standard. See WIS. STAT. § 939.45(5)(b) (2014) ("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.").

For definitions of "substantial risk," see OHIO REV. CODE ANN. § 2901.01(8) (West 2017) ("Substantial risk' means a strong possibility, as contrasted with a remote or significant possibility, that a certain result may occur or that certain circumstances may exist."); WYO. STAT. ANN. § 14-3-202(a)(ii)(C) (West) ("'Substantial risk' means a strong possibility as contrasted with a remote or insignificant possibility"); Lybarger v. People, 807 P.2d 570, 578 (Colo. 1991) ("By a substantial risk of serious bodily harm we mean those conditions which if medically untreated may result in a significant impairment of vital physical or mental functions, protracted disability, permanent disfigurement, or similar defects or infirmities.").

The "gross degradation" standard is intended only for extreme cases. There is little case law developing this term. Illustration 4 is loosely based on *Hunter*, supra, but the facts have been altered to make the punishment clearly meet the gross degradation standard.

The standard is focused solely on physical harm and does not inquire into any potential psychological harm stemming from the use of physical force. Psychological abuse of a child is addressed in § 3.23.

f. Parental privilege in a criminal proceeding—other reasonableness factors. For a case discussing the fact-specific nature of the inquiry, see United States v. Rivera, 54 M.J. 489, 491 (C.A.A.F. 2001) ("[T]he enormous variety of variables that affect human interaction and which place the family at the core of a child's social interaction cautions against black letter rules of conduct."). Some states list the relevant factors in a statute, but most states have developed these factors through judicial interpretations of broadly worded statutes. For statutory provisions listing the relevant factors, see, for example, HAW. REV. STAT. § 703-309(1)(a) (2015) ("The force is employed with due regard for the age and size of the minor"); WASH. REV. CODE § 9A.16.100 (2015) ("The age, size, and condition of the child and the location of the injury shall be considered when determining whether the bodily harm is reasonable or moderate.").

For court decisions listing the relevant factors under a broadly worded statute, see, for example, State v. Sedlock, 882 So. 2d 1278 (La. Ct. App. 2004) (applying Louisiana's justification provision, which allows "reasonable discipline," by looking at the degree of force, the object used, the number of times the child was hit, and the severity of the bruising to find the discipline unreasonable); State v. Rosa, 6 N.E.3d 57, 67 (Ohio Ct. App. 2013) (citations omitted) (interpreting Ohio's prohibition on "excessive" corporal punishment to require a consideration of "(1) the child's age; (2) the child's behavior leading up to the discipline; (3) the child's response to prior non-corporal punishment; (4) the location and severity of the punishment; and (5) the parent's state of mind while administering the punishment"); State v. Kimberly B., 699 N.W.2d 641 (Wis. Ct. App. 2005) (interpreting Wisconsin's affirmative-defense statute, which protects "reasonable discipline," as an objective standard measured in part by considering age, sex, physical and mental condition and disposition of child, conduct of child, nature of discipline and surrounding circumstances).

For references to disciplinary purpose, see, e.g., COLO. REV. STAT. § 18-1-703(1) ("The use of physical force upon another person which would otherwise constitute an offense is justifiable and not criminal under any of the following circumstances: (a) A parent, guardian, or

other person entrusted with the care and supervision of a minor or an incompetent person . . . may use reasonable and appropriate physical force upon the minor or incompetent person when and to the extent it is reasonably necessary and appropriate to maintain discipline or promote the welfare of the minor or incompetent person."); Commonwealth v. Dorvil, 32 N.E.3d 861, 870 (Mass. 2015) (adopting the privilege in a criminal case as a matter of common law if, inter alia, "the force is reasonably related to the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of the minor's misconduct"); State v. Martin, 751 A.2d 769, 771 (Vt. 2000) (approving jury instruction: "Under the law, the parent has a right to inflict corporal punishment on a child subject to his disciplinary control provided the punishment is motivated by a corrective purpose and not by anger, that it is not inflicted upon frivolous pretenses, that it is not excessive or otherwise unreasonably inflicted, or that it is not cruel or merciless").

On the type of corporal punishment, the privilege clearly protects a parent who chooses to discipline a child by hitting the child's buttocks with an open hand and using mild force. See People ex rel. D.A.J., 757 N.W.2d 70, 75 (S.D. 2008) (distinguishing "a quick swat on a bare behind" from the conduct at issue: hitting a nine-year-old with a switch multiple times on the arms, back, and legs, and producing bruising and welts).

Conversely, behavior that is undisputedly abusive and poses a serious risk to the child does not fall within the privilege. At least one state has adopted categorical exclusions to the privilege. See DEL. CODE ANN. tit. 11, § 468(1)(c) (2015) ("The force shall not be justified if it includes, but is not limited to, any of the following: Throwing the child, kicking, burning, cutting, striking with a closed fist, interfering with breathing, use of or threatened use of a deadly weapon, prolonged deprivation of sustenance or medication").

Two states have codified a list of presumptively unreasonable actions. See, e.g., HAW. REV. STAT. § 703-309(1)(a) (2015) ("[T]here shall be a rebuttable presumption that the following types of force are not justifiable for purposes of this [paragraph]: throwing, kicking, burning, biting, cutting, striking with a closed fist, shaking a minor under three years of age, interfering with breathing, or threatening with a deadly weapon"); WASH. REV. CODE § 9A.16.100 (2015) ("The following actions are presumed unreasonable when used to correct or restrain a child: (1) Throwing, kicking, burning, or cutting a child; (2) striking a child with a closed fist; (3) shaking a child under age three; (4) interfering with a child's breathing; (5) threatening a child with a deadly weapon; or (6) doing any other act that is likely to cause and which does cause bodily harm greater than transient pain or minor temporary marks."). The majority of state statutes, however, do not include specified lists.

For cases finding specified actions unreasonable, see State v. Dodd, 503 A.2d 1302 (Me. 1986) (upholding a criminal conviction for a parent who spanked a three-year-old child to stop her from crying, taped her ankles and hands together, taped her mouth shut and hung her from a door knob by her ankles on two occasions for a total of over 20 minutes); State v. Beins, 456 N.W.2d 759 (Neb. 1990) (father choking 15-year-old-daughter and hitting her multiple times in the face, causing cuts, bruising, and swelling, for failure to obey his direction was not protected parental discipline); State v. Kimberly B., 699 N.W.2d 641 (Wis. Ct. App. 2005) (unreasonable where the

mother punched a nine-year-old girl with a closed fist in the face and body six to nine times, causing bruises, swollen eye, and marks on arm).

All the presumptively unreasonable actions listed in Comment *e* pose considerable risk to a child's safety.

Illustration 7 is based on State v. Matavale, 166 P.3d 322 (Haw. 2007) (finding no criminal liability for striking 14-year-old with various objects for lying). For other cases addressing the use of an object, see Swan v. State, 320 P.3d 235 (Wyo. 2014) (covering a five-year-old child's hands and mouth with plastic and then spanking on bare buttocks with an 18- to 24-inch piece of wood leaving abrasions, bruises, and lacerations is sufficient to uphold jury determination that the conduct was not reasonable corporal punishment); Willis v. State, 888 N.E.2d 177 (Ind. 2008) (finding a single mother's use of a belt or an extension cord was privileged when used on an 11-year-old child with history of lying and stealing); Kesar v. State, 706 P.2d 263 (Wyo. 1985) (hitting a 14-year-old three or four times with a metal spatula used to scrape ice off the window, backhanding the teenager in the mouth, hitting the child on bare buttocks and thighs with a leather belt 14 to 15 times as hard as possible and four to five times on the face is child abuse and not protected parental discipline); Sykes v. State, 940 S.W.2d 888 (Ark. Ct. App. 1997) (not unreasonable or inappropriate for a legal guardian to use a telephone cord to whip an 11-year-old child, leaving three marks on the buttocks, arm and leg, after the child was found trespassing and could have been charged with criminal trespass). For a case distinguishing *Willis*, see Hunter v. State, 950 N.E.2d 317, 321 (Ind. Ct. App. 2011) (finding the child's conduct was similar to that in Willis but that the parent's response—requiring a 14-year-old girl to remove all of her clothing except her undergarments and come into the living room, where he beat her with a belt approximately 20 times, creating a scab on her thigh and hurting one of her fingers so much that it was still swollen several months later—was much harsher and that "the arguably degrading and long-lasting physical effects of [the girl's] injuries differentiate the instant matter from *Willis,* and lead us to conclude that the force employed by Hunter was unreasonable").

For other cases finding types of corporal punishment do not fall within the privilege, see Swan v. State, 320 P.3d 235 (Wyo. 2014) (covering a five-year-old child's hands and mouth with plastic and then spanking on bare buttocks with an 18- to 24-inch piece of wood, leaving abrasions, bruises, and lacerations is sufficient to uphold jury determination that the conduct was not reasonable corporal punishment); State v. Dodd, 503 A.2d 1302 (Me. 1986) (upholding a criminal conviction for a parent who spanked a three-year-old child to stop her from crying, taped her ankles and hands together, taped her mouth shut and hung her from a door knob by her ankles on two occasions for a total of over 20 minutes).

Illustration 8 shows a kind of corporal punishment that clearly falls outside the scope of the privilege. This Illustration is based on State v. C.S.D. See 4 So. 3d 204 (La. Ct. App. 2009).

A closed fist falls on the borderline of reasonableness. The Illustration is based on United States v. Rivera, see 54 M.J. 489 (C.A.A.F. 2001) (finding that punching a 13-year-old in the stomach for poor grades and with sufficient force to knock the child to the ground was not covered by the privilege). For a case finding the use of a closed fist reasonable in light of other

circumstances, see Dep't of Children & Families, Div. of Youth & Family Servs. v. K.A., 996 A.2d 1040 (N.J. Super. Ct. App. Div. 2010) (punching an eight-year-old five times in shoulder with a closed fist, leaving visible bruises, was privileged conduct but largely because of the circumstances: the child had an underlying psychological disorder; the mother tried a time-out first; the child defied her; the mother had no social support in caring for child, from father or other relatives; the incident was isolated with no pattern of abuse; and the mother was contrite and willing to take parenting classes). Three state statutes exclude hitting a child with a closed fist from the privilege or create a rebuttable presumption that this conduct is not privileged. See D.C. CODE § 16-2301(23)(B)(i)(II) (2014) (excluding "striking a child with a closed fist" from the privilege); HAW. REV. STAT. § 703-309(1)(a) (2015) (creating a rebuttable presumption that creating a presumption that "striking [a child] with a closed fist" is not justifiable corporal punishment); WASH. REV. CODE § 9A.16.100 (2015) (same).

Oklahoma is the only state that affirmatively protects the use of an object through its statutory definition of protected parental discipline. See OKLA. STAT. tit. 21, § 844 (2015) ("[N]othing contained in this Act shall prohibit any parent . . . from using ordinary force as a means of discipline, including but not limited to spanking, switching or paddling.").

On the amount of force, Illustration 9 is based on State v. Lefevre, 117 P.3d 980, 984 (N.M. Ct. App. 2005) (adopting as a matter of common law the standard of "reasonable and moderate force" and finding that an "isolated incident" of a father squeezing his 12-year-old daughter's hand because she disobeyed him and leaving a dime-sized bruise was within the privilege). For other cases discussing the amount of force, see State v. Morgan, 824 N.W.2d 98 (S.D. 2012) (grabbing and squeezing the face of a six-year-old as discipline for arguing with her brother and failing to complete her homework was not privileged where the conduct caused bruising along face and neck, a contusion on the upper lip and inside of the mouth, and a subconjunctival hemorrhage in one eye); Kesar v. State, 706 P.2d 263 (Wyo. 1985) (hitting a 14-year-old three or four times with a metal spatula used to scrape ice off the window, backhanding the teenager in the mouth, hitting the child on bare buttocks and thighs with a leather belt 14 to 15 times as hard as possible and four to five times on the face is child abuse and not protected parental discipline). As the descriptions of the cases indicate, the physical impact of the discipline on the child—any injury, lasting marks, and enduring pain—are highly relevant to the determination of the reasonableness of the amount of force. The discussion of this factor is in Comment *j*.

Illustration 10 is based on State v. Kimberly B., 699 N.W.2d 641 (Wis. Ct. App. 2005) (using physical force might have been reasonable where a nine-year-old child hit another child and pulled merchandise from the shelves of a store, but the amount of force used by the mother was not reasonable: mother punched child with a closed fist in the face and body six to nine times, causing bruises, swollen eye, and marks on arm; mother also hit child's arm with an umbrella causing skin to peel).

On location of any injury, at least one court has stated that reasonable corporal punishment is not limited to hitting the buttocks. See State v. Hart, 673 N.E.2d 992 (Ohio Ct. App. 1996) (stating that permissible corporal punishment is not limited to hitting the buttocks and can occur

to other parts of the body). When a parent hits another part of the body, the court will consider that fact in conjunction with the other factors.

On age, size, and physical and mental condition of the child, see ARK. CODE ANN. § 9-27-303(3)(C)(iv) (2014) ("The age, size, and condition of the child and the location of the injury and the frequency or recurrence of injuries shall be considered when determining whether the physical discipline is reasonable or moderate"); WASH. REV. CODE § 9A.16.100 (2015) ("The age, size, and condition of the child and the location of the injury shall be considered when determining whether the bodily harm is reasonable or moderate.").

Typically, there are no bright-line rules for the age of a child, but there are exceptions. See, e.g., WASH. REV. CODE § 9A.16.100 (2015) ("The following actions are presumed unreasonable when used to correct or restrain a child . . . (3) shaking a child under age three"). The age inquiry often focuses on a child's ability to understand the reason for the punishment. See, e.g., Commonwealth v. Dorvil, 32 N.E.3d 861 (Mass. 2015) (noting that a nearly three-year-old child was highly verbal and there was sufficient evidence that the child understood the reason for the corporal punishment and thus the parent's conduct was reasonable).

Size is relevant because it puts the corporal punishment in context. In one case, the court upheld a trial court ruling permitting the jury to see a photograph of a 21-month-old child's body. The picture allowed the jury to assess the relation of the wooden spoon used to discipline the child to the child's size and thus determine whether the discipline was reasonable. See State v. Allen, 892 A.2d 456 (Me. 2006).

Illustration 11 is based on People v. Sherman-Huffman, 642 N.W.2d 339 (Mich. 2002) (mother spanked school-age daughter and pushed her in the face, causing a nosebleed and bruises on face and body, pain still felt the next day such that child needed an ice pack at school; fact that child was taking asthma medication that made her bruise more easily was not exculpatory because mother knew of this and should have acted accordingly).

For cases explaining why the parent's emotional state is not relevant, see Commonwealth v. Dorvil, 32 N.E.3d 861 (Mass. 2015) (explaining that inquiry is about objective reasonableness and also noting that unreasonable discipline can be administered calmly and reasonable discipline administered in anger, thus concluding that the parent's mental state does not advance the reasonableness inquiry); State v. Lefevre, 117 P.3d 980, 984-985 (N.M. Ct. App. 2005) ("This protection for parents should exist even if the parent acts out of frustration or short temper. Parents do not always act with calmness of mind or considered judgment when upset with, or concerned about, their children's behavior. Nor do parents always act pursuant to a clearly defined circumstance of discipline or control. A reaction often occurs from behavior a parent deems inappropriate that irritates or angers the parent, causing a reactive, demonstrative act. Heat of the moment must not result in immoderate physical force and must be managed however, an angry moment driving moderate or reasonable discipline is often part and parcel of the real world of parenting with which prosecutors and courts should not interfere.").

For cases explaining that there is no need to prove an absence of malice because this is an objective inquiry about the reasonableness of the action, not a subjective inquiry into the parent's

state of mind, see People v. Alderete, 347 N.W.2d 229 (Mich. Ct. App. 1984); State v. Thrope, 429 A.2d 785 (R.I. 1981).

g. Parental privilege in a civil child-protection proceeding—a consideration of the harm. The harm standard adopted in this Section is consistent with statutes and the case law in most states, which demonstrates only a moderate tolerance for physical injury. For statutes, see ARK. CODE ANN. § 9-27-303(3)(C)(iii) (extending the parental discipline privilege in the civil context only if the physical force is "[r]easonable and moderate" and does "not include any act that is likely to cause and that does cause injury more serious than transient pain or minor temporary marks"). Many states simply state that the physical force has to be reasonable or not excessive. See, e.g., MD. CODE ANN., FAM. LAW § 4-501(b)(2) (LexisNexis 2015) ("Nothing in this subtitle shall be construed to prohibit reasonable punishment, including reasonable corporal punishment, in light of the age and condition of the child, from being performed by a parent or stepparent of the child."); NEV. REV. STAT. § 432B.150 (2015) ("Excessive corporal punishment may result in physical or mental injury constituting abuse or neglect of a child under the provisions of this chapter.").

For cases applying the standard, see N.J. Div. of Youth & Family Servs. v. P.W.R., 11 A.3d 844, 855 (N.J. 2011) (slapping a 16-year-old on the face a few times was not excessive corporal punishment where the slaps left no marks; use of "excessive" in the statute "plainly recognizes the need for some parental autonomy in the child-rearing dynamic"); In re Marianna F.-M., 32 N.E.3d 171, 174 (Ill. App. Ct. 2015) (spanking child "hard, all over her body" and squeezing arms and shoulders hard enough to produce bruises was excessive corporal punishment and thus constituted child abuse; no evidence that the bruises were accidental); G.A.C. v. State ex rel. Juvenile Dep't of Polk Cnty., 182 P.3d 223 (Or. Ct. App. 2008) (bruising and red welts still visible an unspecified period later was not reasonable).

There are a few states that restrict parental discipline even more than the standard adopted in this Section. These states have civil statutes that protect parental discipline only if it results in no injury. See GA. CODE ANN. § 19-15-1(3)(A) (2015) ("[P]hysical forms of discipline may be used as long as there is no physical injury to the child"); MINN. STAT. § 626.556(k) (2015) ("Abuse does not include reasonable and moderate physical discipline of a child administered by a parent or legal guardian which does not result in an injury."). It is noteworthy that these are civil statutes and that in both Georgia and Minnesota, the justification defense in criminal law does not contain this low threshold and instead is silent as to the amount of injury a parent can inflict without legal liability. See GA. CODE ANN. § 16-3-20 (2015) ("The defense of justification can be claimed . . . (3) When the person's conduct is the reasonable discipline of a minor by his parent"); MINN. STAT. § 609.379(1) (2015) ("Reasonable force may be used upon or toward the person of a child without the child's consent . . . (a) when used by a parent . . . to restrain or correct the child"). Florida also appears to fall in this category. See FLA. STAT. § 39.01(2) (2015) ("Corporal discipline of a child by a parent or legal custodian for disciplinary purposes does not in itself constitute abuse when it does not result in harm to the child."); id. § 39.01(30)(a)(4) (defining harm as "inappropriate or

excessively harsh disciplinary action that is likely to result in physical injury"). Case law in Florida indicates that where there is no injury, the privilege protects parents. See, e.g., G.C. v. R.S., 71 So. 3d 164 (Fla. Dist. Ct. App. 2011) (finding reasonable parental discipline where the father spanked his 14-year-old daughter once on the buttocks for disrespectful and defiant behavior and the spanking left no marks); J.C. v. Dep't of Children & Families, 773 So. 2d 1220 (Fla. Dist. Ct. App. 2000) (finding reasonable discipline where stepfather spanked 11-year-old with a belt for misbehaving in school but did not leave any bruises).

At the other end of the spectrum, South Carolina protects parental discipline in a civil child-protection proceeding if it "is reasonable in manner and moderate in degree" and "has not brought about permanent or lasting damage to the child." S.C. CODE ANN. § 63-7-20(4)(a)(iii), (iv) (2014).

A higher standard of harm would likely make a difference in marginal cases. See, e.g., In re J.L., 891 N.E.2d 778 (Ohio Ct. App. 2008) (applying Ohio's standard that parents cannot use "excessive" corporal punishment that "creates a substantial risk of serious physical harm" to find that where a child approximately 34 months old was hit with a belt on the buttocks and legs, causing bruising as well as red marks that were still visible three to four days later but did not require medical attention, this corporal punishment did not amount to serious physical harm; court relied in part on the parent's infrequent use of corporal punishment).

The lower harm standard is not intended to minimize the consequences to the family in the civil context. A finding of unreasonable corporal punishment could lead, for example, to the court exercising jurisdiction over the child and potentially removing the child from the parent's custody. A higher standard, similar to that used in the criminal context, would provide greater protection against this state intrusion. But the courts generally do not permit as much harm in the civil context as they do in the criminal context, absent other factors, and thus this Section adopts a lower standard in the civil context.

When courts have found physical force that results in more than minor pain and transient marks to be reasonable, it is generally because of the other factors. See, e.g., Gonzalez v. Santa Clara Cnty. Dep't of Soc. Servs., 167 Cal. Rptr. 3d 148 (Ct. App. 2014) (presence of bruising not per se unreasonable and does not compel finding of unreasonableness where teenager is doing poorly in school, expressing an interest in gangs, and repeatedly lying to her parents; parents tried to change her behavior through the use of noncorporal punishment; parents warned they would use corporal punishment; mother could not use her hand because of a previous injury, so used a wooden spoon); Dep't of Children & Families, Div. of Youth & Family Servs. v. K.A., 996 A.2d 1040 (N.J. Super. Ct. App. Div. 2010) (eight-year-old hit five times in the shoulder by mother with a closed fist, leaving visible bruises; child had underlying psychological issues; mother tried time-out first; child defied her; mother had no social support in caring for child, from father or other relatives; incident was isolated; there was no pattern of abuse; mother was contrite; blows were clearly painful but, in light of other circumstances, not child abuse); In re Alexander J.S., 899 N.Y.S.2d 281, 282 (App. Div. 2010) ("[F]ather pulled on his daughter's shirt when his daughter failed to follow his instructions, causing her to fall down onto the floor. The evidence also established that he then spanked her on the buttocks and hit her on her arm with an open hand.

Although the evidence established that her wrist was injured as a result of the fall, there was no evidence that he intended to injure her, or engaged in a pattern of using excessive force to discipline her.").

For definitions of "substantial risk," see OHIO REV. CODE ANN. § 2901.01(8) (West 2017) ("Substantial risk' means a strong possibility, as contrasted with a remote or significant possibility, that a certain result may occur or that certain circumstances may exist."); WYO. STAT. ANN. § 14-3-202(a)(ii)(C) (West) ("'Substantial risk' means a strong possibility as contrasted with a remote or insignificant possibility"); Lybarger v. People, 807 P.2d 570, 578 (Colo. 1991) ("By a substantial risk of serious bodily harm we mean those conditions which if medically untreated may result in a significant impairment of vital physical or mental functions, protracted disability, permanent disfigurement, or similar defects or infirmities.").

Illustration 14 is based on Charles Cnty. Dep't of Soc. Servs. v. Vann, 855 A.2d 313, 320 (Md. 2004) (swinging a belt with the buckle exposed at a six-year-old child who was flailing and trying to get away was not reasonable because it created a substantial risk of harm to the child).

The standard is focused solely on physical harm and does not inquire into any potential psychological harm stemming from the use of physical force. Psychological abuse of a child is addressed in § 3.23.

h. Parental privilege in a civil child-protection proceeding—other reasonableness factors. For cases discussing the fact-specific nature of the inquiry, see N.J. Div. of Youth & Family Servs. v. P.W.R., 11 A.3d 844, 853 (N.J. 2011) ("Abuse and neglect cases are generally fact sensitive. Each case requires careful, individual scrutiny."); Cobble v. Comm'r of Dep't of Soc. Servs., 719 N.E.2d 500 (Mass. 1999) (weighing multiple factors to find that the conduct of a father did not fall within definition of abuse when the father spanked his nine-year-old son with a belt for misbehaving in school; court considered factors including the mild to moderate force used; lack of evidence of physical harm to the child; lack of clear evidence that the corporal punishment aggravated an underlying medical condition; father's dedication to the child and particularly to the child's medical care for the underlying medical condition).

Some states list the specific factors in a statute, but most states have developed these factors through judicial interpretations of broadly worded statutes. For statutory provisions listing the relevant factors, see, for example, ARK. CODE ANN. § 9-27-303(3)(C)(iv) (2014) ("The age, size, and condition of the child and the location of the injury and the frequency or recurrence of injuries shall be considered when determining whether the physical discipline is reasonable or moderate"). For a court decision listing the relevant factors under a broadly worded statute, see, for example, Charles Cnty. Dep't of Soc. Servs. v. Vann, 855 A.2d 313, 320 (Md. 2004) (interpreting Maryland's statute governing civil child abuse, which carves out "reasonable corporal punishment, in light of the age and condition of the child," to mean that the child protection agency "assesses the reasonableness of the punishment not only in light of the child's misbehavior and whether it warranted physical punishment, but also in view of the surrounding circumstances in which the punishment took place, including the child's age, size, ability to understand the punishment, as

well as, in the instant case, the minor's capacity to obey his parent's order to stand still while being struck by the belt").

On the type of corporal punishment, the privilege clearly protects a parent who chooses to discipline a child by hitting the child's buttocks with an open hand and using mild force, as shown in Illustration 16. See In re Alexander J.S., 899 N.Y.S.2d 281 (App. Div. 2010) (using an open hand on the buttocks falls within the privilege). Three states have adopted statutory definitions of child abuse that explicitly protect spanking. See CAL. WELF. & INST. CODE § 300 (West 2015) (defining child abuse to exclude "reasonable and age-appropriate spanking to the buttocks where there is no evidence of serious physical injury"); MISS. CODE ANN. § 43-21-105(m) (2015) (defining abuse but noting "physical discipline, including spanking, performed on a child by a parent, guardian or custodian in a reasonable manner shall not be deemed abuse under this section"); MO. REV. STAT. § 210.110(1) (2015) ("[D]iscipline including spanking, administered in a reasonable manner, shall not be construed to be abuse.").

Conversely, behavior that is undisputedly abusive and poses a serious risk to the child does not fall within the privilege. Some states categorically exclude specified actions. See ARK. CODE ANN. § 9-27-303(3)(A)(vi) (2014) (defining abuse to include "[a]ny of the following intentional or knowing acts, with physical injury and without justifiable cause: (a) Throwing, kicking, burning, biting, or cutting a child; (b) Striking a child with a closed fist; (c) Shaking a child; or (d) Striking a child on the face"); D.C. CODE § 16-2301(23)(B)(i) (2014) (defining abuse and carving out "discipline [that] is reasonable in manner and moderate in degree," but adding that "[f]or the purposes of this paragraph, the term 'discipline' does not include: (I) burning, biting, or cutting a child; (II) striking a child with a closed fist; (III) inflicting injury to a child by shaking, kicking, or throwing the child; (IV) nonaccidental injury to a child under the age of 18 months; (V) interfering with a child's breathing; and (VI) threatening a child with a dangerous weapon or using such a weapon on a child").

For an example of a court finding specified actions unreasonable, see, e.g., In re CS, 143 P.3d 918 (Wyo. 2006) (finding that, as a matter of law, it is unreasonable corporal punishment for a parent to place an eight-month-old baby in a fleece sleep sack and tie the opening with a handkerchief for extended periods of time and also to pinch a three-year-old child's fingers until the child screamed in pain).

Illustration 18 is based on People ex rel. D.A.J., 757 N.W.2d 70, 75 (S.D. 2008) (distinguishing "a quick swat on a bare behind" from the conduct at issue: hitting a nine-year-old with a switch multiple times on the arms, back, and legs, and producing bruising and welts), although one key fact has been changed to simplify the fact pattern. In the actual case, the child had visited his mother, whose parental rights had been terminated. This makes the father's reaction somewhat more understandable, but the court still found the use of force unreasonable, largely because of the amount of force and the extent of the injuries.

For cases addressing the use of a belt, see Cobble v. Comm'r of Dep't of Soc. Servs., 719 N.E.2d 500 (Mass. 1999) (finding that the conduct of a father did not fall within the civil definition of abuse when the father spanked his nine-year-old son with a belt for misbehaving in school; the

father delivered one or two, and no more than five, blows to the son's fully clothed buttocks in a nonviolent and controlled manner and did not act in anger; the blows inflicted only transient pain and caused, at most, slightly pink marks and no bruising; father explained the reason for the punishment and displayed a clear commitment to the child's well-being; the court acknowledged that inquiries are very fact-specific and similar use of corporal punishment in different circumstances could be abuse); In re Anastasia L.D., 978 N.Y.S.2d 347 (App. Div. 2014) (finding a father's conduct was not excessive corporal punishment when the father hit his 14-year-old daughter several times with a belt causing bruises; the relevant factors were the child's age, the reason for the punishment—child's truancy—and the father's attempt to use noncorporal punishment first); In re Nurridin B., 982 N.Y.S.2d 910 (App. Div. 2014) (use of a belt, even with only one blow, on a child's arms and legs, leaving red marks, was abuse and not privileged parental discipline); In re H.H., 767 S.E.2d 347 (N.C. Ct. App. 2014) (striking 10-year-old child five times with belt, leaving multiple bruises still visible the next day, which was described by the parent as "a beating," satisfies the statutory definition of abuse—"cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior"); In re J.L., 891 N.E.2d 778 (Ohio Ct. App. 2008) (finding that hitting a child approximately 34 months old with a belt on the buttocks and legs, causing bruising as well as red marks that were still visible three to four days later but did not require medical attention, did not amount to serious physical harm and therefore fell within the parental privilege; other relevant factors included parent's disciplinary intent, lack of parental anger, and infrequent use of corporal punishment); J.C. v. Dep't of Children & Families, 773 So. 2d 1220 (Fla. Dist. Ct. App. 2000) (finding that an 11-year-old child was not abused when the stepfather, acting *in loco parentis*, used a belt to spank the child on the buttocks, which produced a bruise; spanking was because the child misbehaved in school and violated an agreed-upon set of behavior rules; the child knew spanking was the consequence; a list of behavior rules had been developed with a therapist and the family had been in therapy); In re Anthony C., 607 N.Y.S.2d 324, 325 (App. Div. 1994) (finding that scarring on the back of a seven-year-old, showing repeated use of a belt, was evidence of excessive corporal punishment and indicated a "pattern of corporal punishment that exceeds the threshold of reasonableness").

For an outlier case—largely due to the application of a higher statutory threshold for harm—finding the use of a belt reasonable despite bruising, see In re J.L., 891 N.E.2d 778 (Ohio Ct. App. 2008) (applying Ohio's standard that parents cannot use "excessive" corporal punishment that "creates a substantial risk of serious physical harm" to find that where a child approximately 34 months old was hit with a belt on the buttocks and legs, causing bruising as well as red marks that were still visible three to four days later but did not require medical attention, this corporal punishment did not amount to serious physical harm; court relied in part on the parent's infrequent use of corporal punishment).

For cases addressing the use of other objects, see In re Welfare of Children of N.F., 749 N.W.2d 802 (Minn. 2008) (parent's use of a paddle 36 times to hit a 12-year-old child who was 5'2" and weighed 195 pounds was not unreasonable, in part because there was no evidence of injury, the child had repeatedly run away from home, and the parent had warned the child that the

next infraction would result in corporal punishment); Simons v. Dep't of Human Servs., 803 N.W.2d 587 (N.D. 2011) (a two-hour cycle of three swats with a backscratcher followed by 15 minutes of consoling a two-year-old child, resulting in 24 swats leaving two bruises the size of 50-cent pieces, is not reasonable under the circumstances because the child was too young and the infraction—not saying "yes, sir"—was too minor, combined with the length of time, the number of swats and the injury); In re Padmine M., 922 N.Y.S.2d 527 (App. Div. 2011) (hitting a 15-year-old daughter with a pole, causing bruises to arm and back, is excessive corporal punishment).

For a case addressing the use of a closed fist, see Dep't of Children & Families, Div. of Youth & Family Servs. v. K.A., 996 A.2d 1040 (N.J. Super. Ct. App. Div. 2010) (punching an eight-year-old five times in shoulder with a closed fist, leaving visible bruises, was privileged conduct but largely because of the circumstances: the child had an underlying psychological disorder; the mother tried a time-out first; the child defied her; the mother had no social support in caring for child, from father or other relatives; the incident was isolated with no pattern of abuse; and the mother was contrite and willing to take parenting classes).

There are multiple forms of corporal punishment that do not involve hitting, such as requiring a child to hold an uncomfortable position for an extended period of time or requiring a child to kneel on uncooked rice, a "disciplinary practice . . . common in many Latin American countries." LISA A. FONTES & MARGARITA R. O'NEILL-ARANA, ASSESSING FOR CHILD MALTREATMENT IN CULTURALLY DIVERSE FAMILIES, IN HANDBOOK OF MULTICULTURAL ASSESSMENT: CLINICAL, PSYCHOLOGICAL, AND EDUCATIONAL APPLICATIONS 637 (Lisa A. Suzuki, Joseph G. Ponterotto & Paul J. Meller eds., 3d ed. 2008). Depending on the circumstances, courts have found such forms of corporal punishment to be unreasonable. See In re Joseph C., 931 N.Y.S.2d 44, 46 (N.Y. App. Div. 2011) (upholding the trial court's determination that "requiring [an eleven-year-old] to hold himself in a 'push-up' position and kneel on uncooked grains of rice for extended periods of time" constituted excessive corporal punishment and were not "appropriate forms of discipline" and thus constituted child neglect).

For cases addressing the amount of force, see N.J. Div. of Youth & Family Servs. v. P.W.R., 11 A.3d 844, 855 (N.J. 2011) (slapping a 16-year-old on the face a few times was not excessive corporal punishment where the slaps left no marks; use of "excessive" in the statute "plainly recognizes the need for some parental autonomy in the child-rearing dynamic"); In re Alexander J.S., 899 N.Y.S.2d 281, 282 (App. Div. 2010) ("[F]ather pulled on his daughter's shirt when his daughter failed to follow his instructions, causing her to fall down onto the floor. The evidence also established that he then spanked her on the buttocks and hit her on her arm with an open hand. Although the evidence established that her wrist was injured as a result of the fall, there was no evidence that he intended to injure her, or engaged in a pattern of using excessive force to discipline her.").

For cases addressing the location of the injury, see People ex rel. D.A.J., 757 N.W.2d 70, 75 (S.D. 2008) (distinguishing the conduct at issue from "a quick swat on a bare behind"); N.J. Div. of Youth & Family Servs. v. P.W.R., 11 A.3d 844, 855 (N.J. 2011) (slapping a 16-year-old on the face a few times was not excessive corporal punishment where the slaps left no marks; use

of "excessive" in the statute "plainly recognizes the need for some parental autonomy in the child-rearing dynamic"); Dep't of Children & Families, Div. of Youth & Family Servs. v. K.A., 996 A.2d 1040 (N.J. Super. Ct. App. Div. 2010) (punching an eight-year-old five times in shoulder with a closed fist, leaving visible bruises, was privileged conduct but largely because of the circumstances: the child had an underlying psychological disorder; the mother tried a time-out first; the child defied her; the mother had no social support in caring for child, from father or other relatives; the incident was isolated with no pattern of abuse; and the mother was contrite and willing to take parenting classes); In re A.F., 172 P.3d 66 (Kan. App. 2007) (hitting on ear with a one-inch wooden spoon not privileged). California explicitly exempts spanking on the buttocks from its definition of civil child abuse. See CAL. WELF. & INST. CODE § 300(a) (West 2015) ("For purposes of this subdivision, 'serious physical harm' does not include reasonable and age-appropriate spanking to the buttocks where there is no evidence of serious physical injury.").

On the relevance of age, most states do not specify ages. Instead, courts consider age as a relevant factor to be weighed in the inquiry. See N.J. Div. of Youth & Family Servs. v. P.W.R., 11 A.3d 844, 853 (N.J. 2011) (citation omitted) ("[O]ne ought not assume that what may be 'excessive' corporal punishment for a younger child must also constitute . . . excessive corporal punishment in another setting involving an older child."); see also HAW. REV. STAT. § 703-309(1)(a) (2015) ("The force is employed with due regard for the age and size of the minor").

The age inquiry often focuses on a child's ability to understand the reason for the punishment. For a toddler, corporal punishment may be reasonable, but other factors will also be relevant. See Simons v. Dep't of Human Servs., 803 N.W.2d 587 (N.D. 2011) (a two-hour cycle of three swats with a backscratcher followed by 15 minutes of consoling a two-year-old child, resulting in 24 swats leaving two bruises the size of 50-cent pieces, is not reasonable under the circumstances because the child was too young and the infraction—not saying "yes, sir"—was too minor, combined with the length of time, the number of swats and the injury).

Despite the focus on a child's ability to comprehend the reason for the corporal punishment, there is evidence that a substantial percentage of parents use corporal punishment on children under age one, at least according to the 1995 Gallup poll. See Murray A. Straus & Julie H. Stewart, *Corporal Punishment by American Parents: National Data on Prevalence, Chronicity, Severity, and Duration, in Relation to Child and Family Characteristics*, 2 CLINICAL CHILD & FAM. PSYCHOL. REV. 55, 61 tbl. 3 (1999) (stating that 31.8 percent of parents reported they had spanked (defined as hitting the child with an open hand on the buttocks) a child under the age of one, and 36.4 percent reporting they had slapped a child under the age of one on the hand, arm, or leg). The same source discusses the use of corporal punishment for children of other ages. See id. (72 percent of parents reported spanking a child aged two to four, and 14 percent of parents reported spanking a child aged 13 to17). According to the 1995 poll, the kind of corporal punishment also varied by age of the child: parents were far more likely to use a hard object to hit a child's buttocks if the child was aged five to 12 (approximately 28 percent of parents reported doing so) as compared with only 3 percent of parents with a child younger than one and 16 percent of parents with a child aged 13 to17). See id.

Courts typically consider size as it relates to a child's ability to withstand physical force. One court noted that a 12-year-old child was 5'2" and weighed 195 pounds, and therefore it was not unreasonable for the parent to use a paddle with moderate force to discipline the child, at least where there was no evidence of physical injury, even though the child was paddled 36 times. See In re Welfare of Children of N.F., 749 N.W.2d 802 (Minn. 2008).

For cases discussing the relevance of the mental condition of the child, see N.J. Div. of Youth & Family Servs. v. S.H., 106 A.3d 1256 (N.J. Super. Ct. App. Div. 2015) (finding that the same standard applies to children with disabilities, but the disability is relevant to assess reasonableness; applying this to find that hitting a 15-year-old with ADHD with a golf club on the legs and then biting him was not reasonable force and was not reasonable use of corporal punishment because it was disproportionate to the offense of swearing at the mother); Dep't of Children & Families, Div. of Youth & Family Servs. v. K.A., 996 A.2d 1040 (N.J. Super. Ct. App. Div. 2010) (finding that the child's underlying psychological disorder made parenting difficult and other means of discipline ineffective and thus hitting an eight-year-old five times with a closed fist, leaving visible bruises, after first trying a time-out was reasonable, partly because the mother had no social support in caring for child, the incident was isolated, there was no pattern of abuse, and the mother was contrite).

An emphasis on the frequency of corporal punishment is in some tension with the principle that parents have considerable latitude in raising a child. In cases that emphasize frequency, the courts appear to be assessing whether the parent overly relies on corporal punishment such that the parent's behavior is closer to child abuse than reasonable discipline. Compare In re Anastasia L.D., 978 N.Y.S.2d 347 (App. Div. 2014) (emphasizing the absence of a pattern of corporal punishment as one reason why a father's use of a belt on a 14-year-old girl was reasonable), with In re Anthony C., 607 N.Y.S.2d 324, 325 (App. Div. 1994) (finding that scarring on the back of a seven-year-old, showing repeated use of a belt, was evidence of excessive corporal punishment and indicated a "pattern of corporal punishment that exceeds the threshold of reasonableness"). A single instance of using physical force may be unreasonable. See In re Nurridin B., 982 N.Y.S.2d 910 (App. Div. 2014) (use of a belt, even with only one blow, on a child's arms and legs, leaving red marks, was abuse and not privileged parental discipline).

For a case relying, in part, on proportionality, see N.J. Div. of Youth & Family Servs. v. S.H., 106 A.3d 1256 (N.J. Super. Ct. App. Div. 2015) (finding that hitting a 15-year-old with ADHD with a golf club on the legs and then biting him was not reasonable force and was not reasonable use of corporal punishment because it was disproportionate to the offense of swearing at the mother).

For a case weighing the relevance of a parent's attempt to use noncorporal punishment first, see Willis v. State, 888 N.E.2d 177 (Ind. 2008) (finding no criminal liability for a single mother with an 11-year-old child with history of lying and stealing where the mother struck the child five to seven times with a belt or an extension cord, resulting in bruises, but the pain subsided by the next day; the blows were aimed at the buttocks but some hit the child's arm and leg; the mother had spent two days considering disciplinary options and had used noncorporal methods

before but without success). In that case, the court was sympathetic to the mother's quandary about how to discipline a child who persists in his disobedience and who is not responding to noncorporal punishment. For another case, see Dep't of Children & Families, Div. of Youth & Family Servs. v. K.A., 996 A.2d 1040 (N.J. Super. Ct. App. Div. 2010) (finding that the child's underlying psychological disorder made parenting difficult and other means of discipline ineffective and thus hitting an eight-year-old five times with a closed fist, leaving visible bruises, after first trying a time-out was reasonable, partly because the mother had no social support in caring for child, the incident was isolated, there was no pattern of abuse, and the mother was contrite).

Trying noncorporal punishment first does not insulate a parent from liability. For example, in People ex rel. C.F., the mother hit her clothed 10-year-old daughter with a belt six times on the buttocks for the daughter's repeated misconduct, stealing food, lying about it, and not cleaning up her walls after she drew on them with markers. See 708 N.W.2d 313 (S.D. 2005). The court noted that although the mother had been using progressive, noncorporal forms of discipline for several weeks, on the day of the incident she did not try these forms first. This factor combined with the extent of force placed the use of corporal punishment outside the scope of the privilege.

i. Actor. States have adopted different rules about who may exercise the privilege. In a criminal proceeding, a few states extend the privilege only to parents. See LA. STAT. ANN. § 14:18 (2015) ("This defense of justification can be claimed . . . (4) When the offender's conduct is reasonable discipline of minors by their parents"), or parents and guardians, see WASH. REV. CODE § 9A.16.100 (2015) ("[T]he physical discipline of a child is not unlawful when it is reasonable and moderate and is inflicted by a parent, teacher, or guardian for purposes of restraining or correcting the child."); WIS. STAT. § 939.45(5)(a)(3), (5)(b) (2014) (stating the defense of privilege can be claimed "[w]hen the actor's conduct is reasonable discipline of a child by a person responsible for the child's welfare" and explaining "'[p]erson responsible for the child's welfare' includes the child's parent, stepparent, or guardian").

Other states extend the privilege to parents, guardians, and adults acting as parents. See GA. CODE ANN. § 16-3-20 (2015) ("The defense of justification can be claimed . . . (3) When the person's conduct is the reasonable discipline of a minor by his parent or a person in loco parentis"); MISS. CODE ANN. § 97-5-39(2)(g) (2015) ("Nothing . . . shall preclude a parent or guardian from disciplining a child of that parent or guardian, or shall preclude a person in loco parentis to a child from disciplining that child, if done in a reasonable manner"); S.C. CODE ANN. § 16-3-95(D) (2014) ("This section may not be construed to prohibit corporal punishment or physical discipline which is administered by a parent or person in *loco parentis* in a manner which does not cause great bodily injury upon a child."); UTAH CODE ANN. § 76-2-401(1) (LexisNexis 2015) ("The defense of justification may be claimed: (c) when the actor's conduct is reasonable discipline of minors by parents, guardians, teachers, or other persons in loco parentis").

A final group of states extends the privilege more broadly to include adults responsible for the child, including a babysitter, for example. See ALA. CODE § 13A-3-24(1) (2014) ("A parent, guardian or other person responsible for the care and supervision of a minor or an incompetent person . . . may use reasonable and appropriate physical force upon the minor or incompetent

person when and to the extent that he reasonably believes it necessary and appropriate to maintain discipline or to promote the welfare of the minor or incompetent person."); ALASKA STAT. § 11.81.430(a)(1) (2014) ("When and to the extent reasonably necessary and appropriate to promote the welfare of the child or incompetent person, a parent, guardian, or other person entrusted with the care and supervision of a child under 18 years of age . . . may use reasonable and appropriate nondeadly force upon that child or incompetent person."); COLO. REV. STAT. § 18-1-703(1)(a) (2015) ("A parent, guardian, or other person entrusted with the care and supervision of a minor or an incompetent person . . . may use reasonable and appropriate physical force upon the minor or incompetent person when and to the extent it is reasonably necessary and appropriate to maintain discipline or promote the welfare of the minor or incompetent person."); CONN. GEN. STAT. § 53a-18(1) (2015) ("A parent, guardian or other person entrusted with the care and supervision of a minor or an incompetent person, except a person entrusted with the care and supervision of a minor for school purposes . . . may use reasonable physical force upon such minor . . . when and to the extent that he reasonably believes such to be necessary to maintain discipline or to promote the welfare of such minor or incompetent person."); DEL. CODE ANN. tit. 11, § 468 (2015) ("The use of force upon or toward the person of another is justifiable if it is reasonable and moderate and: (1) The defendant is the parent, guardian, foster parent, legal custodian or other person similarly responsible for the general care and supervision of a child, or a person acting at the request of a parent, guardian, foster parent, legal custodian or other reasonable person"); KY. REV. STAT. ANN. § 503.110(1) (West 2015) ("The use of physical force by a defendant upon another person is justifiable when the defendant is a parent, guardian, or other person entrusted with the care and supervision of a minor or an incompetent person"); ME. STAT. tit. 17-A, § 106(1) (2015) ("A person to whom such parent, foster parent, guardian or other responsible person has expressly delegated permission to so prevent or punish misconduct is similarly justified in using a reasonable degree of force."); MINN. STAT. § 609.379(1) (2015) ("Reasonable force may be used upon or toward the person of a child without the child's consent . . . (a) when used by a parent, legal guardian, teacher, or other caretaker of a child or pupil, in the exercise of lawful authority, to restrain or correct the child or pupil"); MO. REV. STAT. § 563.061(1) (2015) ("The use of physical force by an actor upon another person is justifiable when the actor is a parent, guardian or other person entrusted with the care and supervision of a minor or an incompetent person"); NEB. REV. STAT. § 28-1413 (2014) ("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) Such force is used for the purpose of safeguarding or promoting the welfare of the minor"); N.H. REV. STAT. ANN. § 627:6(I) (2015) ("A parent, guardian or other person responsible for the general care and welfare of a minor is justified in using force against such minor when and to the extent that he reasonably believes it necessary to prevent or punish such minor's misconduct."); N.D. CENT. CODE § 12.1-05-05(1) (2015) ("[A] parent, guardian, or other person responsible for the care and supervision of a minor, or other person responsible for the care and supervision of a minor for a special purpose, or a person acting at the direction of any

of the foregoing persons, may use reasonable force upon the minor for the purpose of safeguarding or promoting the minor's welfare"); OR. REV. STAT. § 161.205(1)(a) (2013) ("A parent, guardian or other person entrusted with the care and supervision of a minor or an incompetent person may use reasonable physical force upon such minor or incompetent person when and to the extent the person reasonably believes it necessary to maintain discipline or to promote the welfare of the minor").

In a civil child-protection proceeding, some states extend the privilege to include adults with legal custody or control of the child. See D.C. CODE § 16-2301(23)(B)(i) (2014) ("The term 'abused', when used with reference to a child, does not include discipline administered by a parent, guardian or custodian to his or her child"); FLA. STAT. § 39.01(2) (2015) ("Corporal discipline of a child by a parent or legal custodian for disciplinary purposes does not in itself constitute abuse when it does not result in harm to the child."); IND. CODE § 31-34-1-15 (2015) ("This chapter does not . . . (1) Limit the right of a parent, guardian, or custodian of a child to use reasonable corporal punishment when disciplining the child."); NEV. REV. STAT. § 128.013(1) (2015) ("'Injury' to a child's health or welfare occurs when the parent, guardian or custodian: (a) Inflicts or allows to be inflicted upon the child, physical, mental or emotional injury, including injuries sustained as a result of excessive corporal punishment").

Other states extend the privilege to parents, guardians, and adults acting as parents. See OHIO REV. CODE ANN. § 2151.031(C) (LexisNexis 2015) ("[A] child exhibiting evidence of corporal punishment or other physical disciplinary measure by a parent, guardian, custodian, person having custody or control, or person in loco parentis of a child is not an abused child . . . if the measure is not prohibited under section 2919.22 [Endangering children]."); TEX. FAM. CODE ANN. §151.001(e) (West 2015) ("Only the following persons may use corporal punishment for the reasonable discipline of a child: (1) a parent or grandparent of the child; (2) a stepparent of the child who has the duty of control and reasonable discipline of the child; and (3) an individual who is a guardian of the child and who has the duty of control and reasonable discipline of the child.").

For the reasons stated in Comment *i*, this Section adopts the middle position, recognizing the privilege—in both criminal and civil child-protection proceedings—for guardians and those acting as parents but not recognizing the privilege for temporary caregivers, absent a delegation from the parent.

When assessing the availability of the privilege for those who might stand *in loco parentis*, courts examine the specifics of the relationship between the adult and child. See People ex rel. E.S., 49 P.3d 1221, 1223 (Colo. App. 2002) (court found stepfather who spanked child frequently during road trip, causing faded quarter-sized bruise on upper thigh from using belt buckle, had no "fundamental liberty interest in the care, custody, and management of the stepchild" because there was no substantial evidence that he "stood 'in loco parentis' to the child" after being married to mother for only six weeks, and therefore was not entitled to due-process protections against allegations of abuse).

For a case describing the doctrine of *in loco parentis*, see Marriage of Snow v. England, 862 N.E.2d 664, 666 (Ind. 2007) (citation omitted) ("The doctrine [of *in loco parentis*] 'refers to

a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption. It embodies the two ideas of assuming the parental status and discharging the parental duties.'").

Illustration 22 is loosely based on J.C. v. Department of Children and Families. See 773 So. 2d 1220 (Fla. Dist. Ct. App. 2000). To clarify the doctrine of *in loco parentis*, some facts have been altered. Illustration 23 is based on McReynolds v. State. See 901 N.E.2d 1149 (Ind. Ct. App. 2009).

The Comment notes that parents and others covered by the privilege may delegate their authority to a third party. No state has explicitly prohibited delegation, and the delegation provision is consistent with several state statutes. For examples of criminal-law statutes permitting delegation, see ME. REV. STAT. ANN. tit. 17-A, § 106 ("A person to whom [a] parent, foster parent, guardian or other responsible person has expressly delegated permission to so prevent or punish misconduct is similarly justified in using a reasonable degree of force."); MONT. CODE ANN. § 45-3-107 (2015) ("A parent or an authorized agent of a parent or a guardian . . . is justified in the use of force that is reasonable and necessary to restrain or correct the person's child"); S.D. Codified Laws § 22-18-5 (2015) ("To use or attempt to use or offer to use force upon or toward the person of another is not unlawful if committed by a parent or the authorized agent of any parent"); WASH. REV. CODE § 9A.16.100 (2015) ("Any use of force on a child by any other person is unlawful unless it is reasonable and moderate and is authorized in advance by the child's parent or guardian for purposes of restraining or correcting the child."). For an example of a civil child-protection statute permitting delegation, see MICH. COMP. LAWS ANN. § 750.136b(9) ("This section does not prohibit a parent or guardian, or other person permitted by law or authorized by the parent or guardian, from taking steps to reasonably discipline a child, including the use of reasonable force.").

j. Burden of proof. For criminal cases holding that the state has the burden of negating the defense, see State v. Nathan J., 982 A.2d 1067 (Conn. 2009); State v. Matavale, 166 P.3d 322 (Haw. 2007); Willis v. State, 888 N.E.2d 177 (Ind. 2008); State v. Lefevre, 117 P.3d 980 (N.M. Ct. App. 2005); State v. Kimberly B., 699 N.W.2d 641 (Wis. Ct. App. 2005); Anderson v. State, 330 P.3d 256 (Wyo. 2014).

For a civil case involving an allegation of child abuse, see People ex rel. C.F., 708 N.W.2d 313, 316 (2005) ("Whether a child is abused and neglected is a question of fact that the State must prove by clear and convincing evidence.").

k. Question of fact. For a case stating that the inquiry is a question of fact, see State v. Beins, 456 N.W.2d 759 (Neb. 1990). For a case holding that in extreme circumstances, when the facts clearly do not satisfy the parental discipline privilege, the court can decide the matter as a question of law, see In re CS, 143 P.3d 918 (Wyo. 2006) (placing an eight-month-old baby in a fleece sleep sack and tying the opening with a handkerchief for extended periods of time is excessive or unreasonable corporal punishment as a matter of law).

TITLE B. NEGLECT

SUBTITLE II. MEDICAL

§ 3.26. Medical Neglect

(a) In a criminal proceeding, medical neglect is the unjustifiable failure or refusal of a parent, guardian, custodian, or temporary caregiver to provide medical care necessary to prevent serious harm or a substantial risk of serious harm to the child's physical or mental health.

(1) In a criminal proceeding in which the failure or refusal to provide necessary medical care results in the death of the child, the failure or refusal to provide such care is unjustifiable if it involves a gross deviation from the standard of care that a reasonable parent would observe in the actor's situation.

(2) In all other criminal proceedings, the failure or refusal to provide necessary medical care is unjustifiable if the obligated individual purposely, knowingly, or recklessly fails or refuses to provide such care.

(b) In a civil child-protection proceeding, the failure or refusal of a parent, guardian, or custodian to provide medical care to a child is medical neglect if the parent, guardian, or custodian fails to exercise the minimum degree of care necessary to prevent serious harm or a substantial risk of serious harm to the child's physical or mental health.

Cross-References:

Chapter 2. Parental Authority and Responsibilities

Chapter 19. Medical Decisionmaking by Minors

Comment:

a. Background and guiding principles. As discussed in Chapter 2, a parent has broad authority to make medical decisions for a child. However, this authority is not absolute and the state has a duty to intervene when necessary to protect the child from serious harm stemming from parental decisionmaking. This Section addresses the bases for state intervention through a criminal action or civil child-protection proceeding when a parent or other obligated individual fails or refuses to provide a child with necessary medical care. This Section authorizes state intervention

only when a child has suffered serious harm or a substantial risk of serious harm. This high threshold balances the state's duty to protect children from harm while respecting family integrity and parental authority to make medical decisions for a child. This protection of the family from state intervention absent serious harm to the child is rooted in the Constitution and recognizes that a parent is typically in a better position than the state to make medical decisions for a child. It also recognizes that state intervention imposes significant costs on the family. A criminal action may result in the incarceration of the parent or other caretaker. A civil child-protection proceeding may result in the appointment of a guardian to make medical decisions for the child and, in some cases, the child's removal from the home. Both forms of state intervention are likely to undermine family integrity and may cause the child harm. For these same reasons, state intervention is authorized only when the parent's behavior is culpable. There is no strict liability even when the parent's actions placed the child at substantial risk of serious harm. In a criminal proceeding, the parent's or other obligated individual's failure or refusal to provide medical care must be, at minimum, reckless, except when the failure to provide care results in the death of the child. In cases in which the child dies, the parent or other obligated individual may be criminally liable for negligence if the failure to provide medical care involves a gross deviation from the standard of care that a reasonable parent would observe. In a civil child-protection proceeding, the parent, guardian, or custodian must fail to exercise the minimum degree of care that a parent would exercise to prevent serious harm to the child.

This Section's standard for state intervention respects a parent's constitutional right to raise a child in accordance with the parent's cultural and religious values. It also protects economically vulnerable families and racial, ethnic, cultural, and religious minorities against unwarranted intervention. As described in the Introductory Note to this Chapter, economically vulnerable families of color are disproportionately represented in the child welfare system. Respect for diverse views of what constitutes appropriate medical care, as well as avoiding unwarranted state intervention in vulnerable and minority families, are important goals for the legal system.

b. Criminal vs. civil child-protection proceedings—state goals. This Section recognizes two nonexclusive legal responses to medical neglect: criminal prosecution and a civil child-protection proceeding. In a criminal proceeding, the state's goals are punitive and deterrent. The state seeks to punish the obligated adult who failed to provide the child with medical care necessary to prevent serious harm or a substantial risk thereof and to deter that adult and others from similar

conduct. As a practical matter, criminal liability is generally reserved for cases in which the conduct is repugnant and the injury to the child is life-threatening or fatal.

In a civil child-protection proceeding, the state seeks to protect the health of the child by ordering the necessary medical treatment or appointing a guardian to make medical decisions for the child. The state's interest in protecting the child is also met by the potential loss of custody. A finding of medical neglect will trigger oversight by a child welfare agency and may lead to removal of the child from the parent's custody if necessary to protect the child's health. The initiation of a child-protection proceeding also serves to express condemnation of the conduct and to deter similar conduct in the future, but the state's goals are not punitive. Rather, the state's focus is on the prospective safety and health of the child and the likelihood that the parent will provide for the child's medical needs.

c. Criminal vs. civil child-protection proceedings—differences and similarities. There are several differences between a criminal proceeding and a civil child-welfare proceeding for medical neglect. First, as explained in Comments *e* and *g*, a temporary caregiver may be held criminally responsible for failure to seek necessary medical care for the child, but a civil child- protection proceeding is initiated only when a parent, guardian, or custodian fails or refuses to provide such care. Second, as explained in Comment *f*, criminal liability requires the obligated individual to act purposely, knowingly, or recklessly, except if the child dies, in which case the obligated individual may be liable for criminal negligence if the failure or refusal to provide treatment is a gross deviation from the standard of care a reasonable parent would observe. In contrast, as explained in Comment *h*, a finding of medical neglect in a civil child-protection proceeding requires proof that the parent, guardian, or custodian failed to exercise the minimum degree of care a parent would exercise to prevent serious harm to the child.

The main similarity between a criminal proceeding and a civil child-protection proceeding is the standard of harm. In both proceedings, the state must show serious harm or substantial risk of serious harm to the child's physical or mental health. See Comment *d*.

d. Standard of harm—serious harm or substantial risk of serious harm to the child's physical or mental health. The standard of harm in a criminal prosecution or civil child-protection proceeding for failure to provide medical care to a child is the same. In both types of proceedings, the state must show that the failure or refusal to provide necessary medical care resulted in serious harm or a substantial risk of serious harm to the child's physical or mental health.

The requirement of serious harm covers a wide range of injuries and conditions. In addition to fractures, second- or third-degree burns, internal injuries, and any condition that poses a substantial risk of death, serious harm also includes any injury or condition that, if not treated, may result in protracted disability, temporary or permanent disfigurement, impairment of physical or mental functions, severe developmental delay, or intellectual disability. When alleging serious mental harm to the child, the state must prove that the parent or other obligated adult failed or refused to seek treatment for a diagnosable mood or thought disorder that substantially impairs judgment, behavior, or ability to function within a normal range for the child's age, culture, and environment, or for severe anxiety, depression, withdrawal, or aggressive behavior, as testified to by a qualified health professional.

Illustrations:

1. Edward is 10 years old. He sustains minor bruises to his face when he falls down a flight of stairs. After the fall, Edward climbs back up the stairs unassisted and does not complain of any pain. Edward's parents treat his injuries with over-the-counter medication but do not seek professional medical care. A teacher notices the bruises and notifies the child-protection agency and local police. Edward's condition does not satisfy the harm standard. His parents' actions did not cause Edward serious harm or place him at substantial risk of serious harm. Minor bruises are not serious harm.

2. Petra is 11 years old. She suffers accidental burns on her face, neck, and chest. Although the wounds are clearly quite deep and require medical treatment, Petra's parents believe the wounds will heal with natural herbs and do not seek professional medical care. Petra develops an infection and requires skin grafts to prevent further infection. The failure of Petra's parents to seek medical treatment for Petra placed Petra at substantial risk of serious physical harm and thus satisfies the harm standard.

3. Jin is 12 years old. He suffers from hallucinations and has expressed suicidal inclinations. He told his art teacher that he watched a video on how to cut his wrists and drew a picture in art class of a young boy bleeding from his wrists. Jin also told his teacher that he will not be around for his 13th birthday. Jin's parents refuse to consent to any diagnostic tests or to allow him to meet with a mental-health professional. Jin attempts suicide by jumping out a window and sustains a spinal fracture. The failure of Jin's parents

to seek mental-health treatment for Jin placed Jin at substantial risk of serious harm and thus satisfies the harm standard.

Some states expressly authorize the court to exercise child-protection jurisdiction in cases in which the parent's failure to provide the child with medical care jeopardized the child's emotional health. This Section's threshold for state intervention when a parent's medical decision jeopardizes the child's mental health includes serious harm to the child's emotional health.

The harm standard adopted in this Section includes the creation of a substantial risk of serious harm to a child. It does not require that the child have suffered actual harm. A parent or other obligated adult who fails to provide necessary medical care to a child may be subject to criminal liability or civil child-protection liability if the child's health was at substantial risk of serious harm even if the child did not suffer any actual harm.

Illustration:

4. Four-month-old Victoria rolled off the couch and struck her head on the floor. Her father Lyndon picked her up immediately, saw the bump on her head, and iced it. Although Victoria's head was visibly swollen, and she cried constantly and stiffened in pain, Lyndon did not seek medical care until two days later. Victoria was diagnosed with a large skull fracture. Although skull fractures in infants pose a substantial risk of potentially life-threatening brain injuries, Victoria was fortunate and did not suffer any actual harm from the delay in medical care. Nevertheless, Lyndon's failure to obtain prompt medical attention for Victoria placed her at substantial risk of serious harm and thus satisfies the harm standard.

e. Criminal responsibility—covered adults. This Section imposes criminal liability on a parent, guardian, custodian, or temporary caregiver for failure to provide necessary medical care for a child. A temporary caregiver is a person other than a parent, guardian, or custodian who assumes responsibility for a child's care, even if only for a short period of time. A temporary caregiver will typically be criminally liable when the child's parent, guardian, or custodian either is not present, or is unable or unwilling to provide necessary medical care to the child, even though the child's parent may also be criminally liable. Imposing criminal liability on a temporary

caregiver furthers the state's interest in protecting children from harm and recognizes that an adult other than a parent, guardian, or custodian may have caregiving responsibility for a child.

Illustrations:

5. Tia is three years old. She lives with her mother but spends weekends with her father and his new wife, Adriana. Adriana is Tia's primary caretaker during these visits. She prepares Tia's meals, bathes her, and puts her to bed. During one of these weekend visits, Tia's father becomes angry with Tia because she refuses to eat. He repeatedly punches Tia, throws her into a wall, and pushes her onto the floor. Adriana witnesses these beatings and knows that Tia is severely injured but does not seek medical care for Tia. Tia dies as a result of her injuries. Adriana and Tia's father are both subject to criminal liability. Tia's father is a parent and Adriana is a temporary caregiver. Adriana assumed temporary responsibility for Tia during Tia's visits and Tia's father (the perpetrator of her injuries) was unwilling to seek medical care for Tia.

6. Kana, a 42-year-old neighbor, agrees to babysit two-year-old Ahmed overnight while his father is away on a business trip. While giving Ahmed a bath, Kana leaves Ahmed in the tub unattended and goes to the basement to grab a towel from the dryer. While Kana is gone, Ahmed turns on the hot water and suffers severe burns on his legs and groin. Kana does not seek medical care for Ahmed, and he dies from shock the following afternoon. Kana is subject to criminal liability. Kana is a temporary caregiver. She assumed temporary responsibility for Ahmed's care and Ahmed's parent was not present or able to provide medical care for Ahmed.

f. Criminal responsibility—culpability requirement. In a criminal prosecution for failure or refusal to provide necessary medical care to a child, the state must satisfy the harm standard, see Comment *d* and Reporters' Note thereto, and also prove that the parent or other obligated adult acted with the requisite culpable mental state. This Section follows the Model Penal Code's framework for criminal responsibility and requires the state to prove that the failure or refusal to provide medical care was purposeful, knowing, or reckless, except in cases in which the child dies. See Model Penal Code § 2.02(2). A parent or other obligated adult who did not, at minimum, act recklessly is not sufficiently culpable to warrant criminal liability when the harm to the child is not fatal. However, in cases in which the failure or refusal to provide medical care leads to the

child's death, negligence is sufficient to warrant criminal liability. A parent or other obligated adult may be convicted of criminally negligent homicide if the state proves that he or she should have been aware of a substantial risk of serious harm to the child and that the failure to perceive that risk was a gross deviation from the standard of care that a reasonable parent would observe in that situation. Id. § 2.02(2)(d).

Illustrations:

7. Six-year-old Tamika sustains a head injury. Afterwards, she experiences paralysis on her left side, vomiting, headaches, and seizures. Tamika's mother Susan does not seek medical care for Tamika even though she is aware of Tamika's symptoms and friends and family tell her that Tamika needs medical treatment. Tamika dies three weeks later. Susan may be criminally liable for recklessness if a jury finds that she consciously disregarded a substantial risk that the failure to seek medical care could result in serious harm or a substantial risk of serious harm to Tamika, and her disregard of that risk involves a gross deviation from the standard of conduct that a law-abiding parent would observe in that situation.

8. Same facts as Illustration 2. Petra's parents are not subject to criminal liability. Petra's parents did not seek medical treatment, because they believed the wounds would heal with herbs. Although they failed to exercise the minimum degree of care a parent would exercise to prevent serious harm to a child, which is sufficient in a civil child-protection proceeding, see Illustration 11 (below), except in cases in which the child dies, criminal liability requires, at minimum, recklessness—that the parent act with conscious disregard of a substantial risk of serious harm.

9. Harry's eight-year-old son Jonah becomes ill and his condition deteriorates rapidly. Based on some Internet research on medical websites, Harry suspects that Jonah is suffering from leukemia but does not realize that failing to treat leukemia could cause serious harm or death. Harry does not seek medical treatment for Jonah. Jonah dies a few months later. Harry is subject to liability for criminally negligent homicide. Based on the evidence, the jury could find that Harry should have been aware of a substantial risk that Jonah would suffer serious harm, and that Harry's failure to perceive that risk is a gross deviation from the standard of conduct that a reasonable parent would observe.

g. Civil child-protection proceedings—covered adults. The state may initiate a child-protection proceeding against a parent, guardian, or custodian with ongoing responsibility for the child who fails to provide medical care necessary to prevent serious harm or a substantial risk of serious harm to the child's health. Although the state may not bring a civil child-protection proceeding against a temporary caregiver who does not have ongoing legal responsibility for the child, the state may initiate a child-protection proceeding against the parent, guardian, or custodian who entrusted the child to the temporary caregiver, if a reasonable parent would not have entrusted the child to such caregiver. See Chapter 3, § 3.25, Physical Neglect.

A parent is ordinarily the child's guardian. However, another person or agency may be the guardian in cases in which the parent is deceased, the state has limited the parent's authority, or the parent has voluntarily transferred authority to another person or agency. See § 2.30, Comments *b* and *f* and the Reporters' Note thereto.

This Section adopts the statutory definition of a custodian followed in the majority of states. See § 2.30, Comment *f* and the Reporters' Note thereto. A custodian is a person other than a parent or legal guardian, including a foster parent, who stands *in loco parentis* to the child, or a person to whom a court has granted legal custody of the child. Id. A person who has actual custody of the child is a custodian even though the person does not have legal custody. Id.

h. Civil child protection-proceedings—failure to exercise minimum degree of care. In a civil child-protection proceeding, the state must satisfy the harm standard, see Comment *d*, and prove that the parent, guardian, or custodian failed to exercise the minimum degree of care necessary to prevent serious harm or a substantial risk thereof. This is not an ordinary negligence standard and does not require that the parent have exercised the standard of care of a reasonable parent under the circumstances. Rather, a "minimum degree of care" standard can be understood as equivalent to a gross-negligence standard. As courts have recognized, an ordinary-negligence standard would potentially subject many parents to unwarranted state intervention because what is reasonable under the circumstances varies depending on the parent and the parent's resources, culture, and values. An ordinary-negligence standard might also impinge on a parent's fundamental liberty interest in the care, custody, and control of the child. This Section's minimum-degree-of-care standard reduces the risk that the state will impose dominant parenting norms on low-income families and on racial, ethnic, cultural, and religious minorities. Moreover, this requirement protects the family from state intervention when the harm to the child was not caused

by any deficiency of the parent, guardian, or custodian. This standard also recognizes that, unless the parent's conduct falls below a minimum degree of care, the child is unlikely to be at risk of future harm, and state intervention to protect the child is unnecessary and thus unwarranted.

Illustrations:

10. Barrington is 10 years old. He sustains bruises to his face when he falls off the swing in the backyard. After the fall, Barrington gets back on the swing unassisted and does not complain of any pain. Barrington's mothers treat his bruises with over-the-counter medication but do not seek professional medical care. Two days later, Barrington faints for no apparent reason. One of his mothers takes him to the emergency room, and after a CT scan, Barrington is diagnosed with internal bleeding as a result of the fall. Internal bleeding may be life-threatening but, as in this case, sometimes there are no visible symptoms or discomfort. Barrington is not a neglected child. The substantial risk of harm to Barrington was not the result of the parents' failure to exercise a minimum degree of care. Although the parents did not immediately seek medical care, they did so as soon as it was apparent that the fall might have caused serious harm, and based on these facts, a parent exercising a minimum degree of care is unlikely to have sought medical treatment immediately after the fall.

11. Same facts as Illustration 2. A court may find that Petra is a neglected child. Her parents' failure to seek immediate medical treatment placed Petra at substantial risk of serious harm and fell below the minimum degree of care a parent would observe. Given the severity of the burn wounds, a parent exercising a minimum degree of care would have sought medical treatment.

i. Religious beliefs. A parent, guardian, or custodian may be subject to criminal liability and civil child-protection liability even when the failure or refusal to provide necessary medical care for the child is based on religious conscience. A parent's constitutionally protected right to free exercise of religion and to inculcate a child in the parent's religious beliefs does not include the freedom to deprive a child of medical care necessary to prevent serious harm or a substantial risk of serious harm to the child's physical or mental health. As the U.S. Supreme Court has recognized, "[t]he right to practice religion freely does not include liberty to expose the . . . child to . . . ill health or death." Prince v. Massachusetts, 321 U.S. 158, 166-167 (1944). Moreover,

while every state constitution protects the parent's religious liberty, state courts have uniformly held that a state can interfere with religiously motivated parental conduct if the state has a compelling interest. Protecting a child's health from serious harm is a compelling state interest.

Illustration:

12. Six-year-old Shamika has sickle-cell anemia. She has suffered two strokes, and there is an 80 percent chance that she will suffer another one. A stroke may cause physical disability, developmental delays, blindness, and even death. Shamika's doctors recommend periodic blood transfusions, which prevent recurrent strokes in 90 percent of sickle-cell patients. Shamika's mother is a Jehovah's Witness and refuses to consent to the transfusions based on her religious beliefs. The court will order the transfusions over the mother's religious objections or appoint a guardian to make medical decisions for Shamika.

Although a parent does not have a constitutional right to deny a child medical care necessary to prevent serious harm or a substantial risk of serious harm, even if the refusal is grounded in religious conscience, a majority of states have enacted spiritual treatment exemptions. These exemptions ordinarily appear in civil child-protection statutes and typically provide that a child who is treated solely with prayer in accordance with the beliefs and practices of a recognized religious denomination is not, *for that reason alone,* a neglected child. Many states also include spiritual treatment exemptions in their criminal statutes—most typically in their child-abuse-and-neglect, child-endangerment, and nonsupport statutes. These exemptions do not protect all parents who treat a child solely with prayer. They typically apply only to members of recognized religious denominations that provide spiritual treatment by an accredited practitioner. Except for the Church of Christ, Scientist, few denominations have accredited spiritual practitioners.

In a jurisdiction with an applicable spiritual treatment exemption in its civil child-protection statutes, a parent is not subject to liability in a child-protection proceeding *solely* because the parent treats the child with prayer alone. However, a parent may be subject to civil child-protection liability, despite the spiritual treatment exemption, if the parent's failure or refusal to provide medical treatment causes serious harm or creates a substantial risk of serious harm to the child's physical or mental health. As courts have recognized, in cases in which the child has suffered serious harm, the parent is not subject to liability because the child was treated solely with spiritual means but rather because the deprivation of medical care caused the child serious harm

or placed the child at substantial risk of serious harm. Some spiritual treatment statutes expressly state that the exemption does not apply when the child's life or health is at risk of serious harm and most expressly authorize courts to order medical treatment over a parent's religious objection when there is a substantial risk of serious harm to the child. Under this Section, there is no spiritual treatment defense to civil child-protection liability when the failure to provide medical care places the child's health at substantial risk of serious harm. In addition, under this Section, a court may order medical treatment to prevent serious harm or a substantial risk of serious harm to the child's health even if the spiritual treatment exemption does not expressly authorize intervention. This interpretation is consistent with the U.S. Supreme Court's recognition that the constitutional right to free exercise does not include the right to place the child's health or life at risk and with the state's *parens patriae* duty to protect children from harm. It also consistent with state courts' recognition that the state may restrict religiously motivated conduct when there is a compelling interest such as protecting a child from serious harm.

Illustration:

13. Twelve-year-old Camilo suffers from continual epileptic seizures and has suffered serious physical and mental impairment as a result of the seizures. His doctors prescribe anti-seizure medications. Without medication, Camilo is at substantial risk of further brain impairment and physical harm. Camilo's parents refuse the medication on religious grounds and treat him with prayer alone. The state's civil child-protection statute provides that "*no child who in good faith is under treatment solely by spiritual means shall, for that reason alone, be considered to have been neglected*." Camilo's parents are subject to civil child-welfare liability. Under the spiritual treatment exemption, a child who is treated solely by spiritual means is not, for that reason alone, neglected, but here Camilo is neglected, not because he was treated with prayer alone, but rather because the deprivation of medical care created a substantial risk of serious harm to his health.

Parents in jurisdictions with a spiritual treatment exemption in a civil child-protection statute have argued that the exemption provides a defense to criminal liability. This Section follows the majority of courts that have interpreted spiritual treatment exemptions narrowly. A spiritual treatment exemption in a civil child-protection statute does not provide a defense against criminal liability. A spiritual treatment exemption in a *criminal* statute, however, may provide an

affirmative defense to criminal liability but only against the crime that the statute specifically exempts. For example, a spiritual treatment exemption to criminal child endangerment provides a defense to criminal liability for child endangerment, but it does not provide a defense to liability for negligent homicide or reckless manslaughter if the child dies.

Illustration:

14. Seven-year-old Ronin becomes ill with flu-like symptoms and develops a stiff neck a few days later. In accordance with the tenets of her religion, Ronin's mother Li treats Ronin with prayer instead of conventional medical care. Li contacts members of her church who come to the house and pray for Ronin. Despite the spiritual treatment, Ronin dies of acute meningitis. The state's criminal nonsupport statute provides that the failure to seek necessary medical care for a child is a crime but provides a defense if the parent treats the child with prayer in accordance with the tenets and practices of a recognized church. Li is subject to criminal liability for Ronin's death. The spiritual treatment exemption in the criminal nonsupport statute provides a defense to liability for nonsupport but it does not provide a defense to liability for homicide or manslaughter.

j. Financial ability. A parent's or other obligated adult's financial inability to provide medical care for a child is a defense to liability in a criminal or civil child-protection proceeding for failure to provide necessary medical care to a child. Financial inability is not a defense when the state has offered financial assistance and the parent or other obligated adult rejected it. Except for undocumented children, low-income uninsured children are generally eligible for coverage under the Children's Health Insurance Program (CHIP) and Medicaid. Moreover, the federal Emergency Medical Treatment and Labor Act (EMTALA) prohibits hospitals from denying emergency medical care to an indigent patient based on ability to pay. Thus, financial inability is not commonly a defense in a civil child-protection proceeding or criminal prosecution for failure to provide medical treatment for a child.

REPORTERS' NOTE

Comment a. Background and guiding principles. For sources supporting the discussion in the Comment, see Part I, Introductory Note and Reporters' Note; and Chapter 3, Introductory Note, Reporters' Note. See also § 2.30, Parental Authority and Responsibility for Medical Care, Comment *a* and the Reporters' Note thereto.

Comment b. Criminal vs. civil child-protection proceedings—state goals. For civil child-protection statutes defining medical neglect, see *Statutory Note on Civil Medical Neglect Statutes*.

For criminal nonsupport statutes imposing liability for failure to provide necessary medical care to a child, see, e.g., ALA. CODE § 13A-13-4 (criminal nonsupport includes intentional failure to provide medical attention); ALASKA STAT. ANN. § 11.51.120 (West) ("A person commits the crime of criminal nonsupport if, being a person legally charged with the support of a child the person knowingly fails, without lawful excuse, to provide support for the child. . . As used in this section "support" includes necessary . . . medical attention. . ."); CAL. PENAL CODE § 270 (2016) ("If a parent of a minor child willfully omits, without lawful excuse, to furnish necessary . . . medical attendance, or other remedial care for his or her child, he or she is guilty of a misdemeanor. . ."); IDAHO CODE ANN. § 18-401 (West) (a person who "Willfully omits, without lawful excuse, to furnish necessary . . . medical attendance for his or her child . . . [s]hall be guilty of a felony. . ."); MO. ANN. STAT. § 568.040 (West) (criminal nonsupport includes failure to provide "medical and surgical attention"); OR. REV. STAT. ANN. §§ 163.505(4); 163.555 (West) (defining child support to include "necessary and proper . . . medical attention. . ." and providing that "[a] person commits the crime of criminal nonsupport if, being the parent, lawful guardian or other person lawfully charged with the support of a child . . . the person knowingly fails to provide support for such child.").

For examples of criminal neglect and child-endangerment statutes expressly imposing liability for failure or refusal to provide necessary medical care to a child, see, e.g., MINN. STAT. § 609.378(1) (2016) (imposing criminal liability on "parent, legal guardian, or caretaker who willfully deprives a child of necessary . . . health care . . . and the deprivation harms or is likely to substantially harm the child's physical, mental, or emotional health."); MISS. CODE ANN. § 97-5-39(1)(a), (d) (2016) (imposing criminal liability on "any parent, guardian, or other person who intentionally, knowingly or recklessly" deprives the child "of necessary . . . health care" and such deprivation "results in substantial harm to the child's physical, mental or emotional health. . .").

For cases imposing criminal liability even when the statute does not expressly mention medical care, see State v. Mahurin, 799 S.W.2d 840 (Mo. 1990) (interpreting criminal child-endangerment statute to encompass a duty to provide medical treatment); Woods v. State, 724 So. 2d 40, 48 (Ala. Crim. App. 1998) (defining "willful maltreatment" under the criminal child-abuse statute to include "willful denial of medical care"); State v. Smith, 935 P.2d 841, 843 (Ariz. Ct. App. 1996) (holding that the criminal child-abuse statute "imposes a legal duty" to seek medical care "on anyone assuming the care or custody of a child"); State v. Bartlett, 875 P.2d 651 (Wash. Ct. App. 1994) (interpreting statute making it a crime to recklessly withhold "any of the basic necessities of life" from a child to encompass a duty to seek medical care), aff'd, 907 P.2d 1196 (1995); Commonwealth v. Barnhart, 497 A.2d 616, 619 (Pa. Super. Ct. 1985) (interpreting statute making it a crime to endanger "the welfare of the child by violating a duty of care" to impose duty to seek medical care even though the statute "nowhere defines this duty"), cert. denied, 488 U.S. 817 (1988); State v. Dailey, 755 S.W.2d 348, 351 (Mo. Ct. App. 1988) (same); Faunteroy v. United States, 413 A.2d 1294, 1300 (D.C. App. 1980) (finding that statute criminalizing a parent's failure

to provide a child with "food, clothing, and shelter" creates a statutory duty to seek medical care even though it is "not literally expressed" in the statute).

Comment c. Criminal vs. civil child-protection proceedings—differences and similarities. For discussion of the differences in the standard of liability, see Comments *f* and *h*, and the Reporters' Note thereto. For discussion of who is subject to liability in a criminal proceeding as compared to a civil child-protection proceeding, see Comments *e* and *g*, and the Reporters' Notes thereto. For similarities in the standard of harm, see Comment *d* and the Reporters' Note thereto.

Comment d. Standard of harm—serious harm or substantial risk of serious harm to the child's physical or mental health. Many states have codified the serious-harm or substantial-risk-of-serious-harm standard or its equivalent (e.g., substantial harm) in their child welfare and criminal statutes. For child welfare statutes requiring a high threshold of harm, or risk thereof, see ALASKA STAT. ANN. § 47.10.011(4) (West 2017) (granting the court child-protection jurisdiction when "the child is in need of medical treatment to cure, alleviate, or prevent substantial physical harm or is in need of treatment for mental injury and the child's parent, guardian, or custodian has knowingly failed to provide the treatment"); ARK. CODE ANN. §§ 9-27-303(18)(A), (36)(A)(ii) (West 2017) (granting the court child-protection jurisdiction when a child "is at substantial risk of serious harm as a result of" the failure of "a parent, guardian, custodian, foster parent, or any person who is entrusted with the juvenile's care" to provide "medical treatment"); CAL. WELF. & INST. CODE ANN. § 300(b)(1) (West 2017) ("Whenever it is alleged that a child comes within the jurisdiction of the court on the basis of the parent's or guardian's willful failure to provide adequate medical treatment or specific decision to provide spiritual treatment through prayer, the court shall give deference to the parent's or guardian's medical treatment, nontreatment, or spiritual treatment through prayer alone . . . and shall not assume jurisdiction unless necessary to protect the child from suffering serious physical harm or illness."); FLA. STAT. ANN. § 39.01(42) (West 2017) ("'Medical neglect' means the failure to provide or the failure to allow needed care as recommended by a health care practitioner for a physical injury, illness, medical condition, or impairment, or the failure to seek timely and appropriate medical care for a serious health problem that a reasonable person would have recognized as requiring professional medical attention."); IND. CODE § 31-34-1-1 (2016) (authorizing a court to exercise child-protection jurisdiction where "the child's physical or mental condition is seriously impaired or seriously endangered as a result of the inability, refusal, or neglect of the child's parent, guardian, or custodian to supply the child with necessary . . . medical care. . ."); LA. CHILD. CODE ANN. ART. 603(18) (defining "neglect" as "the refusal or unreasonable failure of a parent or caretaker to supply the child with necessary . . . care, treatment, or counseling for any injury, illness, or condition of the child, as a result of which the child's physical, mental, or emotional health and safety is substantially threatened or impaired."); 22 ME. REV. STAT. ANN. § 4002(6)(B-1) (2016) ("Deprivation of necessary health care when the deprivation places the child in danger of serious harm" is evidence of "serious abuse or neglect"); N.H. REV. STAT. ANN. § 169-C:3(XIX)(b) (2016) (defining a "[n]eglected child" as a child . . . "[w]ho is without proper . . . care or control necessary for his physical, mental, or emotional health, when it is established that his health has suffered or is very likely to suffer serious

impairment"); TEX. CODE ANN. FAM. CODE § 261.001(4) (defining neglect to include "failing to seek, obtain, or follow through with medical care for a child, with the failure resulting in or presenting a substantial risk of death, disfigurement, or bodily injury or with the failure resulting in an observable and material impairment to the growth, development, or functioning of the child"); WIS. STAT. ANN. § 48.13(10), (10m) (West) (authorizing a court to exercise child-protection jurisdiction when a "parent, guardian or legal custodian neglects," refuses, or "is at substantial risk of neglecting, refusing" or is "unable for reasons other than poverty to provide necessary . . . medical or dental care . . . so as to endanger seriously the physical health of the child").

For examples of civil child-protection cases applying a high threshold of harm for state intervention, see In Interest of N.C., 551 N.W.2d 872, 874 (Iowa 1996) (finding that state intervention was proper when parents refused to consent to inpatient treatment for child to "cure or alleviate serious mental illness or disorder, or emotional damage" as required by child-protection statute); In re A.R., 175 Cal. Rptr. 3d 851, 855, 856 (Cal. Ct. App. 2014) (finding that the children did not receive "required medical care" and noting that the court has jurisdiction under the child-protection statute "when a parent's failure to provide his or her child with adequate . . . medical treatment causes or presents a substantial risk of serious physical harm"); In re Petra B., 265 Cal. Rptr. 342, 343 (Cal. Ct. App. 1989) (concluding that "the State should not intrude into the [parent-child] relationship merely because it believes a certain kind of care or treatment is preferable; it is only when a child's health is actually and seriously threatened that the State should intervene.").

Although some civil child-protection statutes do not expressly require a high threshold of harm, in the vast majority of cases involving failure to provide necessary medical care, the child suffered serious harm or was at substantial risk of serious harm. See, e.g., In re Jaelin L., 126 A.D.3d 795 (N.Y. App. Div.), leave to appeal denied, 36 N.E.3d 90 (N.Y. 2015) (affirming finding of neglect where parent's refusal to consent to any mental-health treatment for a child experiencing hallucinations and a desire to harm himself placed the child's health in imminent danger); In re Dustin P., 57 A.D.3d 1480 (N.Y. App. Div. 2008) (affirming finding of neglect when father failed to provide psychiatric care "necessary to prevent the impairment of the child's emotional condition" until after the child jumped out a window and sustained spinal fracture). Cf. New Jersey Div. of Youth & Family Servs. v. S.I., 97 A.3d 265 (N.J. Super. Ct. App. Div. 2014) (reversing finding of medical neglect because legal custodian's refusal to consent to immediate mental-health evaluation for adolescent whom the custodian believed was merely "acting out" did not create a substantial risk of harm to child's physical or mental health). Further, given the policy reasons for protecting families from unnecessary state intervention, as described in Comment *a* and the Introductory Note to this Chapter, see also § 2.30, Parental Authority and Responsibility for Medical Care, Comment *a*, this Section interprets these statutes to require a relatively high threshold of harm.

For civil child-protection statutes authorizing a lower threshold for state intervention than this Section's requirement of serious harm or substantial risk of serious harm, see IOWA CODE

ANN. § 232.68(2)(a) (4)(a) (authorizing state intervention if the "person responsible for the care of a child [fails] to provide for the adequate . . . medical or mental health treatment"); NEB. REV. STAT. ANN. § 28-710(2)(b)(i) (West 2016) ("Child abuse or neglect means knowingly, intentionally, or negligently causing or permitting a minor child to be: [p]laced in a situation that endangers his or her life or physical or mental health"); N.Y. FAM. CT. ACT LAW § 1012(f)(i)(A) (McKinney 2016) (defining a "[n]eglected child" as one "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired"); S.C. CODE ANN. § 63-7-20(6)(c) (defining child abuse or neglect to include the failure of a "parent, guardian, or other person responsible for the child's welfare" to provide the child with adequate "health care . . . and the failure to do so has caused or presents a substantial risk of causing physical or mental injury."); VT. STAT. ANN. tit. 33, § 4912(1), (6)(B) (West 2016) (An "'[a]bused or neglected child' means a child whose physical health, psychological growth and development, or welfare is harmed or is at substantial risk of harm by the . . . [f]ailure to supply the child with adequate . . . healthcare."); W. VA. CODE ANN. § 49-1-201 (West 2016) (defining a "[n]eglected child" as a child "[w]hose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with necessary . . . medical care"); WIS. STAT. ANN. § 48.13(11) (West) (granting the court child-protection jurisdiction when a child "is suffering emotional damage for which the parent, guardian or legal custodian has neglected, refused or been unable and is neglecting, refusing or unable, for reasons other than poverty, to obtain necessary treatment").

For examples of criminal statutes imposing a high threshold of harm, see, e.g., ARK. CODE ANN. § 5-27-206(a)(1) ("A person commits the offense of endangering the welfare of a minor in the second degree if he or she knowingly engages in conduct creating a substantial risk of serious harm to the physical or mental welfare of another person known by the person to be a minor."); MISS. CODE ANN. § 97-5-39(1)(a), (d) (2016) (imposing criminal liability on "any parent, guardian, or other person who intentionally, knowingly or recklessly" deprives the child "of necessary . . . health care" and such deprivation "results in substantial harm to the child's physical, mental or emotional health. . ."); VA. CODE ANN. § 18.2-371.1 (West) (imposing criminal liability for abuse or neglect on "Any parent, guardian, or other person responsible for the care of a child . . . who by willful act or willful omission or refusal to provide any necessary care for the child's health causes or permits serious injury to the life or health of such child ").

Illustration 1 is based on In re Alexander D., 845 N.Y.S.2d 244 (App. Div. 2007). But see In re Samantha B., 5 A.D.3d 590 (N.Y. App. Div. 2004) (finding that parents' failure to seek prompt medical attention for the child after he fell down the stairs and lost consciousness was neglect).

Illustration 2 is based on In re Petra B., 265 Cal. Rptr. 342 (Cal. Ct. App. 1989).

Illustration 3 draws from facts in both In re Dustin P., 57 A.D.3d 1480 (N.Y. App. Div. 2008) and In re Jaelin L., 126 A.D.3d 795 (N.Y. App. Div.), leave to appeal denied, 25 N.Y.3d 910 (2015).

For criminal cases involving a substantial risk of serious harm even though the child did not suffer actual harm, see Sample v. State, 601 N.E.2d 457, 461 (Ind. Ct. App. 1992) (affirming mother's conviction for knowingly neglecting four-month-old child after the child hit her head resulting in swelling and a skull fracture. Although the two-day delay in seeking medical care did not cause further injury, it subjected the child to "actual and appreciable" danger); Johnson v. State, 555 N.E.2d 1362, 1366 (Ind. Ct. App. 1990) (affirming conviction for neglect based on 18-hour delay in seeking medical treatment for 17-month-old child who accidentally suffered burns over 20 percent of her body because, although the delay did not cause harm, it created a serious risk of infection). Cf. State v. Wilson, 920 S.W.2d 177, 180 (Mo. Ct. App. 1996) (reversing conviction for child endangerment because there was no substantial risk to the health of the child but noting that "[w]here an actual risk to the child for failure to provide medical treatment exists, a parent can be held criminally liable for failing to seek such treatment even though the failure did not result in any harm to the child."); People v. Berg, 525 N.E.2d 573, 576 (Ill. App. Ct. 1988) (reversing conviction for child endangerment because the evidence did not show that "the child's health was endangered or adversely affected by the failure to seek medical attention earlier").

Illustration 4 is based on Sample v. State, 601 N.E.2d 457 (Ind. Ct. App. 1992).

For definitions of "substantial risk," see, e.g., Ohio Rev. Code Ann. § 2901.01(8) (West 2017) ("'Substantial risk' means a strong possibility, as contrasted with a remote or significant possibility, that a certain result may occur or that certain circumstances may exist."); WYO. STAT. ANN. § 14-3-202(a)(ii)(C) (West) ("'Substantial risk' means a strong possibility as contrasted with a remote or insignificant possibility").

For criminal cases defining serious harm, see Carter v. State, 195 So. 3d 238, 243-244 (Miss. Ct. App. 2016) (noting that in the "context of felony child abuse, 'serious bodily harm' is defined as 'bodily injury which creates a substantial risk of death, or permanent or temporary disfigurement, or impairment of any bodily organ or function.' Substantial harm, by contrast, does not necessarily implicate a substantial risk of death, and includes harm to mental and emotional health."); Lybarger v. People, 807 P.2d 570, 578 (Colo. 1991) ("By a substantial risk of serious bodily harm we mean those conditions which if medically untreated may result in a significant impairment of vital physical or mental functions, protracted disability, permanent disfigurement, or similar defects or infirmities.").

For criminal statutes defining serious physical or mental harm, see ARK. CODE ANN. § 5-27-206 (West 2006) (defining serious harm under criminal child-endangerment statute to mean "physical or mental injury that causes: (A) protracted disfigurement; (B) protracted impairment of physical or mental health; or (C) loss or protracted impairment of the function of any bodily member or organ."); COLO. REV. STAT. ANN. § 18-1-901(p) (West 2017) ("'Serious bodily injury' means bodily injury which, either at the time of the actual injury or at a later time, involves a substantial risk of death, a substantial risk of serious permanent disfigurement, a substantial risk of protracted loss or impairment of the function of any part or organ of the body, or breaks, fractures, or burns of the second or third degree."); DEL. CODE ANN. tit. 11, § 1100(8) (2015) ("'Serious physical injury' shall mean physical injury which creates a risk of death, or which

causes disfigurement, impairment of health or loss or impairment of the function of any bodily organ or limb . . ."); IOWA CODE ANN. § 702.18(1) (West 2017) ("'Serious injury' means any of the following: a. Disabling mental illness. b. Bodily injury which does any of the following: (1) Creates a substantial risk of death. (2) Causes serious permanent disfigurement. (3) Causes protracted loss or impairment of the function of any bodily member or organ. c. Any injury to a child that requires surgical repair and necessitates the administration of general anesthesia. 2. 'Serious injury' includes but is not limited to skull fractures, rib fractures, and metaphyseal fractures of the long bones of children under the age of four years."); LA. STAT. ANN. § 14:403(A)(1)(b)(ii) (2016) ("'serious bodily injury' includes but is not limited to injury involving protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ, or mental faculty, or substantial risk of death, or injury resulting from starvation or malnutrition."); MICH. COMP. LAWS § 750.136b(1)(f) (West 2017) ("'Serious physical harm' means any physical injury to a child that seriously impairs the child's health or physical well-being, including, but not limited to, brain damage, a skull or bone fracture, subdural hemorrhage or hematoma, dislocation, sprain, internal injury, poisoning, burn or scald, or severe cut."); MICH. COMP. LAWS § 750.136b(1)(g) (West 2017) ("'Serious mental harm' means an injury to a child's mental condition or welfare that is not necessarily permanent but results in visibly demonstrable manifestations of a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life."); MO. ANN. STAT. § 568.060(6) (West 2017) ("'Serious emotional injury', an injury that creates a substantial risk of temporary or permanent medical or psychological damage, manifested by impairment of a behavioral, cognitive, or physical condition. Serious emotional injury shall be established by testimony of qualified experts upon the reasonable expectation of probable harm to a reasonable degree of medical or psychological certainty"); MO. ANN. STAT. § 568.060(7) (West 2017) ("'Serious physical injury', a physical injury that creates a substantial risk of death or that causes serious disfigurement or protracted loss or impairment of the function of any part of the body."); N.C. GEN. STAT. ANN. § 14-318.4 (West 2013) ("(1) Serious bodily injury.—Bodily injury that creates a substantial risk of death or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization. (2) Serious physical injury.—Physical injury that causes great pain and suffering. The term includes serious mental injury."); UTAH CODE ANN. § 76-5-109(1)(f) (West 2017) ("(i)'Serious physical injury' means any physical injury or set of injuries that: (A) seriously impairs the child's health; (B) involves physical torture; (C) causes serious emotional harm to the child; or (D) involves a substantial risk of death to the child. (ii) 'Serious physical injury' includes: (A) fracture of any bone or bones; (B) intracranial bleeding, swelling or contusion of the brain, whether caused by blows, shaking, or causing the child's head to impact with an object or surface; (C) any burn, including burns inflicted by hot water, or those caused by placing a hot object upon the skin or body of the child; (D) any injury caused by use of a dangerous weapon . . . (F) any damage to internal organs of the body; (G) any conduct toward a child that results in severe

emotional harm, severe developmental delay or intellectual disability, or severe impairment of the child's ability to function; (H) any injury that creates a permanent disfigurement or protracted loss or impairment of the function of a bodily member, limb, or organ; (I) any impediment of the breathing or the circulation of blood by application of pressure to the neck, throat, or chest, or by the obstruction of the nose or mouth, that is likely to produce a loss of consciousness; (J) any conduct that results in starvation or failure to thrive or malnutrition that jeopardizes the child's life; or (K) unconsciousness caused by the unlawful infliction of a brain injury or unlawfully causing any deprivation of oxygen to the brain.").

For child-welfare statutes defining serious harm, see ALA. ADMIN. CODE r. 660-5-34-.14(3) (2007) (defining serious harm as "Significant physical injury; sexual abuse; severe impairment in a child's functioning; permanent disability or disfigurement; or death" and defining "'Severe impairment in a child's functioning' [as] a serious deficit in a child's behavior or cognition."); KY. REV. STAT. ANN. § 600.020(60) (West 2017) ("'Serious physical injury' means physical injury which creates a substantial risk of death or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily member or organ"); TEX. CODE ANN. FAM. CODE § 261.001(4) (defining neglect to include "failing to seek, obtain, or follow through with medical care for a child, with the failure resulting in or presenting a substantial risk of death, disfigurement, or bodily injury or with the failure resulting in an observable and material impairment to the growth, development, or functioning of the child"); VA. CODE ANN. § 16.1-251(A)(2) (West 2017) ("'Serious bodily injury' means bodily injury that involves substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ or mental faculty.").

For child-welfare statutes defining mental harm, see CAL. WELF. & INST. CODE ANN. § 300(c) (West 2017) (authorizing the court to exercise child-protection jurisdiction when "The child is suffering serious emotional damage, or is at substantial risk of suffering serious emotional damage, evidenced by severe anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others . . ."); FLA. STAT. ANN. § 39.01(43) ("Mental injury" means an injury to the intellectual or psychological capacity of a child as evidenced by a discernible and substantial impairment in the ability to function within the normal range of performance and behavior."); IOWA CODE § 232.2(6)(e) & (f) (2017) (authorizing child-protection jurisdiction over a child "[w]ho is in need of . . . treatment to cure, alleviate, or prevent serious physical injury or illness . . . [or] to cure or alleviate serious mental illness or disorder, or emotional damage as evidenced by severe anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others and whose parent, guardian, or custodian is unwilling to provide such treatment"); KY. REV. STAT. ANN. § 600.020(26) (West 2017) ("'Emotional injury' means an injury to the mental or psychological capacity or emotional stability of a child as evidenced by a substantial and observable impairment in the child's ability to function within a normal range of performance and behavior with due regard to his or her age, development, culture, and environment as testified to by a qualified mental health professional"); WYO. STAT. ANN. § 14-3-202(a)(ii)(A) ("'Mental

injury' means an injury to the psychological capacity or emotional stability of a child as evidenced by an observable or substantial impairment in his ability to function within a normal range of performance and behavior with due regard to his culture").

Comment e. Criminal responsibility—covered adults. For examples of statutes imposing criminal liability on a temporary caregiver, see, e.g., ALA. CODE §§ 26-15-2, 26-15-3 (2016) (imposing criminal responsibility for child maltreatment (which includes willful denial of medical care, see Woods v. State, 724 So. 2d 40, 48 (Ala. Crim. App. 1997)) on "any other person who has the permanent or temporary care or custody or responsibility for the supervision of a child"); ARIZ. REV. STAT. ANN. § 13-3623 (West 2017) (imposing criminal liability on "any person" who "[u]nder circumstances likely to produce death or serious physical injury … [and] having the care or custody of a child … causes or permits the person or health of the child … to be injured or who causes or permits a child … to be placed in a situation where the person or health of the child … is endangered…"); CAL. PENAL CODE § 273a (West) (imposing criminal liability on "Any person who … having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered"); COLO. REV. STAT. ANN. § 18-6-401(1)(a) (West 2018) ("A person commits child abuse if such person … permits a child to be unreasonably placed in a situation that poses a threat of injury to the child's life or health, or engages in a continued pattern of conduct that results in … lack of proper medical care … or an accumulation of injuries that ultimately results in the death of a child or serious bodily injury to a child."); IDAHO CODE ANN. § 18-1501 (West) (imposing criminal liability on "Any person who … having the care or custody of any child, willfully causes or permits the person or health of such child to be injured, or willfully causes or permits such child to be placed in such situation that its person or health is endangered"); MINN. STAT. ANN. §§ 609.376(3); 609.378(a)(1) (West) (extending liability for criminal neglect to a "A parent, legal guardian, or caretaker who willfully deprives a child of necessary … health care …" and defining "caretaker" as "an individual who has responsibility for the care of a child as a result of a family relationship or who has assumed responsibility for all or a portion of the care of a child."); MISS. CODE. ANN. § 97-5-39(1)(a), (d) (West 2016) (imposing criminal liability on any "person who intentionally, knowingly or recklessly" deprives the child "of necessary . . . health care"); N.Y. PENAL LAW § 260.10 (McKinney) ("A person is guilty of endangering the welfare of a child when … [b]eing a parent, guardian or other person legally charged with the care or custody of a child … he or she fails or refuses to exercise reasonable diligence in the control of such child to prevent him or her from becoming … a 'neglected child'") (cited in People v. Carroll, 715 N.E.2d 500 (N.Y. 1999) discussed below); 18 PA. STAT. AND CONS. STAT. ANN. § 4304 (West 2017) (imposing criminal liability for child endangerment on "parent, guardian or other person supervising the welfare of a child"); VA. CODE ANN. § 18.2-371.1 (West 2017) (imposing criminal liability on "Any parent, guardian, or other person responsible for the care of a child … who by willful act or willful omission or refusal to provide any necessary care for the child's health causes or permits serious injury to the life or health of such child").

Illustration 5 is based on People v. Carroll, 715 N.E.2d 500 (N.Y. 1999). In *Carroll*, the stepmother was charged with child endangerment. The criminal statute applied to a "parent, guardian or other person legally charged with the care or custody of a child," N.Y. PENAL LAW § 260.10 (McKinney). Although the statute did not define who is a person "legally charged with the care or custody of a child," the New York Court of Appeals held that it could include a custodian or "any other person responsible for the child's care at the relevant time." Id. at 502. Moreover, the court rejected the stepmother's argument that she did not have a duty to seek medical care for the child because she did not stand *in loco parentis* unless she intended to support or take care of her on a permanent basis. The court held that depending on the factual circumstances, an adult who has only assumed temporary care of the child and is not *in loco parentis* may act as the functional equivalent of a parent and be responsible for the child's care. Id. See also State v. Smith, 935 P.2d 841, 843 (Ariz. Ct. App. 1996) (noting that criminal endangerment "statute imposes a legal duty on anyone assuming the care or custody of a child" and rejecting defendant's argument that he did not have care of his girlfriend's child "so as to be punishable under the statute for failing to seek medical care for her.").

For discussion of the doctrine of *in loco parentis*, see § 2.30, Comment *f*. An adult acting *in loco parentis* may be held criminally responsible if the failure to provide medical care for a child results in serious harm. See State v. Sherman, 266 S.W.3d 395, 405 (Tenn. 2008) (noting that under the common law "[w]here one is in loco parentis the rights, duties, and liabilities of such person are the same as those of the lawful parent" and holding that the Tennessee criminal code "envisions that a person standing in loco parentis to a child may be subject to criminal liability for child neglect.").

Illustration 6 is loosely based on Townsend v. State, 144 P.3d 170 (Okla. App. 2006). In *Townsend*, the defendant babysitter was convicted of criminal child neglect for failure to provide medical care and sentenced to 35 years in prison. Concluding that she "explicitly accepted responsibility, including medical responsibility, for the child when she offered to babysit for the weekend," the appellate court rejected her argument that she was not a person responsible for the child's safety under the criminal neglect statute because she was not a parent, guardian, or custodian. The court remarked that "[t]o find that a person who voluntarily accepts responsibility for a child, for a significant period of time, is not responsible for the child's health, safety and welfare flies in the face of common sense and basic statutory interpretation." Id. at 172.

Comment f. Criminal responsibility—culpability requirement. For cases involving purposeful, knowing, or reckless failure or refusal to provide necessary medical care to a child, see State v. Neumann, 832 N.W.2d 560, 583 (Wis. 2013) (holding that "when a parent fails to provide medical care to his or her child, creates an unreasonable and substantial risk of death or great bodily harm, is aware of that risk, and causes the death of the child, the parent is guilty of second-degree reckless homicide."); People v. Steinberg, 595 N.E.2d 845 (N.Y. 1992) (holding that a parent's failure to provide a child with adequate medical care can "support a first degree manslaughter charge so long as there is sufficient proof of the requisite *mens rea*—intent to cause serious physical injury."); State v. Mahurin, 799 S.W.2d 840 (Mo. 1990) (affirming conviction for

child endangerment and involuntary manslaughter based on parents' failure to seek medical treatment for the child because the evidence established that they knowingly created a substantial risk to the child's health and recklessly caused the child's death); Commonwealth v. Gallison, 421 N.E.2d 757 (Mass. 1981) (affirming conviction for manslaughter and holding that a parent who "made no effort to obtain medical help, knowing that her child was gravely ill," could be convicted of wanton or reckless involuntary manslaughter."); State v. Rinehart, 383 S.W.3d 95 (Mo. Ct. App. 2012) (affirming conviction for child endangerment and felony murder because the parent "knowingly created a substantial risk to [three-month-old son's] life, body, or health by failing to obtain medical care" for his respiratory illness); People v. Latham, 137 Cal. Rptr. 3d 443 (Cal. Ct. App. 2012) (affirming parents' conviction for second-degree murder, based on their failure to seek medical treatment for 17-year-old daughter suffering from diabetic ketoacidosis, where the evidence demonstrated that they were aware that her condition was life-threatening and consciously disregarded the risk); State v. Drown, 263 P.3d 1057, 1066-1067 (Or. Ct. App. 2011) (affirming conviction for first-degree criminal mistreatment where parent "intentionally or knowingly" withheld necessary medical care from child who was legally blind); Payton v. State, 106 S.W.3d 326, 329 (Tex. App. 2003) (affirming conviction of legal custodian for failure to obtain medical care for the child based on evidence that custodian "recklessly and grossly deviated from the standard of care that an ordinary person would have exercised under all the circumstances."). But see Commonwealth v. Pahel, 689 A.2d 963, 965 (Pa. Super. Ct. 1997) (reversing conviction for endangering welfare of a minor and noting that "parents at times can make mistakes in judgment and their children may be harmed as a result. However, for such mistakes to rise to the level of criminal culpability, parents must knowingly allow their children to be at risk with awareness of the potential consequences of their actions or of their failure to act"); Woodbury v. State, 440 S.E.2d 461, 463 (Ga. 1994) (Sears, J., concurring) (noting that, under the criminal statute, "the failure to provide medical care may not be based on a parent's or guardian's negligent mistake in judgment as to when medical care is required, but must be based on the *malicious* failure to provide that care. . . . This distinction is important as far too many parents today are themselves either underage, undereducated, unhealthy, underfed, or unhoused, or a combination of the foregoing, and therefore are not cognizant of the standards that society expects them to uphold regarding the medical care of their children.") (emphasis in original); see also Baruch Gitlin, *Parents' Criminal Liability for Failure to Provide Medical Attention to Their Children*, 118 A.L.R.5th 253 (2004); § 2-3.1.

For cases involving criminally negligent homicide, see State v. Hoffman, 639 P.2d 507 (Mont. 1982) (holding that a parent is "guilty of negligent homicide if, by failing to provide medical attention" for the three-year-old child, the parent "disregarded a risk of which [the parent] should have been aware, and the risk was so great that to disregard it was a gross deviation from a reasonable standard of conduct."); People v. Mayo, 771 N.Y.S.2d 627, 628-629 (App. Div. 2004) (affirming conviction of parent who did not seek medical care for four-year-old son who "would have exhibited signs of excruciating pain" and noting that criminally negligent homicide requires failure "to perceive a substantial and unjustifiable risk" of death and the "risk must be of such

nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation"); State v. Hays, 964 P.2d 1042, 1046 (Or. Ct. App. 1998) (affirming conviction for criminally negligent homicide based on father's refusal to seek medical treatment for eight-year-old son who died of acute leukemia and noting that "if the parent's failure to be aware of a substantial risk that the child will die is a gross deviation from the standard of a reasonable person, and if as a result the child dies, the parent is guilty [of criminally negligent homicide]"). But see State v. Owens, 820 S.W.2d 757, 760-761 (Tenn. Crim. App. 1991) (reversing parent's conviction for criminally negligent homicide of 11-month-old infant with severe special needs because although the evidence showed "some carelessness and negligence," it did not demonstrate "a gross deviation from the standard of care that an ordinary person would exercise under the circumstances").

For earlier cases imposing criminal liability for failure to provide necessary medical care to a child, see Eaglen v. State, 231 N.E.2d 147 (Ind. 1967) (affirming father's conviction for involuntary manslaughter based on failure to seek medical care for his child); State v. Barnes, 212 S.W. 100 (Tenn. 1919) (recognizing that a parent who fails to provide necessary medical care to a child may be held criminally responsible for the child's death); State v. Staples, 148 N.W. 283 (Minn. 1914) (same); Stehr v. State, 139 N.W. 676, aff'd, 142 N.W. 670 (1913) (affirming conviction for criminal negligence of stepfather who failed to provide necessary medical care for his stepson); People v. Pierson, 68 N.E. 243 (N.Y. 1903) (affirming conviction of father who failed to provide necessary medical attendance for his child); Beck v. State, 233 P. 495, 496 (Okla. Crim. App. 1925) (affirming conviction of father who failed to provide necessary medical attendance for his son).

Illustration 7 is based on Mallory v. State, 563 N.E.2d 640 (Ind. Ct. App. 1990).

Illustration 9 is based on State v. Hays, 964 P.2d 1042 (Or. Ct. App. 1998).

Comment g. Civil child-protection proceedings—covered adults. For statutes defining a legal guardian and the guardian's rights and duties, see § 2.30, Reporters' Note to Comment *b*.

For statutes defining a custodian and the duties of a custodian, see § 2.30, Reporters' Note to Comment *f*.

For child welfare statutes defining medical neglect as the failure of a *parent, guardian, or custodian* to provide a child with necessary medical care, see ARIZ. REV. STAT. ANN. § 8-201(25)(a) (West 2017) (defining "neglect" as "[t]he inability or unwillingness of a parent, guardian or custodian of a child to provide that child with . . . medical care if that inability or unwillingness causes unreasonable risk of harm to the child's health or welfare"); COLO. REV. STAT. § 19-1-103(1)(a)(III) (West 2017) (defining "child abuse or neglect" to include the failure of a parent, legal guardian, or custodian "to take the same actions to provide adequate . . . medical care . . . that a prudent parent would take."); IDAHO CODE § 16-1602(31) (West 2016) ("'Neglected' means a child . . . [w]ho is without proper . . . medical or other care . . . necessary for his well-being because of the conduct or omission of his parents, guardian or other custodian or their neglect or refusal to provide them."); IND. CODE § 31-34-1-1 (2016) (authorizing state intervention if "the child's physical or mental condition is seriously impaired or seriously endangered as a result of

the inability, refusal, or neglect of the child's parent, guardian, or custodian to supply the child with necessary . . . medical care. . ."); IOWA CODE § 232.2(6)(e) (2016) (defining child in need of assistance as one "[w]ho is in need of medical treatment to cure, alleviate, or prevent serious physical injury or illness and whose parent, guardian, or custodian is unwilling or unable to provide such treatment."); KENTUCKY REV. STAT. § 600.020(1)(a)(8) (2016) ("'Abused or neglected child' means a child whose health or welfare is harmed or threatened with harm when . . . [a] parent, guardian . . . or other person exercising custodial control or supervision of the child . . . does not provide the child with . . . medical care necessary for the child's well-being."); OHIO REV. CODE ANN. § 2151.03(A)(3) (West 2016) (a "neglected child" includes a child "[w]hose parents, guardian, or custodian neglects . . . or refuses to provide proper or necessary . . . medical or surgical care or treatment"); S.D. CODIFIED LAWS § 26-8A-2(4) (2016) (defining an "abused or neglected child" as a child "[w]hose parent, guardian, or custodian fails or refuses to provide proper or necessary . . . medical care"); TENN. CODE ANN. § 37-1-102(b)(12)(D) (defining a neglected child as one "[w]hose parent, guardian or custodian neglects or refuses to provide necessary medical, surgical, institutional or hospital care. . . ."); UTAH CODE ANN. § 78A-6-105(27)(a)(iii) (West 2016) (defining "neglect" to include the "failure or refusal of a parent, guardian, or custodian to provide proper or necessary . . . medical care"); W. VA. CODE ANN. § 49-1-201 (West 2016) (defining a "[n]eglected child" as a child "[w]hose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with necessary . . . medical care"); WIS. STAT. ANN. § 48.13(10) (West 2016) (defining child in need of protection or services as a child "[w]hose parent, guardian or legal custodian neglects, refuses or is unable for reasons other than poverty to provide necessary . . . medical or dental care . . . so as to seriously endanger the physical health of the child.").

Comment h. Civil child-protection proceedings—failure to exercise minimum degree of care. The New Jersey Supreme Court has aptly distinguished the minimum degree of care from ordinary negligence concluding that it "denotes a lesser burden on the actor than a duty of ordinary care. If a lesser measure of care is required of an actor, then something more than ordinary negligence is required to hold the actor liable. The most logical higher measure of neglect is found in conduct that is grossly negligent because it is willful or wanton. Therefore, we believe the phrase "minimum degree of care" refers to conduct that is grossly or wantonly negligent, but not necessarily intentional." Dep't of Children & Families, Div. of Child Prot. & Permanency v. E.D.-O., 223 N.J. 166, 179 (N.J. 2015) (quoting G.S. v. Dep't. Hum. Servs., Div. Youth & Fam. Servs., 723 A.2d 612, 620 (N.J. 1999); see also Dep't of Children & Families, Div. of Youth & Family Servs. v. T.B., 24 A.3d 290, 298 (N.J. 2011) (holding that "failure . . . to exercise a minimum degree of care" at least requires grossly negligent or reckless conduct."). Although the minimum degree of care is not an ordinary-negligence standard but rather a "minimum baseline of proper care for children that all parents, regardless of lifestyle or social or economic position, must meet," In re Jessica YY, 258 A.D.2d 743, 744 (N.Y. App. Div. 1999), in assessing whether a parent failed to exercise the minimum degree of care necessary to prevent serious harm to the child, courts may

look at how a reasonable parent would have acted and whether the parent's conduct substantially deviated from the conduct of a reasonable parent. As courts have held "[t]he minimum degree of care standard requires an objective evaluation of [the parent's] actions in light of what a reasonable and prudent parent would have done." In re Kenneth V., 307 A.D.2d 767, 768 (N.Y. App. Div. 2003). See also New Jersey Div. of Child Prot. & Permanency v. J.A., 91 A.3d 655, 660 (N.J. App. Div. 2014) (stating that failure "to exercise a minimum degree of care" requires "'grossly or wantonly negligent, but not necessarily intentional' conduct" and under this standard "[t]he parent is held to what "an ordinary reasonable person would understand …").

The Washington Court of Appeals recently interpreted its civil child-protection statute and concluded that it reflects a "desire by the legislature not to sanction a parent for simple negligence." Brown v. Dep't of Soc. & Health Servs., 360 P.3d 875, 885 (Wash. Ct. App. 2015). In rejecting a reasonable-parent standard, the court reasoned that "[g]ood reason exists to reject a negligence benchmark. A negligence standard could place every Washington parent in jeopardy because what is "reasonable" under a negligence regime varies depending on the situation and actors involved. Such a standard might also implicate a parent's fundamental liberty interest in the care and custody of her children." Id. at 885 (finding that mother's failure to seek immediate medical treatment for two-year-old child's burn was not neglect, because she attempted to treat the wound on her own by applying cream for 10 days and later sought treatment when the burn bled).

For a case recognizing that when a parent's conduct is merely negligent, a child is not at risk of future harm and thus, state intervention is unnecessary, see Dep't of Children & Families, Div. of Youth & Family Servs. v. T.B., 24 A.3d 290, 298 (N.J. 2011) ("where a parent or guardian acts in a grossly negligent or reckless manner, that deviation from the standard of care may support an inference that the child is subject to future danger. To the contrary, where a parent is merely negligent there is no warrant to infer that the child will be at future risk.").

At least two states require the state to prove that the parent failed to exercise a minimum degree of care. See, e.g., N.J. STAT. ANN. § 9:6-8.21(c) (2012) ("'Abused or neglected child' means … a child whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of the failure of his parent or guardian… to exercise a minimum degree of care (a) in supplying the child with adequate … medical or surgical care…"); N.Y. FAM. CT. ACT § 1012(f) (McKinney 2017) ("Neglected child" means a child less than eighteen 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 (A) in supplying the child with adequate … medical, dental, optometrical or surgical care….").

Some states apply a negligence standard. See, e.g., In re Ethan C., 279 P.3d 1052, 1062 (Cal. 2012) (defining "neglect" under the civil child-protection statute as "negligence" or "carelessness"); State ex rel. N.K.C., 995 P.2d 1, 3 (Utah. Ct. App. 1999) (stating that "[t]he definition of neglect in the [civil child-protection statute] is consistent with the derivative term "negligence" which "simply means the failure to use reasonable care.").

For a statute expressly recognizing that a parent's inability or refusal to conform to dominant parenting norms does not justify state intervention, see CAL. WELF. & INST. CODE § 16509 (West 2018) (providing that "[c]ultural and religious child-rearing practices and beliefs which differ from general community standards shall not in themselves create a need for child welfare services unless the practices present a specific danger to the physical or emotional safety of the child."). See also Matter of Appeal In Cochise Cty. Juvenile Action No. 5666-J, 650 P.2d 459, 462 (Ariz. 1982) (stating that "the state may impose a minimum threshold of care a parent must provide any child. In general, a parent must provide a child with a place to live, clothing, an education, attention, and medical care as may be required. By necessity these are fluid terms and may depend on the financial wherewithal of the parents, cultural mores, etc.").

For statutes applying an ordinary negligence standard, see, e.g., COLO. REV. STAT. § 19-1-103(1)(a)(III) (West 2017) (defining "child abuse or neglect" to include the failure of a parent, legal guardian, or custodian "to take the same actions to provide adequate . . . medical care . . . that a prudent parent would take."); FLA. STAT. ANN. § 39.01(42) (West 2017) ("'Medical neglect' means the failure to provide or the failure to allow needed care as recommended by a health care practitioner for a physical injury, illness, medical condition, or impairment, or the failure to seek timely and appropriate medical care for a serious health problem that a reasonable person would have recognized as requiring professional medical attention."). This Section rejects an ordinary-negligence standard for the reasons described in the Comment.

Comment i. Religious beliefs. Many denominations in the United States oppose at least some forms of medical care based on their religious beliefs. See Edward Chemerinksy & Michele Goodwin, *Religion is Not a Basis for Harming Others: Review Essay of Paul A. Offit's Bad Faith: When Religious Belief Undermines Modern Medicine*, 104 GEO. L.J. 1111, 1112 (2016) (stating that "twenty-three denominations in thirty-four states . . . practice faith healing."). For a list of the denominations that have religious objections to at least some forms of medical care, see Children's Healthcare is a Legal Duty (CHILD), Inc., http://childrenshealthcare.org/?page_id=195 (last visited March 14, 2018). Many of these denominations rely solely on prayer to cure illness or injury. Id. It is estimated that hundreds of children in the United States have died as a result of their parents' denial, based on religious beliefs, of necessary medical care for highly treatable conditions. See SHAWN FRANCIS PETERS, WHEN PRAYER FAILS: FAITH HEALING, CHILDREN, AND THE LAW 8 (2008); PAUL A. OFFIT, BAD FAITH: WHEN RELIGIOUS BELIEF UNDERMINES MODERN MEDICINE 180-82 (2015); S. Asser & Rita Swan, *Child Fatalities from Religion-motivated Medical Neglect*, 101 Pediatrics 625 (1998).

For examples of cases ordering medical treatment for a child over a parent's religious objections, see In re Guardianship of L.S. & H.S., 87 P.3d 521, 527 (Nev. 2004) (affirming trial court's appointment of hospital as temporary guardians authorized to consent to necessary medical care for child when the parents refused to consent to blood transfusion and stating that "the State's interests in protecting the welfare of children and the integrity of medical care" outweighed the parents' interests in their religious freedom); Matter of McCauley, 565 N.E.2d 411 (Mass. 1991) (upholding the lower court's order for a hospital to administer a blood transfusion over her parents'

religious objections); In re Sampson, 278 N.E.2d 918 (N.Y. 1972) (authorizing blood transfusion over parent's religious objection); State v. Perricone, 37 N.J. 463 (N.J. 1962) (same); People ex rel. Wallace v. Labrenz, 104 N.E.2d 769 (Ill. 1952) (same); O.G. v. Baum, 790 S.W.2d 839 (Tex. App. 1990) (same); J.V. v. State, 516 So. 2d 1133, 1133 (Fla. Dist. Ct. App. 1987) (same); Morrison v. State, 252 S.W.2d 97 (Mo. Ct. App. 1952) (same). See also Jehovah's Witnesses in State of Wash. v. King County Hospital Unit No. 1, 278 F. Supp. 488 (W.D. Wash. 1967), aff'd per curiam, 390 U.S. 598 (1968).

Illustration 12 is based on In re Cabrera, 552 A.2d 1114 (Pa. Super. Ct. 1989).

Parents have challenged their criminal convictions for the death of the child as a violation of their constitutional right to free exercise of religion under the First Amendment or their state constitution. Courts have uniformly held that the freedom of free exercise of religion does not entitle a parent to place the child's life or health at risk or protect a parent from prosecution for failure to provide necessary medical care. See, e.g., Walker v. Superior Court, 763 P.2d 852 (Cal. 1988); State v. Hays, 964 P.2d 1042 (Or. Ct. App. 1998); State v. Norman, 808 P.2d 1159 (Wash. Ct. App. 1991); Commonwealth v. Barnhart, 497 A.2d 616 (Pa. Super. Ct. 1985).

Despite the lack of constitutional protection for a parent who denies a child necessary medical care based on religious beliefs, a majority of states have enacted spiritual treatment exemptions that provide that a child who is treated solely with prayer in accordance with the beliefs and practices of a recognized religious denomination is not, for that reason alone, a neglected child. These statutes were generally enacted after 1974 when Congress passed the Child Abuse Prevention and Treatment Act (CAPTA), which provides federal funding to states to establish programs to prevent, address, and prosecute child abuse and neglect. *Child Abuse Prevention and Treatment Act (CAPTA) State Grants*, CHILDREN'S BUREAU: AN OFFICE OF THE ADMINISTRATION FOR CHILD AND FAMILIES, https://www.acf.hhs.gov/cb/resource/capta-state-grants (May 17, 2012) (noting that CAPTA "provides funds for States to improve their child protective services systems (CPS)."); Chemerinksy & Michele Goodwin, supra, at 1126 (stating that all but one state passed a law protecting religiously motivated medical neglect in the years following Congress's passing of CAPTA). CAPTA requires states to adopt procedures to enable child-protection services to provide medical care to a child when necessary to prevent or remedy serious harm to the child and to prevent withholding of care from a child with a life-threatening condition. CAPTA expressly permits, but does not require, states to adopt spiritual treatment exemptions. However, states interpreted the regulations implemented by what is now the Department of Health and Human Services to require such exemptions as a condition of funding. Every state (except for Nebraska) and the District of Columbia enacted spiritual treatment exemptions. See Chemerinksy & Michele Goodwin, supra, at 1126 (noting that "'within a few years, forty-nine states (the exception being Nebraska) and the District of Columbia had laws protecting religiously motivated medical neglect.'"); Paula A. Monopoli, *Allocating the Costs of Parental Free Exercise: Striking a New Balance Between Sincere Religious Belief and a Child's Right to Medical Treatment*, 18 PEPP. L. REV. 319, 331 (1991) ("virtually all states in the union complied with [the requirement by the Department of Health, Education and Welfare to adopt a spiritual exemption] and amended their

statutes."). These regulations were repealed in 1984 but the majority of states did not repeal their exemptions. See *Statutory Note on Spiritual Treatment Exemptions*. For a summary of CAPTA and states' responses, see Janna C. Merrick, *Spiritual Healing, Sick Kids and the Law: Inequities in the American Healthcare System*, 29 AM. J.L. & MED. 269, 277-280 (2003).

More than two-thirds of all states have enacted spiritual treatment exemptions in their civil child-protection statutes defining child abuse, neglect, or dependency. See *Statutory Note on Spiritual Treatment Exemptions.*

At least half of all states provide spiritual treatment exemptions to criminal offenses such as child abuse, neglect, endangerment, and nonsupport. See *Statutory Note on Spiritual Treatment Exemption*s. At least two states, West Virginia and Arkansas, have spiritual treatment defenses to homicide. Id. A few others have spiritual treatment defenses to manslaughter. See, e.g., IDAHO CODE ANN. § 18-4006 (West 2016) (stating that an *unlawful* (emphasis added) killing must occur for an individual to be guilty of manslaughter, but allowing criminal injury to children and criminal nonsupport to be lawful if occurring during the practice of a recognized religion in IDAHO CODE ANN. § 18-1501(4) and IDAHO CODE ANN. § 18-401(2), respectively.); IOWA CODE ANN. § 707.5 (West 2016) (stating that a person is guilty of involuntary manslaughter when he or she causes the death of a person during the commission of a public offense, but stating in § 726.6(d) that a person is not guilty of child endangerment based on failure to provide medical treatment if "such treatment would conflict with the tenets and practice of a recognized religious denomination …"); OHIO REV. CODE ANN. § 2903.04 (West 2016) (stating that a person is guilty of involuntary manslaughter if he or she "cause[d] the death of another … as a proximate result of the offender's committing or attempting to commit a felony," but providing a defense in § 2919.22(A) that a person is not guilty of the necessary underlying crime if treating a child "in accordance with the tenets of a recognized religious body.").

Spiritual treatment exemptions do not apply to all parents with religious objections to medical treatment. In Arizona, Connecticut, and Washington, the spiritual treatment exemptions expressly apply to Christian Scientists only. See ARIZ. REV. STAT. ANN. § 8-201.01(A)(1) (West 2016) ("A child who in good faith is being furnished Christian Science treatment by a duly accredited practitioner shall not, for that reason alone, be considered to be an abused, neglected or dependent child."); ARIZ. REV. STAT. ANN. § 8-531.01 (West 2016) (for purposes of the termination of parental rights statute, "no child who in good faith is being furnished christian science treatment by a duly accredited practitioner shall, for that reason alone, be considered to be an abused, neglected or dependent child") (West 2016); CONN. GEN. STAT. ANN. § 17a-104 (West 2016) (". . . the treatment of any child by a Christian Science practitioner in lieu of treatment by a licensed practitioner of the healing arts shall not itself constitute maltreatment"); WASH. REV. CODE ANN. § 9A.42.005 (West 2016) (imposing criminal penalties for child abuse and neglect but stating that "[i]t is the intent of the legislature that a person who, in good faith, is furnished Christian Science treatment by a duly accredited Christian Science practitioner in lieu of medical care is not considered deprived of medically necessary health care or abandoned."). But see H.B. 2791, 2017 Leg., 65th Sess. (Wash. 2017) (amended Feb. 1, 2018) (eliminating current spiritual

treatment exception and providing instead that "health care decisions made in reliance on faith-based practices do not in and of themselves constitute negligent treatment or maltreatment unless any such decision poses a clear and present danger to the health, welfare, or safety of the child."); WASH. REV. CODE ANN. § 26.44.020(18) (West 2016) ("A person who is being furnished Christian Science treatment by a duly accredited Christian Science practitioner will not be considered, for that reason alone, a neglected person for the purposes of this chapter."). But see H.B. 1290, 2017 Leg., 65th Sess. (Wash. 2017) (reintroduced Jan. 8, 2018) (eliminating spiritual treatment exception).

Other states extend the exemption to members of recognized religious denominations that provide spiritual treatment by a duly accredited practitioner. See DEL. CODE ANN. tit. 16, § 913 (2009) (providing that a child is not neglected solely because he "is under treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by a duly accredited practitioner thereof"). For similar language in civil child-protection statutes, see, e.g., ALASKA STAT. ANN. § 47.10.085 (West 2016) (applying exemption if the child "is being provided treatment by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by an accredited practitioner of the church or denomination"); ARK. CODE ANN. § 9-30-103(5)(B) (West 2016) (applying exemption if the child "is being provided treatment by spiritual means through prayer alone in accordance with the tenets or practices of a recognized church or religious denomination by a duly accredited practitioner thereof in lieu of medical or surgical treatment"); CAL. WELF. & INST. CODE § 300.5 (West 2016) (court "shall give consideration to any treatment being provided to the child by spiritual means through prayer alone in accordance with the tenets and practices of a recognized church or religious denomination by an accredited practitioner thereof."); D.C. CODE ANN. § 4-1321.06 (West 2016) same); ME. REV. STAT. ANN. tit. 22, § 4010(1) (2016) (same); MISS. CODE ANN. § 43-21-105(l)(i) (West 2016) (same); N.H. REV. STAT. ANN. § 169-C:3(XIX) (2016) (same); N.J. STAT. ANN. § 9:6-8.21(c) (West 2016) (same); N.M. STAT. ANN. § 32A-4-2(G)(5) (West 2018) (same); WYO. STAT. ANN. § 14-3-202(a)(vii) (West 2016) (same). For similar language in criminal statutes, see, e.g., ALA. CODE § 13A-13-6(b) (2016) (providing defense to child endangerment if child is treated "by spiritual means alone in accordance with the tenets and practices of a recognized church or religious denomination by a duly accredited practitioner thereof in lieu of medical treatment."); ALASKA STAT. ANN. § 11.51.120(b) (West 2016) (providing defense to criminal nonsupport "if the child is provided treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by an accredited practitioner of the church or denomination."); CAL. PENAL CODE § 270 (West 2016) ("If a parent provides a minor with treatment by spiritual means through prayer alone in accordance with the tenets and practices of a recognized church or religious denomination, by a duly accredited practitioner thereof, such treatment shall constitute 'other remedial care', as used in this section" for purposes of the criminal nonsupport statute); TENN. CODE ANN. § 39-15-402(c) (West 2016) (providing defense for criminal abuse, neglect, or endangerment of a child when "the child is being provided treatment

by spiritual means through prayer alone, in accordance with the tenets or practices of a recognized church or religious denomination by a duly accredited practitioner of the recognized church or religious denomination, in lieu of medical or surgical treatment.").

As courts have noted, however, except for the Church of Christian Science, which authorizes selected members as healers to treat illness with prayer, few denominations have duly accredited spiritual practitioners. See Walker v. Superior Court, 763 P.2d 852, 875 (Cal. 1988) (stating that Christian Scientists formally designate their healers as "practitioners," but noting that "certain well-known denominations decline to term anyone a 'healer'."). A number of state supreme courts have noted that the legislative history and statutory language of these exemptions demonstrate that they were intended to benefit primarily Christian Scientists who lobbied for them. See State v. Crank, 468 S.W.3d 15, 21-22 (Tenn. 2015) (discussing how the Senators at the Senate Judiciary Committee, where the exemption was discussed, recognized that the exemption was offered by Christian Scientists and "ensures that they are protected."). Newmark v. Williams/DCPS, 588 A.2d 1108, 1112 (Del. 1991) ("Clearly, in both reality and practical effect, the language providing an exemption only to those individuals practicing 'in accordance' with the 'practices of a *recognized* church or religious denomination by a *duly accredited practitioner* thereof' is intended for the principal benefit of Christian Scientists."); Walker v. Superior Court, 763 P.2d 852, 875 (Cal. 1988) ("The one group of parents squarely protected by the terms of the statute are Christian Scientists, whose denomination sponsored the 1976 amendment … enacting its religious exemption.").

For a case holding that spiritual treatment exemptions violate the First Amendment's Establishment Clause, see State v. Miskimens, 490 N.E.2d 934-935 (Ohio C.P. 1984). The court reasoned that spiritual treatment exemptions require excessive entanglement with religion because the state must determine what is a "recognized" religious denomination and whether spiritual healing is part of the denomination's beliefs and practices. Id. (stating that "questions such as 'what is a recognized religious body,' by whom must it be 'recognized,' for how long must it have been 'recognized,' what are its tenets, did the accused act in accordance with those tenets, what are 'spiritual means,' and what is the effect of combining some prayer with some treatment or medicine" run afoul of the "excessive entanglement" test.). See also State v. Crank, 468 S.W.3d 15, 29-30 (Tenn. 2015) (holding that mother convicted of child neglect "would not be entitled to relief even if we were to hold that the spiritual treatment exemption violates the Establishment Clause or the Equal Protection Clause" but stating that "that the Establishment Clause issue gives us pause, as the statutory text and the legislative history, taken together, appear to indicate that the spiritual treatment exemption was enacted for the benefit of the Christian Scientist denomination of the Christian faith."); *Walker*, 763 P.2d at 876 (Mosk, J., concurring) ("the establishment clause requires at a minimum that the [spiritual treatment] exemption be granted irrespective of denominational affiliation or practice. The conclusion is thus inescapable that the religious exemption . . . violates the establishment clauses of the California and federal Constitutions."); *Newmark*, 588 A.2d at 1112 ("we recognize the possibility that the spiritual treatment exemptions may violate the ban against the establishment of an official State religion guaranteed under both

the Federal and Delaware Constitutions. Clearly . . . the language providing an exemption only to those individuals practicing 'in accordance' with the 'practices of a recognized church or religious denomination by a duly accredited practitioner thereof' is intended for the principal benefit of Christian Scientists.").

Spiritual treatment exemptions have created confusion with regard to a parent's duty when medical care is necessary to prevent serious harm to the child. Some parents have relied on spiritual treatment exemptions and concluded that they may legally treat a child with prayer alone in accordance with their religious beliefs. However, as courts have recognized, when a child's health is at risk of serious harm, the parent must provide the necessary treatment and the spiritual treatment exemption may not shield a parent from liability. The Supreme Court of Colorado addressed the role of the spiritual treatment exemption when the child's health is at risk of serious harm in People in Interest of D. L. E., 645 P.2d 271 (Colo. 1982). The statute provided that "no child who in good faith is under treatment solely by spiritual means . . . shall, for that reason alone, be considered to have been neglected." Id. at 273. The court rejected the mother's argument that the exemption provided an absolute defense to a finding of neglect and concluded that "the statutory language, 'for that reason alone' allows a finding of dependency and neglect for other 'reasons,' such as where the child's life is in imminent danger, despite any treatment by spiritual means." Id. at 274. This Section adopts the court's interpretation that "a child who is treated solely by spiritual means is not, for that reason alone, dependent or neglected, but if there is an additional reason, such as where the child is deprived of medical care necessary to prevent a life-endangering condition, the child may be adjudicated dependent and neglected under the statutory scheme." Id. at 275. Similarly, In re D.R., 20 P.3d 166, 168 (Okla. App. 2001), the court affirmed the adjudication of neglect based on the parents' refusal to provide necessary medical treatment for epileptic child. The court interpreted the spiritual treatment statute "to mean that a child is not 'deprived' merely because his/her parents address injury or illness by spiritual healing" but concluded that the provision authorizing a court to order necessary medical treatment to protect the child's health "shows legislative intent that courts have authority to find a child … deprived, notwithstanding Parents' religious beliefs, if there is a threat to a child's health or welfare." The California Supreme Court has similarly held that the neglect statute and spiritual treatment exemption "must be construed to signify that treatment by prayer will not constitute neglect for purposes of the child welfare services chapter *except* in those instances when such treatment, coupled with a sufficiently grave health condition, present 'a specific danger to the physical ... safety of the child.'" Walker v. Superior Court, 763 P.2d 852, 864 (Cal. 1988) (emphasis added) (citing People in Interest of D. L. E., 645 P.2d 271 (Colo. 1982) with approval). The court expressly adopted the state's argument that "the phrase 'for that reason *alone*'… denotes that a child receiving prayer treatment can still fall within the reach of the statutory definitions [of neglect] if the provision of such treatment, coupled with a grave medical condition, combine to pose a serious threat to the physical well-being of the child." Walker, 763 P.2d at 863 (emphasis in original). Most recently, the Wisconsin Supreme Court cited approvingly the jurisdictions that have interpreted spiritual treatment exemptions providing that a person is not liable "*solely* because

he or she provides a child with treatment by spiritual means through prayer alone … as signifying that treatment through prayer does not create blanket protection from criminal prosecution for child abuse for a parent who treats his or her child with prayer." State v. Neumann, 832 N.W.2d 560, 576 (Wis. 2013) (emphasis in original); Id. at 576 n.30 (stating that "One interpretation of "solely" is that the severity of the child's illness may render the protection inapplicable.").

The vast majority of spiritual treatment statutes use similar language as the Colorado statute discussed above to indicate that a child is not neglected for the sole reason that the parent is treating the child with prayer only. See *Statutory Note on Spiritual Treatment Exemption*s (listing more than 30 statutes using "for that reason alone" or equivalent language).

Illustration 13 is based on People in Interest of D. L. E., 645 P.2d 271 (Colo. 1982).

For examples of statutes providing that the spiritual treatment exemption does not apply when there is a substantial risk of serious harm to the child's health, see DEL. CODE ANN. TIT. 11, § 1104 (providing that spiritual treatment defense to criminal liability does not apply if the failure to provide a child with medical care results in death or serious injury); IND. CODE ANN. § 31-34-1-14(2) (West 2018) (rebuttable presumption that a child is not neglected because the parent "fails to provide specific medical treatment for a child because of the legitimate and genuine practice of the religious beliefs of the parent, guardian, or custodian . . . does not . . . [a]pply to situations in which the life or health of a child is in serious danger."); OKLA. STAT. ANN. TIT. 21 § 852(C) (West 2016) ("Nothing in this section shall be construed to mean a child is endangered for the sole reason the parent, guardian or person having custody or control of a child, in good faith, selects and depends upon spiritual means alone through prayer … provided, that medical care shall be provided where permanent physical damage could result to such child; and that the laws, rules, and regulations relating to communicable diseases and sanitary matters are not violated"); 23 PA. STAT. AND CONS. STAT. ANN. § 6304(b)(4) (West 2016) (providing that spiritual treatment exemption to child abuse "shall not apply if the failure to provide needed medical or surgical care causes the death of the child."); 40 R.I. GEN. LAWS ANN. § 40-11-15 (West) ("A parent or guardian practicing his or her religious beliefs which differ from general community standards who does not provide specified medical treatment for a child shall not, for that reason alone, be considered a negligent parent or guardian. However, nothing in this section shall: (1) prevent the child from being considered abused or neglected if the child is harmed or threatened with harm as described in [civil child-protection statute]").

For examples of spiritual treatment statutes authorizing a court to order medical treatment for a child over the parent's religious objections and adjudicate a child neglected if a parent, guardian, or custodian interferes with the provision of medical care as ordered by the court, see, e.g., GA. CODE ANN. § 15-11-107 (West) (authorizing court to order treatment over the parent's religious objection if "child is in a life-threatening situation or … condition will result in serious disability" and providing that "A child whose parent, guardian, or legal custodian inhibits or interferes with the provision of medical treatment in accordance with a court order shall be considered to be a dependent child"); COLO. REV. STAT. ANN. § 19-3-103(1) (West 2016) (providing a defense to civil neglect when the child is being treated by spiritual means, but

authorizing the court to order medical care for the child over the parent's religious objections "in a life-threatening situation or when the condition will result in serious disability," and stating that a "child whose parent, guardian, or legal custodian inhibits or interferes with the provision of medical treatment in accordance with a court order shall be considered to have been neglected or dependent for the purposes" of civil child-protection liability and "injured or endangered for the purposes of" criminal liability."); CAL. WELF. & INST. CODE § 300(b)(1) (West 2016) (stating that the court will shall give deference to the parent's "spiritual treatment through prayer alone" but shall assume jurisdiction over the child when necessary "to protect the child from suffering serious physical harm or illness."). See also *Statutory Note on Spiritual Treatment Exemption*s.

For a case holding that the spiritual treatment exemption in a civil child-protection statute does not provide a defense to criminal liability, see Commonwealth v. Foster, 764 A.2d 1076, 1082 (Pa. Super. Ct. 2000) (holding that spiritual treatment exemption in civil child-protection statute does not provide an affirmative defense to criminal liability and stating that "[t]he law imposes an affirmative duty on parents to seek medical help when the life of a child is threatened, regardless, and in fact despite, their religious beliefs.").

When a child has died as a result of the parent's denial of medical treatment, a majority of courts have held that a spiritual treatment exemption in a criminal nonsupport, child abuse, or neglect statute does not provide a defense to negligent homicide or manslaughter. For example, in Walker v. Superior Court, the Supreme Court of California rejected the parent's argument that the spiritual treatment exemption in a criminal nonsupport statute is a defense to prosecution for involuntary manslaughter and felony child endangerment and noted that prayer "will be accommodated as an acceptable means of attending to the needs of a child only insofar as serious physical harm or illness is not at risk." 763 P.2d 852, 866 (Cal. 1988). The court added that "[w]hen a child's life is placed in danger, we discern no intent to shield parents from the chastening prospect of felony liability." 763 P.2d at 866. Similarly, in State v. Neumann, the Wisconsin Supreme Court held that the spiritual treatment exemption to criminal child abuse does not provide a defense to reckless homicide and concluded that "when a parent fails to provide medical care to his or her child, creates an unreasonable and substantial risk of death or great bodily harm, is aware of that risk, and causes the death of the child, the parent is guilty of second-degree reckless homicide." 832 N.W.2d 560, 583 (Wis. 2013). See also Commonwealth v. Twitchell, 617 N.E.2d 609 (Mass. 1993) (rejecting argument that spiritual treatment exemption in criminal nonsupport statute is a defense to involuntary manslaughter); Lybarger v. People, 807 P.2d 570, 578 (Colo. 1991) (noting that spiritual treatment exemption serves "as an affirmative defense so long as the child is not in a life-endangering condition or in a situation that poses a substantial risk of serious bodily harm to the child."); Hall v. State, 493 N.E.2d 433, 435 (Ind. 1986) (holding that spiritual treatment exemption in neglect statute did not provide defense to reckless homicide and stating that "[p]rayer is not permitted as a defense when a caretaker engages in omissive conduct which results in the child's death."); Commonwealth v. Nixon, 718 A.2d 311, 314 (Pa. Super. Ct. 1998) (concluding that "[while the [parents] were not considered child abusers for treating their children through spiritual healing, when their otherwise lawful course of conduct led to a child's death, they were

guilty of involuntary manslaughter."); State v. Hays, 964 P.2d 1042, 1045 (Or. Ct. App. 1998) (holding that under the spiritual treatment exemption "[a] person who treats a dependent child through prayer … has a defense to a charge of criminal mistreatment, a defense that does not apply to a charge of criminally negligent homicide. Thus, so long as the child does not die, the parent has a defense to a criminal charge; once the child dies, the defense is gone.").

However, a few state supreme courts have reversed a parent's conviction for manslaughter or homicide on the ground that the spiritual treatment statute failed to provide fair notice of the point at which the failure to seek medical treatment for the child was no longer protected from criminal liability. See Hermanson v. State, 604 So. 2d 775, 782 (Fla. 1992) (holding that the legislature failed to "clearly indicate the point at which a parent's reliance on his or her religious beliefs in the treatment of his or her children becomes criminal conduct."); State v. McKown, 475 N.W.2d 63, 68 (Minn. 1991) (rejecting parents' argument that spiritual treatment exemption in criminal neglect statute is a defense to second-degree manslaughter but concluding that the language of the exemption in the criminal neglect statute did not satisfy due process because it was "broadly worded, stating that a parent may in good faith 'select and depend upon' spiritual treatment and prayer, without indicating a point at which doing so will expose the parent to criminal liability."). These courts have concluded that a spiritual treatment exemption in one statute, such as a criminal neglect statute, misled parents to believe that they could treat the child with spiritual treatment alone and did not provide fair notice that they could face charges for a different crime under a different statute. These courts have concluded that the parents' belief that the spiritual treatment exemption protected them from criminal liability altogether was reasonable.

Other courts have rejected these lack-of-fair-notice arguments and concluded that spiritual treatment exemptions allow a parent to treat a child by spiritual means so long as the illness does not place the child's life at risk but that once there is a substantial risk of serious harm, the parent must seek medical attention for the child. For example, in State v. Neumann, the Wisconsin Supreme Court held that the legislature had clearly limited the scope of the exemption to charges of criminal child abuse, and thus the parents could not have reasonably believed that they could not be found guilty under the reckless homicide statute. 832 N.W.2d at 577-578. Similarly, in Walker v. Superior Court, the court held that "the 'matter of degree' that persons relying on prayer treatment must estimate rightly is the point at which their course of conduct becomes criminally negligent" and concluded that the statute provided "constitutionally sufficient notice to defendant that the provision of prayer alone to her daughter would be accommodated only insofar as the child was not threatened with serious physical harm or illness." 763 P.2d at 872. See also State v. Hays, 964 P.2d 1042, 1046 (Or. Ct. App. 1998) (rejecting father's lack-of-fair-notice argument and concluding that the spiritual treatment exemption "permit[s] a parent to treat a child by prayer or other spiritual means so long as the illness is not life threatening. However, once a reasonable person should know that there is a substantial risk that the child will die without medical care, the parent must provide that care, or allow it to be provided, at the risk of criminal sanctions if the child does die.").

Commonwealth v. Twitchell, 617 N.E.2d 609 (Mass. 1993), illustrates the confusion created by spiritual treatment statutes. The exemption in *Twitchell* expressly provided a defense to criminal liability for neglect, but was silent with regard to liability for more serious common-law crimes. The Supreme Court of Massachusetts rejected the parents' argument that the statute "did not give fair warning" that it did not provide a defense to liability for common-law involuntary manslaughter. 617 N.E.2d at 617. The court concluded that "[t]he fact that at some point in a given case a parent's conduct may lose the protection of the spiritual treatment provision and may become subject to the application of the common law of homicide is not a circumstance that presents a due process of law 'fair warning' violation." Id. However, the court reversed the parents' conviction and remanded for a new trial based on the parents' assertion that they relied on a Christian Science publication that relied on an official interpretation of the Massachusetts Attorney General. This official interpretation stated that the criminal neglect statute "expressly precludes imposition of criminal liability as a negligent parent for failure to provide medical care because of religious beliefs." Id. at 618. The court held that the Massachusetts Attorney General's official opinion was potentially misleading and that the defendants had a right to assert it as an affirmative defense.

For scholarly discussion of the fair-notice arguments in these cases, see Jennifer L. Rosato, *Putting Square Pegs in A Round Hole: Procedural Due Process and the Effect of Faith Healing Exemptions on the Prosecution of Faith Healing Parents*, 29 U.S.F. L. REV. 43, 102-116 (1994).

Illustration 14 is based on Walker v. Superior Court, 763 P.2d 852 (Cal. 1988).

A number of states have repealed or limited their spiritual treatment exemptions, often as a result of the highly publicized death of a child who was denied necessary medical treatment for religious reasons. See, e.g., ARK. CODE ANN. § 5-27-221 (repealed 1993) (repealing the religious exemption from criminal permissive abuse of a child statute); COLO. REV. STAT. ANN. § 19-3-103 (amended 1989) (amending neglect statute to specify that the exemption applies only to practices of a "recognized method of religious healing" and noting that the exemption does not apply in life-threatening situations); DEL. CODE ANN. TIT. 11, § 1104 (amended 1996) (amending spiritual treatment to make failure to provide a child with medical care a prosecutable offense if it results in death or serious injury to the child); HAW. REV. STAT. ANN. § 350-4 (repealed 1992); MD. CODE ANN. FAM. LAW § 5-701(b)(2) (repealed 1994); MASS. GEN. LAWS ANN. CH. 273, § 1 (West 2016) (repealed 1993); MINN. STAT. ANN. § 626.556(g)(5) (amended 1994) (adding that spiritual treatment exemption does not relieve parents or guardians of their duty to report lack of medical care if it could cause serious danger to the child's health); OR. REV. STAT. ANN. § 163.115(4) (repealed 2011) (repealing spiritual treatment exemption to manslaughter); R.I. GEN. LAWS. ANN. § 40-11-15 (2004) (amending spiritual treatment statute to provide that religious practices will not "prevent the child from being considered abused or neglected if the child is harmed or threatened."); S.D. CODIFIED LAWS § 26-8A-2 (repealed 1990); TENN. CODE ANN. § 39-15-402 (2016) (repealing spiritual treatment defense to felony child abuse, neglect, and endangerment after court's decision in State v. Crank, 468 S.W.3d 15 (Tenn. 2015) but retaining spiritual treatment defense to misdemeanor neglect and dependency in TENN. CODE ANN. § 37-1-

157 (West)).

For states that retain spiritual treatment exemptions but expressly authorize courts to order medical treatment for a child when necessary to protect the child from physical, mental, or emotional harm, see *Statutory Note on Spiritual Treatment Exemptions*.

Many organizations oppose spiritual treatment exemptions and have advocated for their repeal. See Children's Healthcare Is a Legal Duty (CHILD), Inc., http://childrenshealthcare.org/; American Academy of Pediatrics, *Conflicts Between Religious or Spiritual Beliefs and Pediatric Care: Informed Refusal, Exemptions, and Public Funding*, 132 Pediatrics 962 (Nov. 2013); American Medical Association, House of Delegates Resolution H-60.96. For articles and books criticizing spiritual treatment exemptions, see Erwin Chemerinsky & Michele Goodwin, *Religion is Not a Basis for Harming Others: Review Essay of Paul A. Offit's Bad Faith: When Religious Belief Undermines Modern Medicine*, 104 GEO. L.J. 1111 (2016) (arguing that parents do not have a constitutional or statutory right to deny necessary medical care to their children); PAUL A. OFFIT, BAD FAITH: WHEN RELIGIOUS BELIEF UNDERMINES MODERN MEDICINE (2015); ALAN ROGERS, THE CHILD CASES: HOW AMERICA'S RELIGIOUS EXEMPTION LAWS HARM CHILDREN (2014); SHAWN FRANCIS PETERS, WHEN PRAYER FAILS: FAITH HEALING, CHILDREN, AND THE LAW (2008).

Congress and 21 states have enacted Religious Freedom Restoration Acts (RFRAs) which provide that the state may not burden the free exercise of religion except when necessary to serve a compelling state interest. The U.S. Supreme Court held that the federal RFRA was unconstitutional as applied to the states. See City of Boerne v. Flores, 521 U.S. 507 (1997). Courts have rejected RFRA challenges to a conviction for failure to provide a child with necessary medical care. See State v Hays, 964 P.2d 1042 (Or. Ct. App. 1998). In *Hays*, a father who had been convicted of criminally negligent homicide for failure to seek medical care for child with acute leukemia argued that the federal RFRA requires the state to demonstrate a compelling state interest before punishing him for acting in accordance with his religious beliefs. The Oregon Court of Appeals rejected his claim on the ground that the U.S. Supreme Court had held that RFRA was unconstitutional as applied to the states and could not be applied retroactively as defendant claimed because RFRA was never constitutional, at least as applied to the states. In State v. Crank, a mother challenged her conviction for neglect claiming that that the state had burdened her free exercise of religion in violation of Tennessee's Preservation of Religious Freedom Act, which prohibits the state from "substantially burden[ing] a person's free exercise of religion" unless it can show a compelling governmental interest and that the burden constitutes the "least restrictive means of furthering that compelling governmental interest." The trial court rejected her claim because the Act was not in effect at the time of her daughter's death. The trial court held, and the Supreme Court of Tennessee affirmed, that the Act did not apply retroactively. State v. Crank, 468 S.W.3d 15 (Tenn. 2015). Although neither of these courts addressed the merits of the claims under RFRA, such challenges are unlikely to be successful. RFRA statutes seek to ensure that the state does not burden the free exercise of religion absent a compelling state interest. It is undisputed that protecting a child's health from serious harm is a compelling state interest. See *Hays*, 964 P.2d at 1047 (stating that "[p]rotecting the lives and welfare of children is

unquestionably a compelling state interest.") (citing Ginsberg v. New York, 390 U.S. 629, 640-641 (1968)); *Crank*, 468 S.W.3d at 38 ("There is clearly a compelling state interest to protect children from abuse or neglect.").

For states that have adopted a Religious Freedom Restoration Act, see Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 845 n.26 (2014) (listing statutes). Arkansas and Indiana have enacted RFRAs since this list was compiled. See ARK. CODE ANN. §§ 16-123-401 to 16-123-407 (West 2017); IND. CODE ANN. §§ 34-13-9-0.7 to 34-13-9-11 (West 2018).

Comment j. Financial ability. For statutes providing that a child is not neglected if the failure of a parent or other obligated adult to seek necessary medical care for the child is caused primarily by financial inability to pay for care, see ARK. CODE ANN. § 9-27-303(36)(A)(ii) (West 2016) (defining "neglect" as the "[f]ailure or refusal to provide the . . . medical treatment necessary for the juvenile's well-being, except when the failure or refusal is caused primarily by the financial inability of the person legally responsible and no services for relief have been offered.") (emphasis added); DEL. CODE ANN. TIT. 10 § 901(18) (West 2014) (defining a child as "neglected" if the person responsible for the child's care "[h]as the ability and financial means to provide for the care of the child; and . . . [f]ails to provide necessary care with regard to . . . health, medical or other care necessary for the child's emotional, physical, or mental health, or safety and general well-being."); FLA. STAT. ANN. § 39.01(44) (West 2016) (the failure to provide a child with "necessary . . . medical treatment . . . shall not be considered neglect if caused primarily by financial inability unless actual services for relief have been offered to and rejected by such person."); FLA. STAT. ANN. § 39.01(30)(f) (West 2016) ("the term 'neglects the child' means that the parent or other person responsible for the child's welfare fails to supply the child with adequate . . . health care, although financially able to do so or although offered financial or other means to do so."); LA. CHILD. CODE ANN § ART. 603(18) (providing that the "inability of a parent or caretaker to provide for a child due to inadequate financial resources shall not, for that reason alone, be considered neglect."); MASS. REGS. CODE TIT. 110, § 2.00 (2016) (defining "neglect" as the failure "either deliberately or through negligence or inability" to provide a child with "minimally adequate . . . medical care . . . provided, however, that such inability is not due solely to inadequate economic resources or solely to the existence of a handicapping condition."); N.Y. FAM. CT. ACT § 1012(f)(1)(A) (McKinney) (defining "neglected child" to include a child "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 . . . in supplying the child with adequate . . . medical, dental, optometrical or surgical care, though financially able to do so or offered financial or other reasonable means to do so"); WIS. STAT. ANN. § 48.13 (West) (granting the court child-protection jurisdiction when a "parent, guardian or legal custodian neglects," refuses, or "is at substantial risk of neglecting, refusing" or is unable for reasons other than poverty to provide necessary . . . medical or dental care . . . so as to seriously endanger the physical health of the child"); see also New Jersey Div. of Youth & Family Servs. v. P.W.R., 11 A.3d 844, 856 (N.J. 2011) (finding that based on the father's

and stepmother's "temporary financial setbacks [their] judgment to delay completing [the child's] teeth-straightening process hardly constituted a form of medical neglect.").

Statutory Note on Civil Medical Neglect Statutes

For civil child-protection statutes defining medical neglect, see ALA. CODE § 12-15-301(8) (2016) (defining neglect to include "the failure to provide adequate … medical treatment …"); ARIZ. REV. STAT. ANN. § 8-201(25)(a)(2017) (defining "neglect" as "[t]he inability or unwillingness of a parent, guardian or custodian of a child to provide that child with . . . medical care if that inability or unwillingness causes unreasonable risk of harm to the child's health or welfare"); COLO. REV. STAT. § 19-1-103(1)(a)(III) (2017) (defining "child abuse or neglect" to include the failure of a parent, legal guardian or custodian "to take the same actions to provide adequate . . . medical care . . . that a prudent parent would take."); IDAHO CODE § 16-1602(31) (West 2016) ("'Neglected' means a child . . . [w]ho is without proper . . . medical or other care . . . necessary for his well-being because of the conduct or omission of his parents, guardian or other custodian or their neglect or refusal to provide them."); IND. CODE § 31-34-1-1 (2016) (a child is in need of services if "the child's physical or mental condition is seriously impaired or seriously endangered as a result of the inability, refusal, or neglect of the child's parent, guardian, or custodian to supply the child with necessary . . . medical care. . ."); IOWA CODE § 232.2(6)(e) (2017) (defining child in need of assistance as one "e. Who is in need of medical treatment to cure, alleviate, or prevent serious physical injury or illness and whose parent, guardian, or custodian is unwilling or unable to provide such treatment" or "f. Who is in need of treatment to cure or alleviate serious mental illness or disorder, or emotional damage as evidenced by severe anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others and whose parent, guardian, or custodian is unwilling to provide such treatment."); KENTUCKY REV. STAT. § 600.020(1)(a)(8) (2016) ("'Abused or neglected child' means a child whose health or welfare is harmed or threatened with harm when . . . [a] parent, guardian . . . or other person exercising custodial control or supervision of the child . . . does not provide the child with . . . medical care necessary for the child's well-being."); LA. CHILD. CODE ANN. ART. 603(18) (defining "neglect" as "the refusal or unreasonable failure of a parent or caretaker to supply the child with necessary . . . care, treatment, or counseling for any injury, illness, or condition of the child, as a result of which the child's physical, mental, or emotional health and safety is substantially threatened or impaired."); 22 ME. REV. STAT. ANN. § 4002(6)(B-1) (2016) ("Deprivation of necessary health care when the deprivation places the child in danger of serious harm" is evidence of "serious abuse or neglect"); N.C. GEN. STAT. ANN. § 7B-101(15) (defining as neglected a child "who is not provided necessary medical care; or who is not provided necessary remedial care" by its "parent, guardian, custodian, or caretaker"); NEV. REV. STAT. ANN. § 432B.140 (West 2015) ("Negligent treatment or maltreatment of a child occurs if a child . . . is without proper . . . medical care . . . necessary for the well-being of the child because of. . . the neglect or refusal of the person to provide them when able to do so."); N.H. REV. STAT. ANN. § 169-C:3(XIX)(b) (2016)

(defining a "[n]eglected child" as a child . . . "[w]ho is without proper . . . care or control necessary for his physical, mental, or emotional health, when it is established that his health has suffered or is very likely to suffer serious impairment"); N.J. STAT. ANN. § 9:6-1 (West) (defining neglect to include "anyone having the custody or control of the child . . . willfully failing to provide proper and sufficient . . . medical attendance or surgical treatment"); N.M. STAT. ANN. § 30-6-1(A)(2) (2016) ("'neglect' means that a child is without proper . . . medical . . . care"); N.Y. FAM. CT. ACT LAW § 1012(f)(i)(A) (McKinney 2016) (a "[n]eglected child" is one "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 in supplying the child with adequate . . . medical, dental, optometrical or surgical care"); N.C. GEN. STAT. ANN. § 7B-101(15) (West 2016) as amended by 2016 N.C. Sess. Laws (H.B. 1030) (defining as neglected a "juvenile who does not receive proper care . . . from the juvenile's parent, guardian, custodian, or caretaker . . . or who is not provided necessary medical care; or who is not provided necessary remedial care"); N.D. CENT. CODE ANN. § 27-20-02(1)(b)(3) (West 2015) (a child is abandoned when his or her parent "willfully fail[s] to furnish . . . medical attention reasonably sufficient to meet the child's needs"); OHIO REV. CODE ANN. § 2151.03(A)(3) (West 2016) (a "neglected child" includes a child "[w]hose parents, guardian, or custodian neglects . . . or refuses to provide proper or necessary . . . medical or surgical care or treatment"); OR. REV. STAT. ANN. § 419B.005(1)(a)(F) (West 2016) (including within the definition of "abuse" the "[n]egligent treatment or maltreatment of a child, including . . . the failure to provide adequate . . . medical care"); 23 PA. STAT. AND CONS. STAT. ANN. § 6303(a) (West 2016) (defining "[s]erious physical neglect" to include "[t]he failure to provide a child with adequate . . . medical care"); R.I. GEN. LAWS ANN. § 14-1-3(8)(i) (West 2016) (defining "[n]eglect" to include instances where "the parents or guardian . . . [f]ails to supply the child with adequate . . . medical care"); S.C. CODE ANN. § 63-7-20(6)(c) (2016) ("'[c]hild abuse or neglect' or 'harm' occurs when the parent, guardian, or other person responsible for the child's welfare . . . fails to supply the child with adequate . . . health care," i.e., "any medical or nonmedical remedial health care permitted or authorized under state law"); S.D. CODIFIED LAWS § 26-8A-2(4) (2016) (defining an "abused or neglected child" as a child "[w]hose parent, guardian, or custodian fails or refuses to provide proper or necessary . . . medical care"); TENN. CODE ANN. 37-1-102(b)(12)(D) (defining a neglected child as one "[w]hose parent, guardian or custodian neglects or refuses to provide necessary medical, surgical, institutional or hospital care…."); UTAH CODE ANN. § 78A-6-105(27)(a)(iii) (West 2016) (defining "neglect" to include the "failure or refusal of a parent, guardian, or custodian to provide proper or necessary . . . medical care"); VT. STAT. ANN. tit. 33, § 4912(1), (6)(B) (West 2016) (An "'[a]bused or neglected child' means a child whose physical health, psychological growth and development, or welfare is harmed or is at substantial risk of harm by . . . [f]ailure to supply the child with adequate . . . healthcare."); VA. CODE ANN. § 16.1-228(2) (2016) (defining an "[a]bused or neglected child" as one "[w]hose parents or other person responsible for his care neglects or refuses to provide care necessary for his health"); W. VA. CODE

ANN. § 49-1-201 (West 2016) (defining a "[n]eglected child" as a child "[w]hose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with necessary . . . medical care"); WIS. STAT. ANN. § 48.13(10) (West 2016) (defining child in need of protection or services as a child "[w]hose parent, guardian or legal custodian neglects, refuses or is unable for reasons other than poverty to provide necessary . . . medical or dental care . . . so as to seriously endanger the physical health of the child."); WYO. STAT. ANN. § 14-3-202(a)(vii) (West 2016) (defining "[n]eglect" as "a failure or refusal by those responsible for the child's welfare to provide adequate . . . medical, surgical or any other care necessary for the child's wellbeing").

Statutory Note on Spiritual Treatment Exemptions

For spiritual treatment exemptions in civil child-protection statutes, see ALA. CODE § 26-14-7.2(a) (2016) ("When an investigation of child abuse or neglect by the Department of Human Resources determines that a parent or legal guardian legitimately practicing his or her religious beliefs has not provided specific medical treatment for a child, the parent or legal guardian shall not be considered a negligent parent or guardian for that reason alone."); ALASKA STAT. ANN. § 47.10.085 (West 2016) ("In a case in which the minor's status as a child in need of aid is sought to be based on the need for medical care, the court may, upon consideration of the health of the minor and the fact, if it is a fact, that the minor is being provided treatment by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by an accredited practitioner of the church or denomination, dismiss the proceedings and thereby close the matter."); ARIZ. REV. STAT. ANN. § 8-201.01(A)(1) (West 2016) ("A child who in good faith is being furnished Christian Science treatment by a duly accredited practitioner shall not, for that reason alone, be considered to be an abused, neglected or dependent child."); ARIZ. REV. STAT. ANN. § 8-531.01 (West 2016) (for purposes of the termination of parental rights statute, "no child who in good faith is being furnished christian science treatment by a duly accredited practitioner shall, for that reason alone, be considered to be an abused, neglected or dependent child") (West 2016); ARK. CODE ANN. § 9-30-103(5)(B) (West 2016) ("Nothing in this chapter shall be construed to mean a child is neglected or abused for the sole reason he or she is being provided treatment by spiritual means through prayer alone in accordance with the tenets or practices of a recognized church or religious denomination by a duly accredited practitioner thereof in lieu of medical or surgical treatment[.]"); CAL. WELF. & INST. CODE § 300.5 (West 2016) ("In any case in which a child is alleged [to be a dependent child] on the basis that he or she is in need of medical care, the court, in making that finding, shall give consideration to any treatment being provided to the child by spiritual means through prayer alone in accordance with the tenets and practices of a recognized church or religious denomination by an accredited practitioner thereof."); COLO. REV. STAT. ANN. § 19-3-103(1) (West 2016) ("No child who in lieu of medical treatment is under treatment solely by spiritual means through prayer in accordance with a recognized method of religious healing shall, for that reason alone, be considered to have been neglected or dependent within the purview of this

article."); CONN. GEN. STAT. ANN. § 17a-104 (West 2016) (". . . the treatment of any child by a Christian Science practitioner in lieu of treatment by a licensed practitioner of the healing arts shall not itself constitute maltreatment"); DEL. CODE. ANN. TIT. 16, § 913 (West 2016) ("No child who in good faith is under treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by a duly accredited practitioner thereof shall for that reason alone be considered a neglected child for the purposes of this chapter."); D.C. CODE ANN. § 4-1321.06 (West 2016) ("[N]o child who in good faith is under treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by a duly accredited practitioner thereof shall, for that reason alone, be considered to have been neglected within the purview of this subchapter."); FLA. STAT. ANN. § 39.01(30)(f) (West 2016) ("[A] parent or legal custodian who, by reason of the legitimate practice of religious beliefs, does not provide specified medical treatment for a child may not be considered abusive or neglectful for that reason alone"); GA. CODE ANN. § 15-11-311(c) (West 2016) ("[a] parent's reliance on prayer or other religious nonmedical means for healing in lieu of medical care, in the exercise of religious beliefs, shall not be the sole basis for determining a parent to be unwilling or unable to provide safety and care adequate to meet his or her child's physical, emotional, and mental health needs"); GA. CODE ANN. § 15-11-107(a) (West 2016) ("A parent, guardian, or legal custodian's reliance on prayer or other religious nonmedical means for healing in lieu of medical care, in the exercise of religious beliefs, shall not be the sole basis for considering his or her child to be a dependent child."); IDAHO CODE ANN. § 16-1602(31)(a) (West 2016) ("no child whose parent or guardian chooses for such child treatment by prayers through spiritual means alone in lieu of medical treatment shall be deemed for that reason alone to be neglected or lack parental care necessary for his health and well-being"); 325 ILL. COMP. STAT. ANN. 5/3 (West 2016) ("[a] child shall not be considered neglected or abused for the sole reason that such child's parent or other person responsible for his or her welfare depends upon spiritual means through prayer alone for the treatment or cure of disease or remedial care"); IND. CODE ANN. § 31-34-1-14 (West 2016) ("If a parent, guardian, or custodian fails to provide specific medical treatment for a child because of the legitimate and genuine practice of the religious beliefs of the parent, guardian, or custodian, a rebuttable presumption arises that the child is not a child in need of services because of the failure."); IOWA CODE ANN. § 232.68(4)(c) (West 2016) ("A parent or guardian legitimately practicing religious beliefs who does not provide specified medical treatment for a child for that reason alone shall not be considered abusing the child, however this provision shall not preclude a court from ordering that medical service be provided to the child where the child's health requires it."); KAN. STAT. ANN. § 38-2202(t)(3) (West 2016) ("A parent legitimately practicing religious beliefs who does not provide specified medical treatment for a child because of religious beliefs shall not for that reason be considered a negligent parent[.]"); KY. REV. STAT. ANN. § 600.020(1)(a)(8) (West 2016) ("A parent or other person exercising custodial control or supervision of the child legitimately practicing the person's religious beliefs shall not be considered a negligent parent solely because of the failure to provide specified medical treatment for a child for that reason alone."); LA. CHILD. CODE ANN. art. 603(18) (2016)

("Whenever, in lieu of medical care, a child is being provided treatment in accordance with the tenets of a well-recognized religious method of healing which has a reasonable, proven record of success, the child shall not, for that reason alone, be considered to be neglected or maltreated."); ME. REV. STAT. ANN. tit. 22, § 4010(1) (2016) ("[A] child shall not be considered to be abused or neglected, in jeopardy of health or welfare or in danger of serious harm solely because treatment is by spiritual means by an accredited practitioner of a recognized religious organization."); MICH. COMP. LAWS ANN. § 722.634 (West 2016) ("A parent or guardian legitimately practicing his religious beliefs who thereby does not provide specified medical treatment for a child, for that reason alone shall not be considered a negligent parent or guardian."); MINN. STAT. ANN. § 626.556(Subd. 2)(g)(5) (West 2017) ("nothing in this section shall be construed to mean that a child is neglected solely because the child's parent, guardian, or other person responsible for the child's care in good faith selects and depends upon spiritual means or prayer for treatment or care of disease or remedial care of the child in lieu of medical care."); MISS. CODE ANN. § 43-21-105(l)(i) (West 2016) ("[A] parent who withholds medical treatment from any child who in good faith is under treatment by spiritual means alone through prayer in accordance with the tenets and practices of a recognized church or religious denomination by a duly accredited practitioner thereof shall not, for that reason alone, be considered to be neglectful under any provision of this chapter"); MO. ANN. STAT. § 210.115(4) (West 2016) ("any child who does not receive specified medical treatment by reason of the legitimate practice of the religious belief of the child's parents, guardian, or others legally responsible for the child, for that reason alone, shall not be found to be an abused or neglected child"); MONT. CODE ANN. § 41-3-102(4)(b) (West 2015) ("This chapter may not be construed to require or justify a finding of child abuse or neglect for the sole reason that a parent or legal guardian, because of religious beliefs, does not provide adequate health care for a child."); NEV. REV. STAT. ANN. § 128.013(2) (West 2015) ("A child's health or welfare is not considered injured solely because the child's parent or guardian, in the practice of his or her religious beliefs, selects and depends upon nonmedical remedial treatment for the child, if such treatment is recognized and permitted under the laws of this state."); N.H. REV. STAT. ANN. § 169-C:3(XIX) (2016) ("[N]o child who is, in good faith, under treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by a duly accredited practitioner thereof shall, for that reason alone, be considered to be a neglected child under this chapter."); N.J. STAT. ANN. § 9:6-1.1 (West 2016) ("This article to which this act is a supplement shall not be construed to deny the right of a parent, guardian or person having the care, custody and control of any child to treat or provide treatment for an ill child in accordance with the religious tenets of any church as authorized by other statutes of this State; *provided*, that the laws, rules, and regulations relating to communicable diseases and sanitary matters are not violated."); N.J. STAT. ANN. § 9:6-8.21(c) (West 2016) ("No child who in good faith is under treatment by spiritual means alone through prayer in accordance with the tenets and practices of a recognized church or religious denomination by a duly accredited practitioner thereof shall for this reason alone be considered to be abused or neglected."); N.M. STAT. ANN. § 32A-4-2(F)(5) (West 2016) (". . . nothing in the Children's Code shall be construed to imply that a child who is being

provided with treatment by spiritual means alone through prayer, in accordance with the tenets and practices of a recognized church or religious denomination, by a duly accredited practitioner thereof is for that reason alone a neglected child within the meaning of the Children's Code"); N.D. CENT. CODE ANN. § 50-25.1-05.1(2) (West 2016) ("A decision that services are required may not be made when the suspected child abuse or neglect arises solely out of conduct involving the legitimate practice of religious beliefs by a parent or guardian."); OHIO REV. CODE ANN. § 2151.03(B) (West 2016) ("Nothing in this chapter shall be construed as subjecting a parent, guardian, or custodian of a child to criminal liability when, solely in the practice of religious beliefs, the parent, guardian, or custodian fails to provide adequate medical or surgical care or treatment for the child."); OKLA. STAT. ANN. tit. 10A, § 1-1-105(20) (West 2016) ("Nothing in the Oklahoma Children's Code shall be construed to mean a child is deprived for the sole reason the parent, legal guardian, or person having custody or control of a child, in good faith, selects or depends upon spiritual means alone through prayer, in accordance with the tenets and practice of a recognized church or religious denomination, for the treatment or cure of disease or remedial care of such child."); 23 PA. STAT. AND CONS. STAT. ANN. § 6304(b) (West 2016) ("If, upon investigation, the county agency determines that a child has not been provided needed medical or surgical care because of sincerely held religious beliefs of the child's parents or relative within the third degree of consanguinity and with whom the child resides, which beliefs are consistent with those of a bona fide religion, the child shall not be deemed to be physically or mentally abused" but providing that "in such cases the "county agency shall closely monitor the child and the child's family and shall seek court-ordered medical intervention when the lack of medical or surgical care threatens the child's life or long-term health" and providing that exemption "shall not apply if the failure to provide needed medical or surgical care causes the death of the child."); R.I. GEN. LAWS ANN. § 40-11-15 (West 2016) ("A parent or guardian practicing his or her religious beliefs which differ from general community standards who does not provide specified medical treatment for a child shall not, for that reason alone, be considered a negligent parent or guardian."); S.C. CODE ANN. § 63-7-950(A) (2016) ("Upon a determination by a preponderance of evidence that adequate health care was withheld for religious reasons or other reasons reflecting an exercise of judgment by the parent or guardian as to the best interest of the child, the department may enter a finding that the child is in need of medical care and that the parent or other person responsible does not consent to medical care for religious reasons or other reasons reflecting an exercise of judgment as to the best interests of the child. The department may not enter a finding by a preponderance of evidence that the parent or other person responsible for the child has abused or neglected the child because of the withholding of medical treatment for religious reasons or for other reasons reflecting an exercise of judgment as to the best interests of the child."); UTAH CODE ANN. § 78A-6-105(27)(c) (West 2016) ("A parent or guardian legitimately practicing religious beliefs and who, for that reason, does not provide specified medical treatment for a child, is not guilty of neglect."); VT. STAT. ANN. TIT. 33, § 4912(6)(B) (West 2016) ("a parent or other person responsible for a child's care legitimately practicing his or her religious beliefs who thereby does not provide specified medical treatment for a child shall not be considered neglectful for that reason alone");

VA. CODE ANN. §§ 63.2-100(2), 16.1-228 (West 2017) ("no child who in good faith is under treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination shall for that reason alone be considered to be an abused or neglected child"), but see VA H.B. 1295, 2016 Reg. Sess. (2016) (proposing to eliminate the spiritual treatment exemption from the civil neglect statute); WASH. REV. CODE ANN. § 26.44.020(18) (West 2018) ("A person who is being furnished Christian Science treatment by a duly accredited Christian Science practitioner will not be considered, for that reason alone, a neglected person . . ."), but see WA H.B. 1290, 2017 65th Leg. (2017) (reintroduced Jan. 2018) (proposing to eliminate the spiritual treatment exemption from civil neglect statute); WIS. STAT. ANN. § 48.981(3)(c)(4) (West 2016) ("A determination that abuse or neglect has occurred may not be based solely on the fact that the child's parent, guardian, or legal custodian in good faith selects and relies on prayer or other religious means for treatment of disease or for remedial care of the child."); WYO. STAT. ANN. § 14-3-202(a)(vii) (West 2016) ("Treatment given in good faith by spiritual means alone, through prayer, by a duly accredited practitioner in accordance with the tenets and practices of a recognized church or religious denomination is not child neglect for that reason alone[.]")

For spiritual treatment exemptions in criminal statutes, see, e.g., ALA. CODE § 13A-13-6(b) (2016) ("A person does not [commit the crime of endangering the welfare of a child] for the sole reason he provides a child under the age of 19 years . . . with remedial treatment by spiritual means alone in accordance with the tenets and practices of a recognized church or religious denomination by a duly accredited practitioner thereof in lieu of medical treatment."); ALASKA STAT. ANN. § 11.51.120(b) (West 2016) ("There is no failure to provide medical attention to a child [under the criminal nonsupport statute] if the child is provided treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by an accredited practitioner of the church or denomination."); Ark. Code Ann. § 5-10-101(a)(9)(b) (West 2018) ("A person commits capital murder if …
(9)(A) Under circumstances manifesting extreme indifference to the value of human life, the person knowingly causes the death of a person fourteen (14) years of age or younger at the time the murder was committed if the defendant was eighteen (18) years of age or older at the time the murder was committed. (B) It is an affirmative defense to any prosecution under this subdivision (a)(9) arising from the failure of the parent, guardian, or person standing in loco parentis to provide specified medical or surgical treatment, that the parent, guardian, or person standing in loco parentis relied solely on spiritual treatment through prayer in accordance with the tenets and practices of an established church or religious denomination of which he or she is a member."

CAL. PENAL CODE § 270 (West 2016) ("If a parent provides a minor with treatment by spiritual means through prayer alone in accordance with the tenets and practices of a recognized church or religious denomination, by a duly accredited practitioner thereof, such treatment shall constitute 'other remedial care', as used in this section" for purposes of the criminal nonsupport statute); DEL. CODE. ANN. tit. 11, § 1104 (West 2016) ("[i]n any prosecution for endangering the welfare of a child . . . which is based upon an alleged failure or refusal to provide proper medical

care or treatment to an ill child, it is an affirmative defense that the accused is a member or adherent of an organized church or religious group, the tenets of which prescribe prayer as the principal treatment for illness, and treated or caused the ill child to be treated in accordance with those tenets"); IDAHO CODE ANN. § 18-1501(1), (4) (West 2016) (imposing criminal felony liability on "(1) Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of such child to be injured, or willfully causes or permits such child to be placed in such situation that its person or health is endangered" but providing that "(4) The practice of a parent or guardian who chooses for his child treatment by prayer or spiritual means alone shall not for that reason alone be construed to have violated the duty of care to such child"); IOWA CODE ANN. § 726.6(1)(d) (West 2016) ("the failure to provide specific medical treatment shall not for that reason alone be considered willful deprivation of health care if the person can show that such treatment would conflict with the tenets and practice of a recognized religious denomination of which the person is an adherent or member"); KAN. STAT. ANN. § 21-5601(d) (West 2016) (providing defense to criminal child endangerment when "the child's parent or guardian, in good faith, selects and depends upon spiritual means alone through prayer, in accordance with the tenets and practice of a recognized church or religious denomination, for the treatment or cure of disease or remedial care of such child"); ME. REV. STAT. ANN. tit. 17-a, § 557 (2016) ("For the purposes of this chapter, [offenses against the family], a person who in good faith provides treatment for a child or dependent person by spiritual means through prayer may not for that reason alone be determined to have knowingly endangered the welfare of that child or dependent person."); MINN. STAT. ANN. § 609.378(1) (West 2016) ("If a parent, guardian, or caretaker responsible for the child's care in good faith selects and depends upon spiritual means or prayer for treatment or care of disease or remedial care of the child, this treatment or care is "health care," for purposes of [the neglect or endangerment of a child] clause."); MO. REV. STAT. § 568.050(2) (West 2016) ("Nothing in [the endangering the welfare of a child] section shall be construed to mean the welfare of a child is endangered for the sole reason that he or she is being provided nonmedical remedial treatment recognized and permitted under the laws of this state."); NEV. REV. STAT. ANN. § 200.5085 (West 2015) (providing a defense for criminal abuse or neglect of a child when "his or her parent or guardian, in good faith, selects and depends upon nonmedical remedial treatment for such child, if such treatment is recognized and permitted under the laws of this State in lieu of medical treatment."); N.H. REV. STAT. ANN. § 639:3(IV) (2016) ("A person who pursuant to the tenets of a recognized religion fails to conform to an otherwise existing duty of care or protection is not guilty of an offense under this section" under the statute imposing criminal responsibility for endangering the welfare of a child); N.Y. PENAL LAW § 260.15 (McKinney 2016) ("In any prosecution for endangering the welfare of a child . . . based upon an alleged failure or refusal to provide proper medical care or treatment to an ill child, it is an affirmative defense that the defendant (a) is a parent, guardian or other person legally charged with the care or custody of such child; and (b) is a member or adherent of an organized church or religious group the tenets of

which prescribe prayer as the principal treatment for illness; and (c) treated or caused such ill child to be treated in accordance with such tenets."); OHIO REV. CODE ANN. § 2919.22(A) (West 2016) ("It is not a violation of a duty of care, protection, or support under [the child endangerment statute] when the parent, guardian, custodian, or person having custody or control of a child treats the physical or mental illness or defect of the child by spiritual means through prayer alone, in accordance with the tenets of a recognized religious body."); OKLA. STAT. ANN. tit. 21, § 852(C) (West 2016) (providing a defense for criminal abandonment and neglect of children when "a child is endangered for the sole reason the parent, guardian or person having custody or control of a child, in good faith, selects and depends upon spiritual means alone through prayer, in accordance with the tenets and practice of a recognized church or religious denomination, for the treatment or cure of a disease or remedial care of such child"); R.I. GEN. LAWS § 11-9-5(b) (West 2016) ("a parent or guardian practicing his or her religious beliefs which differ from general community standards who does not provide specified medical treatment for a child shall not, for that reason alone, be considered an abusive or negligent parent or guardian" under the statute imposing criminal responsibility for cruelty to or neglect of a child); TENN. CODE ANN. § 39-15-402(c) (West 2016) (providing a defense for criminal abuse, neglect, or endangerment of a child when "the child is being provided treatment by spiritual means through prayer alone, in accordance with the tenets or practices of a recognized church or religious denomination by a duly accredited practitioner of the recognized church or religious denomination, in lieu of medical or surgical treatment."); UTAH CODE ANN. § 76-5-109(6) (West 2016) ("A parent or legal guardian who provides a child with treatment by spiritual means alone through prayer, in lieu of medical treatment, in accordance with the tenets and practices of an established church or religious denomination of which the parent or legal guardian is a member or adherent shall not, for that reason alone, be considered to have committed an offense under [the criminal child abuse and child abandonment section]."); UTAH CODE ANN. § 76-5-110(3)(a) (West 2016) ("A parent or legal guardian who provides a child with treatment by spiritual means alone through prayer, in lieu of medical treatment, in accordance with the tenets and practices of an established church or religious denomination of which the parent or legal guardian is a member or adherent shall not, for that reason alone, be considered to be in violation under [the criminal child abuse and child abandonment section]."); VA. CODE ANN. § 18.2-314 (West 2016) (providing defense to misdemeanor for failure to seek medical attention for a child, specifically "that any parent or other person having custody of a minor child that is being furnished Christian Science treatment by a duly accredited Christian Science practitioner shall not, for that reason alone, be considered in violation of" the section criminalizing the failure to secure medical attention for an injured child); VA. CODE ANN. § 18.2-371.1(C) (West 2016) ("Any parent, guardian, or other person having care, custody, or control of a minor child who in good faith is under treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination shall not, for that reason alone, be considered in violation of" the felony child abuse and neglect statute), but see VA H.B. 1295, 2016 Reg. Sess. (2016) (proposing to eliminate the spiritual treatment exemption from the criminal neglect statute); WASH. REV. CODE ANN. § 9A.42.005 (West 2016) ("It is the intent of the

legislature that a person who, in good faith, is furnished Christian Science treatment by a duly accredited Christian Science practitioner in lieu of medical care is not considered deprived of medically necessary health care or abandoned" under the criminal abuse and neglect statute), but see WA H.B. 1290, 2017 Leg., 65th Sess. (2017) (proposing to eliminate the spiritual treatment exception following the death of children in surrounding states, including Oregon and Idaho); W. VA. CODE. ANN. § 61-8D-4a(b) (West 2016) ("No child who in lieu of medical treatment was under treatment solely by spiritual means through prayer in accordance with a recognized method of religious healing with a reasonable proven record of success shall, for that reason alone, be considered to have been neglected" under statute making child neglect resulting in the child's death a felony); WIS. STAT. ANN. § 948.03(6) (West 2016) (providing an exemption from criminal responsibility for child abuse when "he or she provides a child with treatment by spiritual means through prayer alone for healing in accordance with the religious method of healing permitted under s. 48.981(3)(c)4 or 448.03(6) in lieu of medical or surgical treatment.").

For examples of states with spiritual treatment exemptions that expressly authorize courts to order medical treatment for a child when necessary to protect the child from physical, mental, or emotional harm, see ALA. CODE § 26-14-7.2(a) (2016) ("This exception shall not preclude a court from ordering that medical services be provided to the child when the child's health requires it."); COLO. REV. STAT. ANN. § 19-3-103(1) (West 2016) (providing that "the religious rights of a parent, guardian, or legal custodian shall not limit the access of a child to medical care in a life-threatening situation or when the condition will result in serious disability" and authorizing the court to order medical treatment for the child under those circumstances); FLA. STAT. ANN. § 39.01(30)(f)(3) (West 2016) ("… a parent or legal custodian who, by reason of the legitimate practice of religious beliefs, does not provide specified medical treatment for a child may not be considered abusive or neglectful for that reason alone, but such an exception does not . . . [p]reclude a court from ordering, when the health of the child requires it, the provision of medical services by a physician, as defined in this section, or treatment by a duly accredited practitioner who relies solely on spiritual means for healing in accordance with the tenets and practices of a well-recognized church or religious organization."); IDAHO CODE ANN. § 16-1602(31)(a) (West 2018) (providing that no child who is treated by "spiritual means alone in lieu of medical treatment shall be deemed for that reason alone to be neglected or lack parental care necessary for his health and well-being, but this subsection shall not prevent the court from acting pursuant" to section authorizing a court to order medical treatment when "the life of the child would be greatly endangered without certain treatment and the parent, guardian or other custodian refuses or fails to consent."); IND. CODE ANN. § 31-34-1-14 (West 2016) (rebuttable presumption that a child is not neglected because the parent "fails to provide specific medical treatment for a child because of the legitimate and genuine practice of the religious beliefs of the parent, guardian, or custodian . . . does not … prevent a juvenile court from ordering, when the health of a child requires, medical services from a physician licensed to practice medicine in Indiana."); IOWA CODE ANN. § 232.68(4)(c) (West 2016) (spiritual treatment exemption does "not preclude a court from ordering that medical service be provided to the child where the child's health requires it"); KAN.

STAT. ANN. §§ 38-2202(t)(3), 38-2217(a)(2) (West 2016) (". . . however, this exception shall not preclude a court from entering an order" "[w]hen the health or condition of a child who is subject to jurisdiction of the court requires it"); KY. REV. STAT. ANN. § 600.020(1)(a)(8) (West 2016) (exemption does "not preclude a court from ordering necessary medical services for a child"); LA. CHILD. CODE ANN. art. 603(18) (2016) (spiritual treatment exemption does not "prohibit the court from ordering medical services for the child when there is substantial risk of harm to the child's health or welfare."); MICH. COMP. LAWS ANN. § 722.634 (West 2016) ("This section shall not preclude a court from ordering the provision of medical services or nonmedical remedial services recognized by state law to a child where the child's health requires it nor does it abrogate the responsibility of a person required to report child abuse or neglect"); MO. ANN. STAT. § 210.115(4) (West 2016) ("Such an exception shall not limit the administrative or judicial authority of the state to ensure that medical services are provided to the child when the child's health requires it."); MONT. CODE ANN. § 41-3-102(4)(b) (West 2015) ("However, this chapter may not be construed to limit the administrative or judicial authority of the state to ensure that medical care is provided to the child when there is imminent substantial risk of serious harm to the child."); N.M. STAT. ANN. § 32A-4-2(G)(5) (West 2018) (providing that "nothing in the Children's Code shall be construed to imply that a child who is being provided with treatment by spiritual means alone through prayer, in accordance with the tenets and practices of a recognized church or religious denomination, by a duly accredited practitioner thereof is for that reason alone a neglected child … provided that no child shall be denied the protection afforded to all children under the Children's Code."); N.D. CENT. CODE ANN. § 50-25.1-05.1(2) (West 2016) ("This exception does not preclude a court from ordering that medical services be provided to the child when the child's life or safety requires it or the child is subject to harm or threatened harm."); OHIO REV. CODE ANN. § 2151.03(B) (West 2016) (This exception "does not preclude any exercise of the authority of the state, any political subdivision, or any court to ensure that medical or surgical care or treatment is provided to a child when the child's health requires the provision of medical or surgical care or treatment."); OKLA. STAT. ANN. tit. 10A, § 1-1-105(20) (West 2016) ("Nothing contained in this paragraph shall prevent a court from immediately assuming custody of a child and ordering whatever action may be necessary, including medical treatment, to protect the child's health or welfare."); OKLA. STAT. ANN. tit. 21, § 852(D) (West 2016) (stating that a child is not "endangered for the sole reason" that he or she is being treated solely with spiritual treatment "provided, that medical care shall be provided where permanent physical damage could result to such child"); 23 PA. STAT. AND CONS. STAT. ANN. § 6304 (West) (providing that a child is not abused if the child-protection agency determines that the "child has not been provided needed medical or surgical care because of sincerely held religious beliefs of the child's parents or relative within the third degree of consanguinity and with whom the child resides, which beliefs are consistent with those of a bona fide religion" but requiring the agency to "closely monitor the child and the child's family and . . . seek court-ordered medical intervention when the lack of medical or surgical care threatens the child's life or long-term health"); R.I. GEN. LAWS ANN. § 40-11-15 (West 2016) ("However, nothing in this section shall . . . preclude the court from

ordering medical services or nonmedical services recognized by the laws of this state to be provided to the child where his or her health requires it."); S.C. CODE ANN. § 63-7-950(A) (2016) ("the department may petition the family court for an order finding that medical care is necessary to prevent death or permanent harm to the child. Upon a determination that a preponderance of evidence shows that the child might die or suffer permanent harm, the court may issue its order authorizing medical treatment without the consent of the parent or other person responsible for the welfare of the child."); S.D. CODIFIED LAWS § 26-8A-23 (West 2016) ("If a child has been or is under treatment for physical, mental, or emotional illness solely by a spiritual means, the court may . . . order that medical, psychological, or psychiatric treatment and hospitalization be provided for the child."); UTAH CODE ANN. § 76-5-110(3)(b) (West 2016) (". . . the exception under Subsection (3)(a) does not preclude a court from ordering medical services from a physician licensed to engage in the practice of medicine to be provided to the child where there is substantial risk of harm to the child's health or welfare if the treatment is not provided."); VA. CODE ANN. § 63.2-100(2) (West 2016) (providing that "no child who in good faith is under treatment solely by spiritual means" shall be deemed an abused or neglected child, but noting that the exemption does not limit the provisions of § 16.1-278.4, which authorizes the court to make orders regarding the "supervision, care and rehabilitation of the child"); WIS. STAT. ANN. § 48.981(3)(c)(4) (West 2016) (noting that "a determination that abuse or neglect has occurred may not be based solely on the fact that the child's parent, guardian, or legal custodian in good faith selects and relies on prayer or other religious means for treatment of disease or for remedial care of the child," but recognizing that this "does not prohibit a court from ordering medical services for the child if the child's health requires it.").

PART III

CHILDREN IN THE JUSTICE SYSTEM

CHAPTER 14

PRE-ADJUDICATION

Section 14-2. Interrogation and the Admissibility of Statements

§ 14-2. Introductory Note: Incriminating statements by criminal defendants play a critically important role in the efficient functioning of the justice system. Confessions are given substantial weight by factfinders, facilitating convictions; for this reason, law-enforcement agents are motivated to obtain incriminating statements from suspects during interrogation. But fundamental principles of due process, together with the Fifth Amendment privilege against self-incrimination and Sixth Amendment right to counsel, create constitutional constraints on police efforts to obtain confessions.

The Fifth Amendment privilege is based on two principles. The first is evidentiary: certain confessions by defendants are excluded from subsequent criminal proceedings because they are deemed to be untrustworthy, the products of coercion in the setting of police interrogation. The second, more foundational principle, generally implicated in the commitment to fair criminal proceedings under the Due Process Clause of the Fourteenth Amendment, defines the relationship between the individual citizen and the state in our society: The privilege aims to "prevent the state, whether by physical force or by psychological domination, from overcoming the mind and will of the person under investigation." In re Gault, 387 U.S. 1, 47 (1967). In imposing this restraint, the privilege seeks to preserve some measure of equality between the individual and the state, such that the state agent should not be allowed to extract from the defendant the evidence needed to convict.

The Supreme Court has concluded that suspects facing interrogation have the right to remain silent and the right to the presence of an attorney to guard against coercion and to advise them in making the decision whether to exercise the right to remain silent. Interrogation cannot proceed in the absence of a valid waiver of both rights.

The general legal standard for evaluating whether a suspect validly waived the right to counsel and right to remain silent is the same for adults and juveniles—the totality of the

circumstances. But many courts have recognized that the confessions of juveniles are more untrustworthy than are those of adults and that the "mind and will" of a juvenile is more likely to be overcome by law-enforcement agents when the youth is questioned as a suspect of a crime. Juveniles are more likely than are adults to make incriminating statements when interrogated and more likely to confess to crimes that they have not committed. These tendencies of juveniles are discussed in § 14.21, Comments *c* and *h* and the Reporters' Notes thereto. Juveniles are also less likely than are adults to understand their rights in this setting and more likely to waive those rights. Research supporting this conclusion is discussed in § 14.21, Reporters' Note to Comments *c*. Further, younger juveniles are particularly vulnerable and are more likely to give an invalid waiver and involuntary confession. § 14.22, Reporters' Note to Comment ***a.***

The empirically based premise that juveniles, because of their developmental immaturity, are more vulnerable to coercion and less likely to understand or to exercise their interrogation rights has led courts to examine the confessions of juveniles with "special caution." In re Gault, 387 U.S. at 45. Courts have recognized that the age and immaturity of juveniles are critically important to every aspect of the legal determination of whether a statement made during interrogation can be introduced against the juvenile in a subsequent delinquency or criminal proceeding. Because juveniles are more vulnerable and may be less capable of exercising their rights, courts often suppress juvenile confessions obtained under conditions that would not result in suppression of an adult's statement.

Recent constitutional and legal developments have reinforced the importance of critical judicial scrutiny of juveniles' statements. In 2011, the Supreme Court in J.D.B. v. North Carolina held that a juvenile's age must be considered in determining whether a juvenile was in police custody when the statement was made. 131 S. Ct. 2394 (2011). This requirement is adopted in § 14.20(b). In *J.D.B.*, the Court emphasized the vulnerability of juveniles to coercion in the interrogation setting and the risk of false confessions. A year later, in Miller v. Alabama, the Supreme Court held that the Eighth Amendment prohibits states from imposing a mandatory sentence of life without parole on offenders under age 18 at the time of their crimes. 132 S. Ct. 2455 (2012). In describing why this harsh sentence is restricted for juveniles, *Miller* observed that juveniles' convictions might result from their inability to deal with police and prosecutors, citing *J.D.B.* Id. at 2468. In 2016, the Court underscored the importance of *Miller,* holding that it created a substantive rule of constitutional law and therefore applied retroactively to prisoners whose

sentences were final before it was decided. Montgomery v. Louisiana, 577 U.S. __ , 136 S. Ct. 718 (2016). These opinions are having an impact on courts applying interrogation law. They are also part of a broader constitutional and legal trend recognizing that juveniles, due to developmental immaturity, differ from adults, and that the law regulating juvenile crime must attend to these differences.

Because juveniles may be less capable than adults of understanding their interrogation rights and more vulnerable to aggressive police tactics, special protections are afforded juveniles facing interrogation. These Sections provide protections that contemporary courts and legislatures have required in evaluating the admissibility of juveniles' statements made in response to police questioning. First, as required by *J.D.B.*, § 14.20(b) provides that a "reasonable juvenile" standard be applied to the judicial determination of whether the juvenile was in custody, and *Miranda* warnings were required. Section 14.21 applies the totality of circumstances standard to determine whether the juvenile's *Miranda* waiver was valid and the statement voluntarily made. Although the standard is generally that same for adults and juveniles, for juveniles this standard must be applied in light of the individual's age, experience, intelligence, and education. Under § 14.22, a special protection applies to the waiver of a juvenile age 14 or younger; the waiver is not valid unless the juvenile has had the assistance of counsel at interrogation. Section 14.23 requires that the interrogation ordinarily must be video-recorded in its entirety, as required by legislatures and courts in many states.

§ 14.20. Rights of a Juvenile in Custody; Definition of Custody

(a) A juvenile in custody has the right to the assistance of counsel and the right to remain silent when questioned about the juvenile's involvement in criminal activity by a law-enforcement officer.

(b) A juvenile is in custody if, under the circumstances of the questioning:

(1) a reasonable juvenile of the suspect's age would feel that his or her freedom of movement was substantially restricted such that the juvenile was not at liberty to terminate the interview and leave, and

(2) the officer is aware that the individual being questioned is a juvenile or a reasonable officer would have been aware that the individual is not an adult.

Comment:

a. Background and history. The privilege against self-incrimination and the right to the assistance of counsel extend to all individuals subject to police interrogation. Escobedo v. Illinois, 378 U.S. 478 (1964), clarified that under the Sixth Amendment every suspect has the right to consult with an attorney during custodial police interrogation and that the police must inform the suspect of the right to remain silent. Miranda v. Arizona, 384 U.S. 436 (1966), famously held that a statement made by a defendant in custody is admissible in a subsequent criminal proceeding only if the defendant was informed of these rights and the consequences of waiver and, on that basis, executed a knowing, intelligent, and voluntary waiver of the rights. Section 14.21 formulates the standard for evaluating the validity of waiver.

The juvenile facing criminal prosecution as an adult historically enjoyed the right to counsel and the privilege against self-incrimination on the same basis as adult defendants. But under the traditional rehabilitative model of juvenile justice, juveniles in many states did not enjoy these rights in juvenile-delinquency proceedings. The Supreme Court, in In re Gault, 387 U.S. 1 (1967), extended the right to counsel and the privilege against self-incrimination to the juvenile in a delinquency proceeding. Following *Gault,* the judge in a subsequent delinquency proceeding or criminal trial will exclude a confession obtained in violation of *Miranda* and other Supreme Court decisions restricting custodial interrogation. Section 14.20(a) embodies this requirement.

The obligation of a law-enforcement officer to inform a suspect of *Miranda* rights arises only when the suspect is in custody, because questioning in a custodial setting is presumed to be inherently coercive. In a noncustodial setting, in which the individual's freedom is not unduly restricted, questioning can proceed without *Miranda* warnings and the suspect's incriminating statements will ordinarily be admissible in subsequent criminal proceedings. Determination of whether an individual is in custody is based on a two-part objective inquiry described by the Supreme Court: First, what were the circumstances surrounding the interrogation? Second, under those circumstances, would a reasonable person have felt at liberty to terminate the interrogation and leave? Thompson v. Keohane, 516 U.S. 99 (1995). Under this standard, a reasonable person is assumed to be a reasonable adult. Custody is always triggered when law-enforcement agents arrest a suspect, but a suspect can be in custody without a formal arrest.

In 2011, the Supreme Court held that the determination of whether a juvenile is in custody at the time the incriminating statement was made must include consideration of the age of the juvenile. J.D.B v. North Carolina, 131 S. Ct. 2394 (2011). Effectively, the Court adopted, as a matter of constitutional law, a "reasonable juvenile" standard for deciding whether the juvenile was in custody, a standard that courts in several states had adopted before *J.D.B.* was decided. Under the reasonable-juvenile standard, a court could find a juvenile to be in custody under circumstances in which *Miranda* warnings would not be required for an adult under the reasonable-person standard. Section 14.20(b) sets out this standard. If a juvenile was in custody under this standard, a statement made in response to police questioning is admissible only if the juvenile was informed of his or her *Miranda* rights and executed a valid waiver. See § 14.21. Further, in directing that the custody determination must include consideration of the juvenile's age, *J.D.B.* implicitly acknowledged that younger juveniles may be more susceptible to coercion than older juveniles. Section 14.22 recognizes the special vulnerability of younger juveniles in requiring that a juvenile younger than age 15 in custody can give a valid waiver only after consultation with counsel.

b. Rationale for the reasonable-juvenile standard. The reasonable-juvenile standard set forth in this Section recognizes that a juvenile is more vulnerable than an adult to pressure when questioned by law-enforcement agents. Courts assume that a juvenile is more likely than an adult to feel restricted in his or her freedom to terminate questioning by law-enforcement officers.

As courts have observed, a juvenile may respond differently than an adult because juveniles are subject to adult authority in daily life, simply on the basis of legal minority. The typical juvenile is taught from a young age to submit to the authority of teachers, school officials, law-enforcement officers, and other adults. A minority youth particularly may be instructed by parents to show deference to law-enforcement officers for the youth's personal safety, and may be especially unlikely to feel free to terminate an interview. Further, a juvenile generally lacks experience with autonomy, contributing to a greater tendency toward submissiveness than an adult might show in the context of police questioning. Thus, the traditional "reasonable person" standard, as applied to a juvenile without consideration of the youth's age, can result in a judgment that the youth was not in custody, when similarly situated youths of the juvenile's age would feel compelled to continue to answer the officer's questions. Further, although most juveniles are likely to feel constrained

when questioned by a police officer, a younger juvenile, who usually has even less experience with autonomy, is likely to feel less freedom to leave and terminate questioning.

c. Objective inquiry. Under this Section, a court deciding whether a juvenile was in custody when the incriminating statement was made does not consider the actual mindset of the individual youth. The question for the factfinder is whether a reasonable youth of the juvenile's age would have felt at liberty to terminate the interview under the surrounding circumstances. The law in many contexts assumes that it is objectively possible on the basis of community experience to "determine what is to be expected" of children. Restatement Second, Torts § 283A. This experience "makes it possible to know what to expect of children subjected to police questioning." *J.D.B*, 131 S. Ct. at 2404.

The subjective belief of the officer regarding whether the individual is a juvenile or an adult is relevant only if the officer has knowledge or a reasonable belief about the individual's age. The standard requires the officer to apply the reasonable-juvenile standard when either the officer is aware that the suspect is a juvenile or this fact would be objectively apparent to a reasonable officer. If a reasonable officer would likely believe that the individual is an adult, the officer's mistake about the age of the juvenile will be deemed reasonable.

Illustrations:

1. The manager of the Galleria jewelry store in the mall reported to the police that a watch had been taken from her store. She explained that a short time before the watch was discovered missing, several youths came into the store and walked around, leaving after five minutes. At the time, the manager was busy with a customer and was not sure whether she could identify the youths, but she remembered that one had a blue jacket. A few minutes later, Henry, age 17, walked by with two friends; he was wearing a red jacket. The police officer asked the boys if they could answer a few questions, assuring them that they were not suspects. He then turned to Henry and politely asked a few questions about the incident as they stood in front of the entrance to the H&M store. Henry suffered from an anxiety disorder and was extremely frightened to be questioned by the officer. Feeling trapped, he reported that he had been in the jewelry store and took the watch. Henry was not in custody when questioned at the mall and the officer was not obliged to give *Miranda* warnings. Because Henry's fear was due to his anxiety disorder, it was not relevant to

consideration of whether a reasonable juvenile of Henry's age would have felt free to leave. A brief, polite, voluntary interview in a public setting is not custodial under the reasonable-juvenile standard absent other constraining conditions.

2. Officer Rogers was investigating a sexual-assault allegation brought by Maria, a student at Springfield College, against Elmo, her former boyfriend. The officer drove to the college in search of Elmo and found him in the student union, chatting with friends. Rogers asked Elmo to sit with him at a nearby lounge. Rogers questioned Elmo for 30 minutes without giving *Miranda* warnings. Elmo is 17 years old, but appears to be older. Elmo was not in custody during the interview. A police interview of an adult in a public place with others around is usually not deemed custodial. Depending on the duration, the tone of the questioning, and other conditions, such an interview could be custodial for a juvenile. But, because of the college setting and Elmo's appearance, Officer Rogers reasonably assumed that he was not a juvenile. Thus, he was not required to consider Elmo's age in deciding whether Elmo was in custody and should have been given *Miranda* warnings.

d. Surrounding circumstances. The factfinder deciding whether a juvenile was in police custody must consider the circumstances surrounding the questioning, and on that basis ask whether a reasonable juvenile of the juvenile's age would have felt that he or she was at liberty to terminate the interview and leave. J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011). Implicit in the adoption of the reasonable-juvenile standard is the assumption that circumstances that would not signify that an adult is in custody may be sufficient to constitute custodial interrogation for a juvenile. Also implicit is the assumption that a younger juvenile may feel more constrained than one who is older. Relevant circumstances include the location of the interview, background interactions between the youth's community and law enforcement, the duration of the interview, the extent to which the juvenile was isolated from other people, the extent to which the interview setting was enclosed, the number and role of questioners, and the manner in which the interrogator addressed the juvenile, including whether the youth was told he was free to go. The fact that a parent agrees to the questioning of a juvenile or agrees voluntarily to bring the juvenile to the location of the interview does not make it voluntary or insulate it from a finding of custodial interrogation. Further, questioning in the home or school setting may be more constraining for a juvenile than for an adult. Considerations relevant to the manner of police questioning include

whether the questioning was threatening or accusatory, and whether it was directed toward eliciting information about the juvenile's involvement in the crime. Extensive questioning about a youth's involvement in a crime in a detention facility, police station, or jail is very likely to be custodial, even when the child's parents voluntarily bring the child to the location. A juvenile also may not feel free to terminate questioning in a school office or children's shelter. Depending on other surrounding circumstances, even questioning in the juvenile's home can be custodial interrogation for a child. The status of the interviewer as a government agent with law-enforcement functions is also relevant. See Reporters' Note to Comment *e*, discussing school resource officers. Often, circumstances are overlapping, and usually, no single consideration is dispositive in resolving the custody question.

Illustrations:

3. Same facts as Illustration 1 above, except that Henry has no anxiety disorder. Henry was not in custody when questioned by the officer in the mall.

In this Illustration, Henry, age 17, is an older teenager, questioned briefly in a polite manner by a police officer. The interview was in a public setting with friends in attendance. Under these circumstances, the questioning is not custodial.

4. Officer Allegro was called to investigate a suspicious fire that severely damaged the Martins' home on Elm Street. The homeowner told Officer Allegro that she suspected that Alicia, a 13-year-old neighbor, was involved in setting the fire, as another neighbor reported seeing Alicia outside the Martins' home shortly before the fire started. Officer Allegro went to Alicia's home and asked Alicia's mother if she could bring Alicia to the police station for a "chat" sometime that afternoon, adding, "No hurry. She can come any time." Alicia's mother said, "Of course," and a few hours later, she took Alicia, an eighth-grader with no criminal record, to the station. Officer Allegro questioned Alicia for an hour in an interview room, at which point she confessed to setting the fire. Alicia was in custody and should have been given *Miranda* warnings. Her statement is not admissible in evidence. The officer's open-ended invitation, together with the mother's voluntary compliance, would likely result in a judgment that the interview was not custodial if the mother herself were the subject. But Alicia's compliance was based on her mother's consent and, particularly given her age and the setting of the questioning, Alicia likely would feel less free to terminate the interview than would an adult.

5. Jason, a 12-year-old in sixth grade, was removed from his mother's home and placed in a foster home with Erica and Al Statler. Two days later, Officer Jimenez stopped by the Statlers' home and told them she wanted to chat with Jason. Officer Jimenez was investigating a burglary in Jason's mother's neighborhood. Someone had broken into a neighbor's home several days earlier and taken cash and a computer. The neighbor suspected Jason and some other neighborhood boys. Officer Jimenez took Jason by himself into the kitchen and asked him questions about the burglary. After an hour, Jason confessed to the burglary. Jason was in custody when questioned in the Statlers' kitchen and Officer Jimenez should have explained his *Miranda* rights. Jason's statement is not admissible in evidence. Jason's lack of familiarity with his foster home, combined with the fact that he was isolated during extensive questioning, support the conclusion that a reasonable 12-year-old in Jason's situation would not have felt at liberty to terminate the interview.

6. Bob, a 13-year-old seventh-grader at Heywood Middle School, was summoned from his history class by Officer O'Brien, the school resource officer. Officer O'Brien told Bob that a local police officer was waiting in the principal's office to ask Bob some questions. Officer O'Brien then escorted Bob to a small conference room next to the principal's office, where Principal Rodriguez and Officer Calhoun from the local police department were waiting. Officer O'Brien closed the door, and the principal said to Bob, "Officer Calhoun has some questions for you. You should cooperate with her." Officer Calhoun then asked Bob questions about a robbery at a nearby 7-11 store. A witness had seen Bob near the store shortly after the robbery. After almost an hour of questioning, Bob confessed to his involvement in the crime. He was arrested shortly thereafter on the basis of this confession. Bob was in custody and should have been given *Miranda* warnings. His statement was not admissible in evidence.

An important factor in the custody decision is whether the law-enforcement officer explained during questioning that the juvenile was free to leave and was not under arrest. The failure to offer this explanation is given substantial weight in the decision that the youth's statement was made during custodial interrogation. The obverse is also true: The officer's statement that the juvenile is free to leave and is not under arrest is evidence that the juvenile was not in custody if a reasonable juvenile, under the circumstances surrounding the interview, would have felt free to terminate the interview and leave. These circumstances can include the

background history of interactions between law enforcement and youths in the juvenile's community.

e. School resource officers and other government agents. A police officer is a law-enforcement agent with the authority to arrest suspects and undertake custodial interrogation. But sometimes the questioning of a juvenile by another government official can amount to custodial interrogation, when the official performs a law-enforcement function or acts as an agent of law enforcement. A school resource officer (SRO), a law-enforcement officer assigned to a public school to maintain safety, can undertake a custodial interrogation of a student and is subject to this Section, regardless of whether the questioning involves a crime on or off school premises. However, a school official such as a principal ordinarily is not a law-enforcement officer. A student questioned by a school official is not in custody unless the official acts in concert with or as the agent of law enforcement. This principle applies in other settings; if a government employee acts as an agent of law enforcement, an interview can be custodial. The director of a juvenile detention facility or a staff member in a residential treatment facility for juvenile offenders can serve in a law-enforcement role and undertake custodial interrogation.

Illustrations:

7. The facts are the same as Illustration 6, except that the SRO Officer O'Brien alone questioned Bob in the presence of the principal, with no other law-enforcement officer present. Bob was in custody and should have been given *Miranda* warnings. His statement was not admissible in evidence.

8. Principal Garcia found a package containing marijuana behind the toilet in the boys' restroom. A teacher told the principal that some of her students reported that Joachim was bragging in the lunchroom about hiding a stash of marijuana in the school. Before questioning Joachim, Principal Garcia called a detective at the local police station for advice and promised to report what happened in the interview. He then followed the officer's instructions in conducting the interview. These instructions included the use of standard police tactics for inducing confession: Principal Garcia told Joachim he was not going to get in trouble and indicated, falsely, that three boys had reported seeing him put the marijuana behind the toilet. After an hour of questioning, Joachim admitted that he had hidden the marijuana. Principal Garcia called the local police department; an officer came to school and arrested Joachim. Joachim was in custody when interviewed by Principal

Garcia and *Miranda* warnings should have been given. His statement was not admissible in evidence. Although an interview by a school official with no involvement of law enforcement is usually not custodial, Principal Garcia was acting in concert with law enforcement. Because of his use of tactics as advised by the police and his promise to report to police, the interview was custodial; a reasonable juvenile would not have felt free to terminate the interview.

9. The facts are the same as Illustration 8, except that Principal Garcia questioned Joachim without consulting the police. After talking to Joachim, who admitted to hiding the marijuana, Principal Garcia called the local police department to report his interview of Joachim. Principal Garcia was not acting in consort with law enforcement and his interview of Joachim was not custodial. He was not required to give *Miranda* warnings to Joachim. If the police subsequently decide to interview Joachim on the basis of this information, the interview will be custodial and the police will be required to give *Miranda* warnings.

10. Officer Jameson suspected Alvin, a mentally disabled juvenile, of participating in a burglary. Due to Alvin's disability, Officer Jameson found it difficult to communicate with him. He asked Erica Lambert, Alvin's social worker, who has known him for years, to assist in questioning. Jameson instructed Lambert about the information that he sought to elicit from Alvin. Lambert interviewed Alvin in an office in Alvin's school, with Officer Jameson sitting nearby. She asked Alvin questions as instructed by Officer Jameson, occasionally consulting with the officer. After an hour of questioning, Alvin confessed to the burglary. Alvin was in custody and should have been informed of his *Miranda* rights. His statement was not admissible in evidence. Lambert acted as an agent of law enforcement in this scenario. Her interview of Alvin amounted to custodial interrogation.

REPORTERS' NOTE

a. Background and history. Until the Supreme Court decided J.D.B. v North Carolina, 131 S. Ct. 2394 (2011), the determination of whether the juvenile suspect was in custody was typically evaluated on the basis of a uniform "reasonable person" standard that applied to adults and juveniles alike. See Stansbury v. California, 511 U.S. 318, 325 (1994) (describing reasonable-person standard); see also Berkemer v. McCarty, 468 U.S. 420, 442 (1984) (same). Although some states considered age in applying the reasonable-person standard to a juvenile, most did not.

For pre-*J.D.B.* opinions requiring that the age of a juvenile be considered in applying the general reasonable-person standard, see, e.g., United States v. Erving L., 147 F.3d 1240 (10th Cir. 1998); State v. Jason L., 2 P.3d 856 (N.M. 2000); State ex rel. Juvenile Dep't of Multnomah Cty. v. Loredo, 865 P.2d 1312 (Or. Ct. App. 1993); In re L.M., 993 S.W.2d 276 (Tex. App. 1999); State v. D.R., 930 P.2d 350 (Wash. Ct. App. 1997). For courts declining to consider the age of the juvenile, see United States v. Little, 851 A.2d 1280 (D.C. 2004); People v. Rodney P., 233 N.E.2d 255 (N.Y. 1967); CSC v. State, 118 P.3d 970 (Wyo. 2005).

In Yarborough v. Alvarado, the Supreme Court declined to find that consideration of the age of the juvenile was constitutionally required in applying the reasonable-person standard to a juvenile. 541 U.S. 652 (2004). The Supreme Court in *J.D.B.* distinguished *Alvarado* on the ground that failing to consider a suspect's age was not "objectively unreasonable" under the deferential standard of review of state court rulings under the federal statute being applied. *J.D.B.*, 131 S. Ct. at 2405. Nonetheless, after *J.D.B.*, courts must consider age in applying the reasonable-person standard to the determination of whether a juvenile was in custody.

Commentators and courts have recognized that the importance of *J.D.B.* extends well beyond the issue of the standard to be applied in deciding whether police questioning of a juvenile was custodial. *J.D.B.* rationalized its holding that age must be incorporated into the custody analysis by pointing to the general vulnerability of juveniles in interrogation and their propensity to confess (even falsely) in response to police pressure. These concerns are discussed in § 14.21, Comment *h*, and the Reporters' Note thereto. Thus, the opinion strongly reinforced a theme of earlier Supreme Court juvenile interrogation cases—that juveniles are likely to succumb to pressures that an adult could withstand, and that special caution must be used in reviewing statements by juveniles made during police interrogation. Gallegos v. Colorado, 370 U.S. 49 (1962); Haley v. Ohio, 332 U.S. 596 (1948). Some scholars have argued that *J.D.B.* is important to juvenile crime regulation beyond interrogation because it reinterprets in a developmental framework the basic construct of "reasonableness" that underlies many criminal law doctrines. See Marsha L. Levick and Elizabeth-Ann Tierney, *The United States Supreme Court Adopts A Reasonable Juvenile Standard in J.D.B. v. North Carolina for Purposes of the Miranda Custody Analysis: Can A More Reasoned Justice System for Juveniles Be Far Behind?*, 47 HARV. C.R.-C.L. L. REV. 501, 512 (2012). See also Martin Guggenheim & Randy Hertz, J.D.B. *and the Maturing of Juvenile Confession Suppression Law*, 38 WASH. U. J.L. & POL'Y 109, 176 (2012) ("*J.D.B.* has opened the door to an extensive reshaping of juvenile rights in criminal and delinquency cases.").

J.D.B. is part of a broader reform trend in which courts and legislatures increasingly have focused on the developmental immaturity of juveniles in responding to their criminal conduct. At the level of constitutional law, *J.D.B.* is one of five important Supreme Court decisions since 2005 that have emphasized the principle that "children are different," and that the justice system must pay attention to these differences in responding to juveniles' criminal conduct. Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012). In three Eighth Amendment opinions, including *Miller*, the Court prohibited the imposition of harsh criminal sentences on juvenile offenders on proportionality

grounds. Id. (prohibiting mandatory life without parole for homicide); Graham v. Florida, 560 U.S. 48 (2010) (prohibiting life without parole for non-homicide offenses); Roper v. Simmons, 543 U.S. 551 (2005) (prohibiting death penalty). Then in 2016, the Court underscored the "children are different" principle announced in these opinions: Montgomery v. Louisiana held that *Miller* applied retroactively to prisoners whose sentences were final before the case was decided because *Miller* created a new substantive constitutional rule. 577 U.S. __, 136 S. Ct. 718 (2016). *Montgomery* emphasized again the importance of youthful immaturity to the justice system's response to youths' crimes. These opinions have had a major impact on courts and legislatures and have contributed to the implementation of a developmental approach that recognizes differences between juveniles and adults in the justice system. These reforms have influenced legal doctrine regulating interrogation, waiver of rights, trial participation, and sentencing. See § 14.21, Reporters' Note to Comment *a;* § 18.3, Adjudicative Competence in Delinquency Proceedings, Comment *b*, *Developmental incompetence*, and the Reporter's Note thereto.

Scholars have analyzed the broader developmental framework adopted by the Supreme Court in *J.D.B.* and the Eighth Amendment opinions. See e.g., Elizabeth Scott, Thomas Grisso, Marsha Levick, and Laurence Steinberg, *Juvenile Sentencing Reform in a Constitutional Framework*, 88 TEMPLE L. REV. 675 (2016); Elizabeth S. Scott, *"Children Are Different": Constitutional Values and Justice Policy*, 11 OHIO ST. J. CRIM. L. 71 (2013); Shobha L. Mahadev, *Youth Matters: Roper, Graham, J.D.B., Miller, and the New Juvenile Jurisprudence*, THE CHAMPION, March 2014, at 14, 17 (constitutionally inspired reforms recognize "inherent developmental, biological, and behavioral differences between children and adults").

b. Rationale for the reasonable-juvenile standard. The Supreme Court in *J.D.B.* drew on common sense and experience in concluding that the evaluation of whether a juvenile was in custody must include consideration of the juvenile's age. A reasonable-juvenile standard is necessary, the Court concluded, because "a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go." J.D.B. v. North Carolina, 131 S. Ct. 2394, 2403 (2011). The Court pointed to the school setting in which J.D.B. was questioned, where applying the adult reasonable-person standard would often result in "nonsensical" custody analysis. Id. at 2405.

> Were the court precluded from taking J.D.B.'s youth into account, it would be forced to evaluate the circumstances present here through the eyes of a reasonable person of average years. In other words, how would a reasonable adult understand his situation, after being removed from a seventh-grade social studies class by a uniformed school resource officer; being encouraged by his assistant principal to 'do the right thing' . . . ? To describe such an inquiry is to demonstrate its absurdity.

Id.

In justifying the adoption of the reasonable-juvenile standard, the Court pointed to general concerns that led it to conclude that juveniles needed special protections when they face police questioning. As evidence of why the special standard was needed, the Court noted the high risk

that juveniles will be coerced into making false confessions, pointing to an amicus brief that developed this argument. Brief for Center on Wrongful Convictions of Youth et al. as Amici Curiae Supporting Petitioner, J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011), 2010 WL 5385329. Indeed, numerous studies have established juveniles are more likely than adults to be induced into making confessions that later are shown to be false. These studies are discussed in § 14.21, Reporters' Note to Comment *h*.

The Supreme Court's observation that juveniles likely feel more constrained than adults when questioned by police is supported by conventional norms of appropriate behavior by a child dealing with an adult authority figure such as a teacher or police officer. As scholars have noted, "[s]cholarship on moral development explains why a juvenile would be more inclined than an adult to acquiesce to authority." Marsha Levick & Neha Desai, *Still Waiting: The Elusive Quest to Ensure Juveniles a Constitutional Right to Counsel at All Stages of the Juvenile Court Process*, 60 RUTGERS L. REV. 175, 192 (2007). Research evidence supports that children are generally instilled with a respect for authority figures, like police officers, and may thus be more likely to comply with what is asked of them. Phillip R. Costanzo & Marvin E. Shaw, *Conformity as a Function of Age Level*, 37 CHILD DEV. 967 (1966); Barry C. Feld, KIDS, COPS, AND CONFESSIONS: INSIDE THE INTERROGATION ROOM 58 (NYU Press, 2012) (juvenile suspects show an "eagerness to comply with adult authority figures.").

In general, the law assumes that children, including adolescents, are subject to adult authority and do not enjoy the liberty interests of adult citizens. Children are assumed not to possess the capacity to take care of themselves or to make consequential decisions. Rather, they are subject to the custodial control of their parents; if parents falter in exercising their authority, the state steps in as *parens patriae*. The Supreme Court has recognized parents' authority to make decisions for their children in several opinions. See, e.g., Parham v. J.R., 442 U.S. 584, 603 (1979) ("Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions . . . . Parents can and must make these judgments."). See also Baker v. Smith, 477 S.W.2d 149 (Ky. 1971); State v. Gleason, 404 A.2d 573 (Me. 1979); Wayburn v. Schupf, 350 N.E.2d 906 (N.Y. 1976). In an opinion allowing juveniles to be placed in pretrial detention without the procedural protections enjoyed by adults, the Supreme Court noted that "juveniles, unlike adults, are always in some form of custody." Schall v. Martin, 467 U.S. 253, 265 (1984). Thus the legal status of minor children generally is one of subordination to adult authority and of limited autonomy and liberty. It would be surprising if many juveniles did not feel more constrained than adult counterparts in facing police questioning.

c. Objective inquiry. The Supreme Court has been clear that the reasonable-person inquiry applied to determine whether a suspect is in custody is an objective test. Thompson v. Keohane, 516 U.S. 99, 112 (1995) ("[T]he court must apply an objective test to resolve 'the ultimate inquiry' . . . ." (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983)) In *Thompson*, the Court noted, "The benefit of the objective custody analysis is that it is 'designed to give clear guidance to the police.'" *J.D.B.*, 131 S. Ct. at 2402 (quoting Yarborough v. Alvarado, 541 U.S. 652, 668 (2004)).

J.D.B. modified the test to include consideration of the suspect's age, arguing that, in incorporating this single trait, the reasonable-juvenile standard was still an objective test. Including age as part of the custody analysis did not require the officer to "anticipat[e] the frailties or idiosyncrasies" of the particular suspect being questioned. Id. at 2404 (quoting *Alvarado*, 541 U.S. at 662). The court noted, "[t]he same 'wide basis of community experience' that makes it possible, as an objective matter, 'to determine what is to be expected' of children in other contexts, likewise makes it possible to know what to expect of children subjected to police questioning." Id. (quoting Restatement Second, Torts § 283A, at 15 (AM. LAW INST. 1965)) (internal citations omitted).

Under the standard adopted by the Court, age is included in the custody analysis only if the officer knew the juvenile's age "at the time of questioning or [the child's age] would have been objectively apparent to a reasonable officer." Id. at 2406. Thus unless the officer has personal knowledge of the suspect's age, an objective test is applied to the question of whether the officer should have known that a juvenile was being questioned.

d. Surrounding circumstances. Although the analysis of whether the juvenile was in custody is objective, it is undertaken in light of the circumstances surrounding the questioning. In applying the reasonable-juvenile standard, courts assume that a juvenile may not feel free to terminate the interview under circumstances in which an adult would not feel constrained. Surrounding circumstances include police behavior during questioning, the location or setting of the interview, and its duration. The weight given to the surrounding circumstances can vary depending on the age of the juveniles; younger juveniles are likely to feel more constrained than older youths under comparable circumstances. Often no single circumstance is dispositive in the custody analysis.

The age of the juvenile is not a "surrounding circumstance" but a mandatory consideration under the standard. Courts assume that a younger juvenile is less likely to feel free to leave when questioned by the police than an older juvenile or an adult. See, e.g., People v. T.C., 898 P.2d 20, 25 (Colo. 1995) (affirming juvenile court finding that "the circumstances of the interrogation including . . . the fact that it involved an eleven-year-old, would lead a reasonable person in T.C.'s situation to feel that he had no choice but to stay and listen to the officer"); United States v. IMM, 747 F.3d at 767 ("no reasonable twelve year old would have felt free to [terminate the interview"]); In re Joshua David C., 698 A.2d 1155 (Md. Ct. App. 1997) (10-year-old was in custody when interviewed at night without a parent, and not informed he was free to leave). Implicit in consideration of age are factors associated with juveniles' dependent status that contribute to a lack of autonomy. Thus, a parent or school principal might insist that the juvenile submit to the interview, giving the juvenile little choice. Further, younger juveniles are also more susceptible to police coercion and less likely to understand *Miranda* rights than older juveniles and adults. Under § 14.22, a younger juvenile can give a valid waiver of *Miranda* rights only after consulting with counsel.

Courts point to several aspects of police behavior in determining whether the juvenile would have felt free to terminate the interview. When an adult volunteers freely to answer questions, courts are not likely to find that the interview was custodial. A juvenile also usually is

not in custody if she acts voluntarily upon the invitation or request of the police and there are no threats, express or implied, that she will be forcibly taken. Chambers v. State, 866 S.W.2d 9 (Tex. Crim. App. 1993). But courts recognize that a younger juvenile is likely to feel constrained when questioned by police even though the youth volunteered to answer questions, See e.g. People v. T.C., 898 P.2d 20, 25 (Colo. 1995) (compliance by 11-year-old was irrelevant to conclusion that questioning was custodial). Further, as suggested above, a parent's voluntary agreement to questioning of a juvenile does not mean that the juvenile him- or herself (or a reasonable juvenile) views the interrogation as voluntary. See United States v. IMM, 747 F.3d 754, 766 (9th Cir. 2014) ("[A]lthough [suspect's] mother agreed to a voluntary meeting with the detective, there is no evidence that [suspect] himself ever agreed to an interview . . . .")

Illustration 4 is based in part on United States v. IMM, 747 F.3d 754, 766 (9th Cir. 2014).

The nature and tone of the questions are also important in determining whether the interview was custodial. Aggressive questioning and use of deceptive interrogation tactics, such as making false representations about evidence designed to elicit a confession, weigh in favor of finding custody. United States v. IMM, 747 F.3d at 767 ("detective's aggressive, coercive, and deceptive interrogation tactics created an atmosphere in which no reasonable twelve year old would have felt free to tell the detective, an adult making full use of his position of authority, to stop questioning him"). But some courts have found that a question designed to minimize the crime (suggesting it was "a possible accident") does not affect a reasonable juvenile's belief that he or she is free, or not free, to leave. Sturm v. Superintendent of Indian River Juvenile Corr. Facility, 514 F. App'x 618, 624 (6th Cir.), cert. denied sub nom. B.C.S. v. Darnell, 134 S. Ct. 96 (2013). See also In re Marquita M., 970 N.E.2d 598, 604 (Ill. Ct. App. 2012) (holding that questioning which was "inquisitory ('what would have happened if you and T.H. got into a fight?') rather than accusatory ('You were going to stab T.H., weren't you?') was not custodial).

The location of the questioning is also important. A police station can be "naturally coercive" and weighs in favor of finding that a juvenile was in custody. Jeffley v. State, 38 S.W.3d 847, 857 (Tex. Ct. App. 2001). See also United States v. IMM, 747 F.3d 754, 767 (9th Cir. 2014) (noting juveniles are especially likely to be "overwhelmed" in a police-station setting). But even within a police station, location is important in evaluating whether the juvenile was in custody. For example, an interrogation in a "private office" within a campus police station is deemed less of a restraint on freedom than an interrogation in an interview room. United States v. Littledale, 652 F.3d 698, 702 (7th Cir. 2011).

Police questioning in a juvenile's home often has not been found to be custodial, a response uniformly applied to adult suspects. Courts assume that this familiar setting is not likely in itself to be intimidating. See, e.g., United States v. Erving L., 147 F.3d 1240 (10th Cir. 1998); In re D.W., 989 A.2d 196 (D.C. 2010); In re D.L.H., Jr., 32 N.E.3d 1075 (Ill. 2015). But if an interview in a juvenile's home is accompanied by aggressive police tactics, such as "continued skeptical questioning[,]" it has been deemed custodial. See State v. C.F., 798 So. 2d 751, 754 (Fla. Dist. Ct. App. 2001); see also State v. J.Y., 623 So. 2d 1232 (Fla. Dist. Ct. App. 1993).

Illustration 5 is adapted from Murray v. Earle, 405 F.3d 278 (5th Cir. 2005).

Questioning that takes place out of doors is likely to be deemed voluntary and not custodial, especially if it is relatively brief. In In re N.J., the court found that the juvenile was not in custody when asked one question by a police officer outside during daytime hours. 752 S.E.2d 255 (N.C. Ct. App. 2013), review denied, 763 S.E.2d 384 (N.C. 2014). However, if other markers suggesting coercion are present—such as multiple adult authority figures and a failure to inform the juvenile that she is free to leave—an interrogation that takes place out of doors can be deemed custodial. See In re B.C.P., 990 N.E.2d 1135 (Ill. 2013).

A juvenile interviewed in a school setting can be found to be in custody if law-enforcement officers play a prominent role in the questioning and other conditions indicate that a reasonable juvenile would not have felt free to terminate the interview. In J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011), the Supreme Court remanded to the trial court to determine whether questioning was custodial when the child was removed from his class by a police officer and questioned in a conference room with two school officials present. Even when a school official takes the juvenile from the classroom, questioning that involves law enforcement may be custodial. One court observed, "It is precisely *because* students are accustomed to having their actions directed by school authorities that a student who is told by a principal or teacher that he must speak with a law enforcement officer might reasonably believe that he is not free to leave the interview or break off questioning." Kalmakoff v. State, 257 P.3d 108, 123 (Alaska 2011). But some courts disagree when the law-enforcement officer is a school resource officer. See People v. N.A.S., 329 P.3d 285, 290 (Colo. 2014) (questioning was not custodial when uniformed school resource officer summoned the juvenile, who was questioned in the presence of family and school officials). Custodial interrogation by school resource officers is further discussed in Comment *e* and the Reporters' Note thereto.

Illustration 6 is based on J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011).

The extent to which the juvenile is isolated during questioning is another factor that is considered. Isolation of the juvenile, like aggressive questioning or an unreasonably long duration, contributes to pressure leading the juvenile to feel constrained from leaving. United States v. IMM, 747 F.3d at 768.

Although no specific duration defines an interview as custodial, courts agree that a juvenile can be in custody after briefer questioning than might be necessary for an adult. See United States v. IMM, 747 F.3d 754 (9th Cir. 2014). A juvenile questioned for four hours was found to be in custody, following the application of a reasonable-juvenile standard. See Smith v. Clark, 612 F. App'x 418 (9th. Cir. 2015). A 30-minute interrogation of a juvenile, absent other factors, has been found not custodial in nature. In re Tyler G., 947 N.E.2d 772 (Ill. App. Ct. 2010).

Noncustodial questioning of a juvenile can become custodial, depending on the duration, location, and nature of the questioning. See Jeffley v. State, 38 S.W.3d 847 (Tex. App. 2001); see also In re M.G., No. 10-09-00037-CV, 2010 WL 3292711, at *5 (Tex. Crim. App. Aug. 11, 2010). If a juvenile asks to leave an interrogation, and this request goes unacknowledged or is affirmatively denied, the questioning shifts from noncustodial interview to custodial interrogation.

An officer's failure to apprise a juvenile of his or her freedom to terminate the interview is a substantial factor in the custody analysis. Some courts find it to be dispositive. See In re Welfare of R.J.E., 630 N.W.2d 457, 460 (Minn. Ct. App. 2001), rev'd on other grounds, 642 N.W.2d 708 (Minn. 2002) (noting "[k]ey to our decision in *G.S.P.* was the fact that the police officer failed to inform G.S.P. that he was not under arrest or that he was free to leave"). See also In re E.W., 114 A.3d 112, 119 (Vt. 2015) (describing failure to inform juvenile that he was free to leave as "most important factor" in custody analysis). This assurance is important because juveniles are generally inexperienced with the legal system, and therefore may not understand that questioning does not necessarily equate with a formal arrest. See Gaono v. Long, No. 13-CV-103-LAB-WVG, 2014 WL 171548, at *17-18 (S.D. Cal. Jan. 10, 2014) (questioning was not custodial when officer informed juvenile suspect numerous times during interview that he was not under arrest and was free to leave, but interview became custodial after juvenile's request to go home was denied); In re Joshua David C., 698 A.2d 1155 (Md. Ct. App. 1997) (10-year-old was in custody when interviewed at night without a parent, and not informed he was free to leave).

Some courts have pointed to an officer's statement that the juvenile was not under arrest, along with other factors, in finding the interview to be noncustodial. See Martinez v. State, 131 S.W.3d 22 (Tex. Crim. App. 2003). However, courts express skepticism that this statement alone would convey to a reasonable juvenile that he or she was free to terminate the interrogation. In In re E.W., 114 A.3d 112, 117 (Vt. 2015) (quoting State v. Sullivan, 80 A.3d 67, 76 (Vt. 2013)), the court observed, "[T]he most important factor is whether police told the defendant [affirmatively] that he or she was free to leave."

e. School resource officers and other government agents. Interviews of juveniles in school often involve both school officials and law-enforcement officers. Under *J.D.B.*, an interview of a student by a police officer about the student's involvement in a crime can constitute custodial interrogation. Most courts that have addressed the issue have concluded that a school resource officer assigned to a school to maintain safety and order is a law-enforcement officer who can undertake custodial interrogation. Questioning by both a school official and a law-enforcement officer can also constitute custodial interrogation. In re Welfare of G.S.P., 610 N.W.2d 651 (Minn. Ct. App. 2000) (finding custodial interrogation existed where assistant principal and school liaison (resource) officer worked together to question a student). Some courts examine the extent of involvement of the school resource officer. When the principal or other school employee was "acting at the behest of law enforcement," the questioning is likely to be custodial. C.S. v. Couch, 843 F. Supp. 2d 894, 918 (N.D. Ind. 2011). Courts also recognize that the school setting is unique, an environment in which a reasonable juvenile *generally* will feel his or her freedom to be constrained. Thus, when the school official created the appearance, whether in concert with law enforcement or not, that the juvenile was not free to leave, the official's questioning in the presence of the law-enforcement officer has been found to be custodial. See In re K.D.L., 700 S.E.2d 766 (N.C. Ct. App. 2010) (noting school resource officer's "near-constant supervision of [suspect's] interrogation and active listening could cause a reasonable person to believe [principal] was interrogating [juvenile suspect] in concert with [school resource officer]"). See also N.C. v. Com.,

396 S.W.3d 852, 856 (Ky. 2013) ("[presence or] absence of law enforcement" during the interrogation is a "significant factor," that should be considered "contextual[ly])." This has not been universally followed. In People v. N.A.S., a Colorado court held that an interview by a school resource officer was not custodial. 329 P.3d 285 (Colo. 2014).

In recent years, concern about the collaboration between school officials and law enforcement has become more intense in response to the widespread implementation of "zero tolerance" policies. School districts across the country have adopted these policies, often in response to school shootings and other acts of violence. The effect of zero-tolerance policies has been to criminalize much misbehavior in schools, resulting in closer ties between schools and law enforcement, and in criminal charges against juveniles in many cases that previously would have been dealt with as matters of school discipline. In New York City, one of the largest school systems in the country, for example, responsibility for school security was moved from the Board of Education to the police department. Udi Ofer, *Criminalizing the Classroom: The Rise of Aggressive Policing and Zero Tolerance Discipline in New York City Public Schools*, 56 N.Y.L. SCH. L. REV. 1373, 1380 (2011–2012). Studies have found an "increasing tendency of school officials to criminally charge students for behaviors, such as minor fights and scuffles, that would have been kept within the school domain in the past." Lisa H. Thurau & Johanna Wald, *Controlling Partners: When Law Enforcement Meets Discipline in Public Schools*, 54 N.Y.L. SCH. L. REV. 977, 981 (2009–2010). Courts evaluating claims by juveniles that school questioning was custodial have noted this trend. As one court observed in finding that questioning by a school resource officer was custodial, there has been "a dramatic shift away from traditional in-school discipline towards greater reliance on juvenile justice interventions, not just in drug cases, but also in common school misbehavior that ends up in the juvenile justice system." N.C. v. Com., 396 S.W.3d at 863 (Ky. 2013).

This shift in school disciplinary policies is likely to affect the response of juveniles to questioning about their misconduct by school officials and law-enforcement officers. As one commentator noted, "[t]he increased and highly publicized collaboration between schools and law enforcement makes it natural for students questioned by administrators in the presence of school-based officers to assume that the administrators and law enforcement are in fact working together with respect to the investigation at hand." Paul Holland, *Schooling* Miranda*: Policing Interrogation in the Twenty-First Century Schoolhouse*, 52 LOY. L. REV. 39, 90 (2006). This adversarial climate might well lead the reasonable juvenile to conclude that he or she is not at liberty to leave when questioned by a school official in the presence of a school resource officer. The background policy shift does not transform every interaction among law enforcement, school officials, and the juvenile into a custodial interrogation, but it does support courts' recognition that juveniles' perceptions about the nature of these interviews are likely to be affected.

In other contexts, interviews of juveniles by state agents who are not law-enforcement officers have been deemed custodial when a close collaboration with law enforcement exists. For example, questioning conducted by an assistant director of a juvenile detention facility was deemed custodial when the interrogator was functioning as an instrument of the police. Com. v. A

Juvenile, 521 N.E.2d 1368, 1370 (Mass. 1988). Similarly, a staff member in a residential treatment facility for juvenile offenders can undertake a custodial interrogation. See State v. Evans, 760 N.E.2d 909 (Ohio Ct. App. 2001). Using a social worker to elicit a confession from a mentally disabled suspect is custodial, especially when the social worker was specifically employed by police because he was trusted by the suspect. See Buster v. Com., 364 S.W.3d 157 (Ky. 2012). Even questioning by a sexual-assault nurse examiner was found to be custodial interrogation, when the nurse was gathering evidence and had a close relationship with law enforcement. See Hartsfield v. Com., 277 S.W.3d 239, 244 (Ky. 2009).

Illustration 10 is based on Buster v. Com., 364 S.W.3d 157 (Ky. 2012).

§ 14.21. Waiver of Rights in a Custodial Setting

(a) A statement made by a juvenile in custody is admissible in a subsequent delinquency or criminal proceeding only if

(1) the juvenile has given a knowing, intelligent, and voluntary waiver of the right to remain silent and the right to assistance of legal counsel;

(2) the statement was made voluntarily; and

(3) the requirements of § 14.22 and § 14.23 are satisfied.

(b) The determination of whether the juvenile has given a knowing, voluntary, and intelligent waiver of rights under subsection (a)(1) and made a voluntary statement under subsection (a)(2) is based on consideration of the totality of the circumstances surrounding the interrogation, in light of the juvenile's age, education, experience in the justice system, and intelligence. Circumstances surrounding the interrogation include police conduct and conditions of the questioning.

Comment:

a. General background and rationale. For both adults and juveniles, the decision to waive *Miranda* rights must be knowing, voluntary, and intelligent, and the statement must be voluntarily given. Subsections (a)(1) and (a)(2) describe this standard for determining whether a statement made in interrogation is admissible in a subsequent proceeding. The voluntariness requirements of subsections (a)(1) and (a)(2) are overlapping, but are distinguished in this Section for analytic clarity. The court undertaking the waiver inquiry focuses on the circumstances under which *Miranda* rights were explained and waived by the suspect, evaluating how the rights were

communicated, whether there was misrepresentation or coercion in inducing waiver, and whether the suspect understood the rights and the consequences of waiver. Comments *c*, *d*, *e*, and *h* and the Reporters' Notes thereto examine these issues. In determining whether the juvenile's statement was voluntary, the court examines police behavior and the surrounding conditions over the course of the interrogation to determine whether the juvenile's will was overborne. These issues are examined in the Comments *f*, *g*, and *h* and the Reporters' Notes thereto.

In deciding whether a statement by an adult or juvenile is admissible, the court considers the totality of the circumstances, examining a range of factors implicating police behavior, conditions of interrogation, and characteristics of the defendant. Other than in extreme cases, no single circumstance (the duration of the interview for example) is dispositive. Under subsection (b), when the individual is a juvenile, the determination of whether the waiver was validly executed and the statement was voluntarily made must take into account the juvenile's age, education, experience, and intelligence. The required consideration of these factors is based on a longstanding judicial belief that juveniles are both less able to understand their interrogation rights and the consequences of waiver, and more vulnerable to the interrogation tactics of police than are adults. Juveniles' comprehension of *Miranda* rights is discussed in Comment *c* and youthful susceptibility to police tactics and conditions in Comments *g* and *h*.

The court, in evaluating whether the waiver by a juvenile was valid and the statement voluntary, also considers the requirements set forth in §§ 14.22 and 14.23. Under § 14.22, the younger juvenile can only give a valid waiver after consultation with counsel; under § 14.23, the entire interview usually must be video-recorded.

For more than half a century, the Supreme Court has emphasized the heightened vulnerability of youths in police custody, in opinions suppressing the confessions of juveniles on constitutional grounds. As the Court put it in Haley v. Ohio in 1948:

> What transpired would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. 332 U.S. 596 at 599.

The Supreme Court later quoted this passage in extending the Fifth Amendment privilege against self-incrimination to juveniles in delinquency proceedings. In re Gault, 387 U.S. 1 (1967). *Gault* emphasized that the will of a juvenile is more likely to be overborne than that of an adult, and that juveniles' confessions are particularly untrustworthy as testimonial evidence.

Miranda's requirement that suspects in interrogation be informed of their rights and of the consequences of waiver raises another set of concerns in the context of juvenile interrogations. In evaluating whether a juvenile's waiver of *Miranda* rights was "knowing, intelligent, and voluntary" the court addresses whether immaturity affected the juvenile's comprehension of the warnings and the consequences of waiver, and also whether the decision to waive was voluntary.

Courts assume that juveniles are particularly disadvantaged on the basis of immaturity in the interrogation setting on the basis of common sense, but often also invoke a large body of social science research supporting this proposition. The Reporters' Notes to Comments *c* and *h* describe this research, which focuses both on the capacities of juveniles in the relevant domains and also on their actual behavior in interrogation. Many studies indicate that younger juveniles have substantially more limited comprehension of their *Miranda* rights and the consequences of waiver than do adults. This research is described in the Reporter's Note to Comment *a* of § 14.22, which predicates a valid waiver by a younger juvenile on consultation with counsel. The developmental evidence also supports the conclusion that juveniles generally are particularly vulnerable to coercion in the incarceration setting. As compared to adults, adolescents are more impulsive, more susceptible to suggestion, and more likely to base decisions on short-term consequences. They are also more susceptible to coercive influence than are adults because they tend to be submissive to authority. Comments *c* and *h* and the Reporters' Notes thereto discuss these matters.

Juveniles waive their rights during interrogation and confess to crimes at a far higher rate than do adult suspects. Studies also find that juveniles (and particularly younger juveniles) disproportionately offer demonstrably false confessions. The Reporters' Note to Comment *h* discusses this research. Taken as a whole, the evidence of differences between juveniles and adults facing interrogation supports careful consideration of the age of the juvenile and other factors associated with immaturity when a court reviews a statement made by a juvenile. The scientific evidence strongly supports the special caution that courts apply in determining the validity of waiver and the voluntariness of confessions when juveniles seek to suppress statements.

b. Objective and subjective dimensions of the standard. In contrast to the objective custody determination under the reasonable-juvenile standard, the judgment of whether the juvenile's waiver was valid and the statement voluntary requires a subjective judgment. The objective nature of the custody analysis is discussed in § 14.20, Comment *c*. Under § 14.21, the court must answer two questions in deciding whether the juvenile's custodial statement should be excluded: First, did the juvenile, in deciding to waive his or her rights, in fact, understand the meaning of those rights and understand that the consequences of waiver include the use of the statement in a subsequent proceeding to prove that the juvenile committed a crime? Second, was the juvenile's will overborne by the conduct of interrogators or conditions of interrogation? In answering these questions, the inquiry will evaluate evidence, if available, of the juvenile suspect's actual comprehension and response to police pressure. The court's judgment is also guided by the categorical (or objective) factors of the juvenile's age, experience, education, and intelligence level. In combination, these factors support an individualized inquiry into the attributes of the juvenile.

Illustration:

1. Maria, age 15, was mildly mentally disabled and in a special-education class in her high school. One afternoon, a police officer stopped by her home and asked Maria to come to the police station for questioning about the theft of a computer from a nearby discount store. At the station, Officer Johnson told Maria that the store's surveillance camera had recorded her leaving the store with the computer. He read *Miranda* warnings and asked Maria if she was ready to sign a statement waiving her rights. Maria said she would sign the waiver statement because, "My mom will make me sign it anyway." The officer did not clarify to Maria that she had an absolute right to silence and counsel, and that her mother could not make the waiver decision. Maria signed the *Miranda* waiver and confessed to the theft of the computer. Maria's waiver was not knowing and intelligent, and her statement is not admissible in evidence. Together with the objective factors of Maria's age, education, and intelligence, the evidence that she subjectively did not understand her *Miranda* rights supports the conclusion that her waiver was invalid.

c. The requirement of a knowing, intelligent, and voluntary waiver. Subsection (b) requires that the juvenile's waiver of *Miranda* rights be knowing, intelligent, and voluntary, a determination

made on the basis of the totality of the circumstances in light of the youth's age, education, intelligence, and experience. The waiver of rights must be unambiguous. Further, an indication that the juvenile seeks to exercise Miranda rights, even if not in the form of a specific invocation, is evaluated in light of the juvenile's age and creates the obligation to inquire further on the part of law-enforcement officers. See Comment *i* and Reporters' Note thereto. The requirement that the waiver be knowing and intelligent implicates cognitive factors. The voluntariness requirement implicates emotional factors. However, emotional stress combined with immaturity can undermine an individual's capacity for comprehension.

To execute a knowing and intelligent waiver, the juvenile, like an adult, must understand the meaning of the rights and the consequences of waiver, and be competent to make a decision about whether to remain silent or make a statement. There are several ways cognitive immaturity can impair a juvenile's capacity to execute a valid waiver. First, the juvenile's ability to weigh variables in making a decision of this kind may be inadequate as compared to an adult. Second, the juvenile may be more likely to lack the relevant knowledge to understand important dimensions of the decision or the vocabulary to comprehend the meaning of the words of the *Miranda* warnings. Beyond this, the juvenile may be less likely than an adult to comprehend the meaning and function of his or her rights due to limited knowledge, a reduced ability to comprehend abstract concepts (such as "rights"), or lack of experience in the justice system. For example, the juvenile may not understand that the rights are absolute and not conditional, that neither the police nor the judge can take the rights away, and that the juvenile cannot be subject to adverse consequences for exercising interrogation rights. The juvenile may not understand the consequences of waiver, even though the warnings explain that the statement will be used against the juvenile. A juvenile is less likely than an adult to weigh accurately the long-term costs and benefits of a choice, and more likely to overvalue short-term consequences.

These deficiencies are particularly prevalent in younger juveniles. Until mid-adolescence, about age 15, most adolescents lack the ability to make consequential decisions due to cognitive immaturity; a substantial body of psychological and neurological research shows that younger juveniles are less able to comprehend their *Miranda* rights than are older juveniles and adults and also are particularly susceptible to police tactics aimed at inducing confessions. A younger juvenile also is less likely to have experience in the justice system. See Comment *d*. Thus, although the waiver of rights in interrogation by any juvenile warrants special scrutiny, a waiver and confession

by a juvenile under age 16 is reviewed with particular care, giving substantial weight to the individual's youth. Because the potential for an invalid waiver is acute for the younger juvenile, courts and legislatures have created prophylactic measures aimed at providing special protections. Under § 14.22, consultation with and presence of counsel is required for a valid waiver of a juvenile age under age 15. Comment *a* of § 14.22 and the Reporters' Note thereto discuss the scientific evidence supporting this rule.

The juvenile's education and intelligence are relevant to the question of whether the waiver was knowing and intelligent, particularly if the youth's intellectual capacities are limited, such that his or her mental age is younger than chronological age. Similarly, the fact that the juvenile is in a special-education program is evidence of more limited intellectual abilities than the norm for his or her age group. Courts point to research showing that comprehension is correlated with intelligence; 15- and 16-year-old juveniles with lower I.Q. scores demonstrate deficient comprehension of their rights as compared to adults, similar to that of younger children. This is important because these youths are overrepresented in the justice system.

Illustration:

2. Mark, age 15, suffered from moderate intellectual impairment. He was taken into custody for questioning about an armed robbery of a convenience store. In the interrogation room, the police officers told Mark that his friends had confessed to the robbery and said that he was with them. Officer Roberts read Mark his *Miranda* rights and asked him if he wanted to waive his rights. Mark replied that there was no point talking to a lawyer, since the lawyer would tell the judge everything Mark told him. Mark then signed the *Miranda* waiver and confessed to the crime. Mark's *Miranda* waiver was not intelligent and knowing, and his statement is not admissible in evidence.

A juvenile's waiver of rights can fail to meet the requirement that it be knowing and intelligent solely on the basis of the youth's immature capacities for comprehension, without misbehavior or misinformation on the part of the interrogating officer. In contrast, the waiver or statement will be excluded on the ground that it was not voluntary only if it is made in response to coercive police behavior or conditions. See Comment *g*. However, police behavior can contribute to the juvenile's failure to understand the meaning of *Miranda* rights and of waiver, as when the officer misinterprets words in the warning, or minimizes the importance of the rights or the

consequences of waiver; younger juveniles, particularly, are more vulnerable to these tactics than are adults. Thus, although the knowing and voluntary requirements for a valid waiver are distinct, they can overlap when police seek to induce waiver and confession through these means.

Illustration:

3. Jonathon, age 17, was taken into custody for questioning about the murder of two men, on the basis of a statement by his friend Carlos that Jonathon had borrowed from him the gun that was identified as the murder weapon. The police read Jonathon his *Miranda* warnings, suggesting several times that "These are just a formality." The officer also said to Jonathon, "You have a right to an attorney present prior to and during questioning. An attorney is a lawyer who will help you if you were involved in the crime. It doesn't mean that you were involved, but if you were, the right would apply to you." Jonathon signed the waiver and later confessed to the murders. Jonathon's waiver of his right to an attorney was not valid and his statement is not admissible in evidence.

Although the officer clearly indicated that Jonathon had a right to an attorney, he suggested that the right was a formality and later suggested that this right applied only if he were involved in the crime. This misinformation was inaccurate and could deter Jonathon from exercising his right, since it would appear to constitute an admission of involvement.

Waiver of *Miranda* rights must be voluntary and not compelled by police coercion, a basis for suppression separate from the requirement of a knowing, intelligent waiver. Thus, a statement can be excluded when the juvenile comprehends *Miranda* rights, but succumbs to police pressure to waive, as well as when the juvenile voluntarily gives the waiver, but lacks adequate comprehension. Courts recognize that certain police tactics are particularly effective in eliciting confessions from juveniles. Due to normal immaturity, a typical juvenile is more vulnerable to deceptive tactics than an adult might be. As the following Illustration shows, tactics that would usually not render an adult's waiver involuntary can be deemed coercive for a juvenile and result in a finding that a juvenile's waiver was invalid.

Illustration:

4. Leo, age 16, was taken to the police station for questioning about a suspicious fire at the local high school. Leo knew that he didn't have to talk to the cops and that he had a right to ask for an attorney because his older brother, Joe, had explained *Miranda* rights to him after Joe was arrested a few months earlier. At first, after the officers read Leo his *Miranda* rights, Leo told them he knew his rights and had nothing to say. After an hour, the officers told Leo (falsely) that Leo's friends had confessed, implicating him, and that Leo was not going home until he told them what happened. The officer also told Leo that the damage to the school was minor, when, in fact, the school had burned down. Four hours later, Leo waived his *Miranda* rights and confessed to setting the fire. Leo's waiver of rights was invalid because it was given involuntarily, even though he understood his rights. His statement is not admissible in evidence.

The voluntary waiver requirement under subsection (a)(1) implicates emotional factors that can undermine the validity of the waiver. Adolescents' poorer impulse control, tendency to focus on short-term consequences, and tendency toward compliance with adult authority can make the juvenile more likely to waive rights than an adult would be. Moreover, emotional factors associated with immaturity can contribute to stress in a way that undermines comprehension, even in older juveniles who may have the capacity to comprehend *Miranda* rights in the abstract. Developmental psychology research shows that emotional development proceeds more slowly in adolescence than cognitive development. As discussed above, coercive police behavior can induce waiver by undermining comprehension. See Comments *g* and *h*.

The requirement of a voluntary waiver by the juvenile interacts in many cases with the requirement that the confession itself be voluntary under subsection (a)(2). See Comment *f*. The distinction between the two requirements implicating voluntariness is often irrelevant, as in a case like Illustration 4, in which the scrutinized police behavior and conditions of interrogation are part of a continuous pattern of inducing the suspect to waive *Miranda* rights and then to confess. But the validity of the *Miranda* waiver and the voluntariness of the confession itself are sometimes distinct, as when the waiver decision is knowingly, intelligently, and voluntarily made, but coercive police tactics over the course of interrogation subsequent to waiver render the statement involuntary.

Illustration:

5. Al, age 16, was brought into the police station for questioning about the sexual assault of a 12-year-old girl who lived next door. The interrogating officer carefully explained Al's *Miranda* rights to him in simple language, asking Al to explain the meaning of each right in response. Al did so and his responses showed that he had understood each right. Afterwards, Al said, "I had nothing to do with hurting that girl and I'm happy to answer your questions. I certainly don't need an attorney." Al then signed a waiver of his *Miranda* rights.

After Al signed the waiver, the police continued to question him for several hours. They told him falsely that his DNA, taken from a paper cup, matched DNA on the victim. They also told him falsely that a street video camera had recorded him going into the victim's house. Finally, they said that the victim only wanted an apology and did not plan to prosecute, but that it was "wrong [for Al] to lie about it." In fact the victim was seriously injured and unconscious. The police repeatedly rejected Al's claims that he was innocent and said he could not go home until he told the truth. At 3 a.m., after six hours of questioning, Al confessed to the crime. Al's waiver of his *Miranda* rights was knowing, intelligent, and voluntary, but his confession was extracted through coercive police tactics that are particularly effective with youths and was not voluntary.

d. Justice-system experience. The determination of whether a juvenile's waiver of *Miranda* rights was knowing, intelligent and voluntary is made in light of the juvenile's justice-system experience, among other factors. Courts often assume that a juvenile who has not had experience in the justice system is likely to be unsophisticated, vulnerable to police tactics, and deficient in understanding the meaning *of Miranda* rights or the implications of waiver. On the other hand, a youth who has had substantial experience in the justice system and frequently enjoyed the assistance of counsel is sometimes assumed to be familiar with *Miranda*, the role of attorneys, and the function of confessions in prosecuting criminal cases. Justice-system experience is given limited weight under this section. Social-science research offers little support for the assumption that a youth with justice-system experience is more likely to understand *Miranda* rights. Moreover, this factor could weigh disproportionately against youths in poor communities in which police contact is frequent.

Illustration:

6. Michael, age 15 and in the 10th grade, was on probation for a burglary when he was picked up by the police and questioned in connection with a convenience store robbery. The officer explained the *Miranda* warnings to Michael, and Michael told the officer that he wanted to talk and he didn't need an attorney. After an hour, Michael made a statement confessing to the crime. Michael had been stopped by the police on the street and questioned several times, but had only been charged with, and convicted of, the burglary. Although he was represented by an attorney in that proceeding, Michael only spoke with her on one occasion for a few minutes. Michael's previous experience in the justice system will be given little weight in the determination of whether the waiver of his rights was valid.

e. Communication of Miranda *rights.* Because a juvenile may be less able than an adult to comprehend *Miranda* rights, a waiver will be valid only when the officer explains rights to the suspect in language the youth can understand. The effort by the law-enforcement officer to accurately explain and clarify the meaning of each *Miranda* right and warning weighs in favor of finding a valid waiver. On the other hand, the court may be skeptical that a juvenile understood the rote repetition of the standard *Miranda* warnings. Communication of *Miranda* rights in language that a parent, present at interrogation, can understand is not sufficient unless the language is comprehensible to the juvenile as well. Some local jurisdictions have adopted simplified *Miranda* warnings to be given to juveniles in custody.

Illustrations:

7. James, age 15, was a special-education student with an I.Q. of 65. He was brought in for questioning about a burglary in his neighborhood. After some preliminary questioning during which James seemed confused and (in the officer's view) evasive, Officer Jackson read him the standard *Miranda* warnings from a card. When asked whether he understood the warnings, James shrugged. James signed the waiver, and two hours later he confessed to involvement in the robbery. James's waiver of his rights was not knowing and intelligent and his statement is not admissible. Officer Jackson should have made further efforts to assure that James understood his rights and the meaning of the warnings, when James indicated confusion.

8. Annabelle, age 15, was taken into custody for questioning about an assault and robbery in Grant Park in which an elderly couple were injured. Officer Hogan, after speaking briefly with Annabelle, decided that she might have trouble understanding *Miranda* warnings. He explained Annabelle's rights as follows:

> I'm going to read you your rights. One, you have the right to remain silent and refuse at any time to answer any questions asked by a police officer. Do you know what that means? It means you absolutely don't have to talk to me if you don't want to.
>
> Two, anything you do or say can be used against you. That means if you make a statement, I've got to put it in a report and it can be used at your trial to show you committed the crime.
>
> Three, you have the right to talk to a lawyer and to have the lawyer with you to help you during any questioning. That means if you wanted to have a lawyer, you can have one.
>
> Four, if your mom doesn't have the money for a lawyer, the court would give you one without paying, and you could remain silent until you had a chance to talk to that lawyer.
>
> After describing each *Miranda* statement, Officer Hogan asked Annabelle if she understood, and she indicated that she did. She then waived her rights and confessed to the crime. Based on this description, Annabelle executed a knowing, intelligent, voluntary waiver, and her statement is admissible in evidence. The officer's effort to communicate clearly the meaning of *Miranda* warnings, together with Annabelle's confirming her understanding, weigh in favor of a valid waiver.

In some cases, a consequence of the juvenile's decision to waive *Miranda* rights is that the juvenile may be prosecuted as an adult. The stakes faced by a juvenile charged with a crime are substantially higher if she or he is subject to prosecution and punishment in criminal court, rather than in a juvenile delinquency proceeding. Because this information is relevant to the juvenile's understanding of the consequences of a decision to waive his or her rights, some courts have required that officers must disclose that the statement may be used against the juvenile in a criminal proceeding.

f. The requirement of a voluntary confession. The requirement that the statement be voluntary aims to avoid using against an individual, in a subsequent criminal or delinquency proceeding, a statement that was compelled through coercive tactics that overcame his or her will. Courts agree that such a statement constitutes untrustworthy evidence and its use is also offensive on grounds of fairness. If the statement was coerced by law-enforcement officers, it will be excluded from evidence regardless of whether the initial waiver of *Miranda* rights was valid. See Comment *c.*

The requirement that a defendant's statement must be voluntary is based on a broad due-process principle that long predates *Miranda* and has not been supplanted by *Miranda,* although courts sometimes conflate the voluntary-waiver requirement with the requirement that the statement be voluntarily given. Illustration 4 of Comment *c* presents a case in which the confession is involuntary after a valid waiver of *Miranda* rights. Concern about the heightened vulnerability of juveniles to police tactics in the interrogation setting has been at the heart of Supreme Court jurisprudence in this area. Courts frequently emphasize that juveniles, as adolescents, may be overwhelmed by standard interrogation tactics that an adult could withstand. Describing an interrogation of a 15-year-old that continued from midnight to 5:00 a.m., the Supreme Court expressed skepticism that "a lad of tender years is a match for the police in such a contest." Haley v. Ohio, 332 U.S. 596, 599 (1948). The Supreme Court's assumption that the "contest" between the juvenile and interrogating police officer is particularly uneven (and thus unfair) is shared by many courts. Common sense and substantial empirical evidence support this assumption. Comment *h* and the Reporters' Note thereto discuss juveniles' vulnerability to police tactics.

g. Coercive police conduct or conditions required. An individual's statement will not be excluded as involuntary in the absence of coercive interrogation conditions or police conduct. Coercion can be physical or, more typically, psychological in nature. A youth's compulsion to confess is not alone sufficient to invalidate a waiver or suppress a statement. Nor does pressure exercised by an individual who is not a government actor render a confession involuntary, unless that individual acts as an agent of law-enforcement officers. For example, pressure from a juvenile's parent to confess will not make the statement involuntary unless the parent acts in collaboration with the interrogating officer.

This limitation is not broadly construed. Due to their enhanced susceptibility to standard police tactics that might not constitute coercion of an adult subject, juveniles may succumb to less

compulsion than would an adult. See Comment *h*. So long as police behavior or interrogation conditions created *some* coercive pressure, a claim that the confession was involuntary can be sustained. The determination under the legal standard is made by considering the impact of the pressure exerted by police in light of the juvenile's age, experience in the justice system, intelligence, and education.

h. Factors affecting voluntariness and youthful vulnerability. Historically, physical coercion by police was required for a finding that a defendant's statement was involuntary. Today, coercion is usually psychological and therefore more difficult to evaluate. The factors discussed in this Comment are relevant to evaluating the voluntariness of both the waiver of *Miranda* rights and the confession.

Under the totality-of-circumstances test, no single type of police behavior or interrogation condition is likely to be deemed sufficiently coercive to warrant suppression of a juvenile's statement as involuntary. But courts frequently point to several factors that in various combinations support exclusion of a juvenile's waiver and/or statement. Purposeful isolation, long duration of questioning, threats or promises, and deception either about the evidence against the defendant or about admissions of codefendants are standard tactics used by police in interrogation. Both adults and juveniles challenge the admissibility of statements on the basis of excessive use of these tactics by law-enforcement officers. But these tactics are particularly effective with juveniles; juveniles, as compared to adults, are more submissive to adult authority, susceptible to suggestion, impulsive, and inclined to make decisions on the basis of short term consequences. Thus a court may find a juvenile's statement inadmissible under conditions that would not result in suppression of an adult's statement.

Purposeful isolation of the juvenile from parents or other interested adults is seen as inherently coercive because it leaves the juvenile to face the interrogation with no supportive adult to turn to for advice. This factor is given substantial weight particularly if the police purposely exclude a parent or other interested adult when the juvenile or the adult has requested that the adult be present during interrogation. Some states follow a per se rule requiring that the juvenile be given the opportunity for meaningful consultation with a parent or interested adult. The Restatement does not adopt such a rule. Although the presence of an interested adult can sometimes compensate for the disadvantages that a juvenile faces in interrogation due to immaturity, many parents are unable to provide effective assistance to the juvenile in this setting. Instead, § 14.22 adopts a per

se rule requiring that an attorney be present to advise a juvenile who is under the age of 15. Comment *b* of § 14.22 and the Reporter's Notes thereto provide the rationale for adopting this rule rather than a rule encouraging the participation of a parent. Nonetheless, the purposeful exclusion of a parent is a key factor, especially when a juvenile seeks consultation with a parent or other adult.

Interrogation typically is conducted in a small room behind closed doors, a condition that contributes to isolation. Courts also consider the duration and time of day at which an interrogation was conducted; questioning that extends over many hours or through the night is assumed to be more disturbing to a juvenile than to an adult. Deprivation of food and fluids or failure to give breaks can also be considered coercive.

Illustration:

9. Fifteen-year-old Benjie was picked up as he was leaving school by Officer Jackson and taken to the police station for questioning about the robbery of a nearby convenience store the night before, in which the clerk was shot and killed. Benjie was known to be a friend of a boy who had been identified on the store security camera. Officers Murphy and Jackson began to question Benjie, who denied knowledge of the crime. After about an hour of questioning, Officer Murphy read Benjie his *Miranda* rights, and Benjie signed a waiver. At 6:00 p.m., he asked to call his father, a request that was ignored. Meanwhile, Benjie's father was in the station waiting room, where his requests to see his son were ignored. Benjie and his father repeated the request several times as questioning continued. At 11:00 p.m., Officers Malorca and Knight replaced their colleagues and continued to question Benjie. These officers also refused requests by Benjie and his father that Benjie be allowed to talk with his father. At 2:00 a.m., Benjie confessed to involvement in the crime. Benjie's confession was involuntary and his statement is not admissible in evidence. Because of the duration of the interrogation into the night by multiple officers, and particularly the officers' failure to allow Benjie to see his father in response to many requests by both father and son, Benjie's statement was not voluntarily made. The exclusion of Benjie's father represented a purposeful effort to isolate Benjie from a supportive adult and was inherently coercive.

Other aspects of police questioning are considered in determining the admissibility of statements by both adults and juveniles, but are particularly important in evaluating whether a juvenile's statement was voluntary. These include an express or implied promise of lenient treatment, or the suggestion that the youth can return home after making a statement. Further, sympathetic assurance by police that the juvenile's culpability or role in the crime was minor can be deemed coercive. Tactics that induce fear—the use of threats, a raised voice, endless repetition of questions, and dismissive rejection of a suspect's denials—are often considered coercive. Courts are particularly likely to find compulsion when an officer threatens that harsher treatment will be imposed if the juvenile does not confess. Deception involving exaggerated or manufactured evidence against the juvenile can contribute to the suspect's conclusion that the only available option is to make the statement desired by the interrogators. The use of deception has secured many false confessions by juveniles. It does not automatically invalidate a statement, but it is a factor that can weigh heavily against the admissibility of the juvenile's statement. Even interrogation training manuals discourage the use of deception with juveniles because of their heightened susceptibility to this tactic.

Illustrations:

10. Officer Graham picked up Jeno, age 17, in his squad car to question him about a robbery in which a store clerk had been killed. He and two other officers questioned Jeno for several hours, repeatedly rejecting his claims of innocence. After assuring Jeno that the police had evidence of his involvement in the crimes, and that the victims could identify him in a line up, Officer Graham said, "You're not going to tell me anything I don't already know. I know when you're young, you sometimes do stupid stuff. But if you try and hide it from me, you're really going to get hammered. You'll go to prison for a long, long time. You gotta tell me the truth." Jeno eventually made a statement admitting to the crimes. Jeno's statement was not voluntary and is not admissible in evidence. This case involves several standard tactics, but the officer's threat of harsher treatment if Jeno did not confess represents a particularly coercive kind of police behavior. A threat by police of harsher treatment if the suspect exercises interrogation rights is deemed by some courts to create a presumption that the juvenile's confession should be suppressed.

11. Ellery, age 15, had a feud with a classmate, who was seriously injured one night when several teenagers with masks ambushed her as she was returning home. Ellery was

brought from school to the police station by Officer Marquez for questioning about the crime the next day. She denied any knowledge of the crime but said she didn't want an attorney and would talk to the officer. Six hours later, with Ellery continuing to deny involvement in the assault, Officer Marquez said "I know you're tired, but I know you're lying. If you just tell me the truth about what happened, you can go home. But we're going to keep going until you tell the truth." He repeated this statement multiple times over the next three hours. At 2:00 a.m., Ellery confessed to the crime. Ellery's statement was involuntary and is not admissible in evidence. Officer Marquez's promise that Ellery could go home when she made a statement raised a substantial question about the voluntariness of her statement. A promise conditioned on making a statement, particularly a promise with immediate benefits, is likely to have a greater influence on a juvenile than an adult counterpart because of juveniles' greater tendency to focus on short-term consequences of decisions. In this Illustration, the confession is presented to the juvenile as the only viable option, which she chose only after hours of interrogation.

12. Brian, Jake, and Alonzo, ages 14, 15, and 16, were walking in the park one evening when Officer Edward stopped them for questioning about an assault on a young woman that had occurred 30 minutes before. Officer Edward convinced the boys to accompany him back to station headquarters, where they were placed in separate interrogation rooms. Officer Edward and other officers read each youth his *Miranda* rights separately. After hours of questioning, officers told each youth, "Listen, I know what boys do. The woman you beat up is fine and as long as you just admit you did it, you can go. Your two friends have already admitted to the crime, and said you weren't the one who hit her, so once you tell me what happened you'll be able to go home like them." After five more hours of questioning that yielded little response, Officer Edward told each boy, "The results just came in: we have your DNA on her clothing. We can wait here all week if we have to, and I can promise you the judge won't like it if you don't own up." In fact, the woman had been raped and was seriously injured; none of the boys had confessed when Officer Edward reported their confessions to the others; and no DNA evidence linked the juveniles to the assault. Each boy signed a waiver of his *Miranda* rights and confessed to participating in the assault on the woman. Each youth's waiver and statement was involuntary and is not admissible in evidence. The age of the suspects, the duration of the

interrogation, the minimization of the seriousness of the offense, the conditional promise of release, and the multiple false statements made by law-enforcement agents indicate that the statements were coerced.

The practices described above are standard interrogation techniques commonly used by law-enforcement agencies in this country. The extreme use of these techniques can result in the suppression of an adult's statement, and they are accorded greater weight in evaluating the confession by a juvenile.

i. Request for attorney post-waiver. If a juvenile requests an attorney after signing a waiver of *Miranda* rights, questioning must cease until an attorney is present to counsel the juvenile. Further, if a juvenile has asked that a parent or interested adult not be present during interrogation and later requests that person's presence, the interrogation will stop until the interested adult is present. The request for an attorney or interested adult must be unequivocal, but the determination of whether the request is unequivocal is made in light of the age, education, intelligence, and experience of the juvenile.

Illustration:

13. Jake was taken to police headquarters for questioning about a shooting. He waived his *Miranda* rights and agreed to speak to the officer. A short time later, the interrogating officers ran a video, insisting that it showed the 15-year-old suspect participating in the shooting. At that point, Jake said, "Could I have an attorney? . . . because that's not me." The officer ignored Jake's request. Two hours later, Jake confessed to the shooting. Jake's waiver was invalid and his confession is inadmissible in evidence. Jake's request for an attorney was unequivocal and not conditional. The failure by police to cease questioning Jake until counsel was present was a violation of his *Miranda* rights.

j. Burden and standard of proof. When a juvenile challenges the admissibility of a statement made in response to custodial interrogation, the state has the burden to prove by a preponderance of the evidence that the juvenile validly waived *Miranda* rights and/or that the statement was voluntarily made. The Supreme Court has held that the preponderance-of-evidence standard satisfies the constitutional requirement for finding a valid waiver or a voluntary statement.

State courts have adopted the preponderance-of-evidence standard of proof and have drawn no distinction between adult and juveniles.

REPORTERS' NOTE

a. General background and rationale. In applying the totality-of-the-circumstances standard to the rights waivers and confessions of juveniles, courts have pointed to a wide range of factors, observing that no single factor is likely to be dispositive. Among these are the mandatory factors specified in this Section of age, education, experience in the justice system, and intelligence, but courts also consider the juvenile's physical condition, the duration of interrogation, tactics used by police, the youth's knowledge of the charges, the presence or absence of a parent, and whether the juvenile was informed he could be transferred to criminal court. See, e.g., Gilbert v. Merchant, 488 F.3d 780, 787 (7th Cir. 2007) (identifying factors including "defendant's age, education, intelligence, experience and physical condition; the duration of the questioning; whether the defendant was advised of his constitutional rights; whether the defendant was threatened, enticed with promises, or coerced; and whether the defendant was induced to speak by police deception . . . time of day during which the youth was questioned and the presence or absence of a parent or other friendly adult"). In Fare v. Michael C., the Supreme Court adhered to the totality-of-circumstances standard, declining to hold that a juvenile's request for his probation officer was a per se invocation of his constitutional right to counsel. 442 U.S. 707 (1979). Instead, the Court indicated that this fact could be considered among other circumstances in light of the youth's age and experience in the system in determining whether the waiver of rights was valid.

Although courts repeatedly admonish that the statements of juveniles must be reviewed with "special caution," the totality-of-circumstances standard allows the court considerable latitude. The standard has been criticized as providing little guidance, and allowing the admission of confessions in cases in which the youth's comprehension of his rights was clearly deficient or his statement was compelled. Critics have often challenged opinions that seem to ignore the relevance of immaturity and susceptibility to coercive police tactics in evaluating juveniles' waivers and statements, and that decline to recognize juveniles' reduced comprehension. See, e.g., Joshua A. Tepfer, *Defending Juvenile Confessions After* J.D.B. v. North Carolina, Champion at 20 (2014); Joshua A. Tepfer et. al., *Convenient Scapegoats: Juvenile Confessions and Exculpatory DNA in Cook County, Illinois*, 18 CARDOZO J.L. & GENDER 631 (2012); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 919 (2004); David T. Huang, *"Less Unequal Footing": State Courts' Per Se Rules for Juvenile Waivers During Interrogations and the Case for their Implementation*, 86 CORNELL L. REV. 437 (2001); Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of* Miranda *Rights*, 2006 WIS. L. REV. 431 (2006).

The totality-of-circumstances standard is well established as the dominant legal rule applied to evaluate the admissibility of confessions, but recent constitutional and legal reforms

have influenced courts' application of the standard to juveniles. Increasingly, courts rejecting juveniles' waiver decisions cite research studies comparing juveniles' comprehension of their rights with that of adults. This research and its use by courts are discussed in Reporters' Note to Comment *c* and § 14.22, Reporter's Note to Comment *a*. Courts also point to empirical evidence that juveniles are more vulnerable to pressure during interrogation than are adults. Judicial concern has also focused on evidence that juveniles waive their rights at substantially higher rates than do adults, and are more likely to make confessions that later are shown to be false. The Reporters' Note to Comment *h* discusses this research and the judicial response.

Prominent courts in recent years have addressed the issue of juveniles' vulnerability in the interrogation setting. The issue has been highlighted in several recent Supreme Court opinions articulating a constitutional principle that "children are different." Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012). J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011), emphasized the susceptibility of youths facing police questioning in holding that the age of the juvenile must be taken into account in the determination of whether the juvenile is in custody. Comment *a* and the Reporters' Note to § 14.20 discuss the opinion and standard. But the Supreme Court has also pointed to the susceptibility of youths facing police interrogation in opinions prohibiting the imposition of harsh adult sentences on juveniles under the Eighth Amendment. The Court suggested that a juvenile's inability to deal effectively with police could contribute to the conviction that resulted in the severe sentence. See, e.g., Graham v. Florida, 560 U.S. 48, 68 (2010) (in prohibiting life without parole ("LWOP") for non-homicide offenses, the Court indicated that features that distinguish juveniles from adults put them at "significant disadvantage in criminal proceedings"); Miller v. Alabama, supra, at 2468 (citing *J.D.B.*, and suggesting that juveniles' inability to deal with police could contribute to conviction (leading to mandatory LWOP sentence for homicide)). More generally, in rejecting harsh sentences for juveniles under the Eighth Amendment, the Court highlighted developmental characteristics of adolescents that are also relevant to their functioning in interrogation. These include poor impulse control, a tendency to focus on short-term consequences, and susceptibility to influence. Other courts have also elaborated on the disabilities of juveniles facing police interrogation. See, e.g., Hardaway v. Young, 302 F.3d 757 (7th Cir. 2002); Doody v. Ryan, 649 F.3d 986 (9th Cir. 2011) (rejecting confession of 17-year-old after 12-hour interrogation); A.M. v. Butler, 360 F.3d 787 (7th Cir. 2004) (confession of 11-year-old excluded); Crowe v. Cty. of San Diego, 608 F.3d 406 (9th Cir. 2010) (concluding that 14-year-old was compelled to confess by inappropriate interrogation techniques).

This trend has not yet transformed interrogation law. Many courts have continued to routinely uphold the admissibility of juveniles' statements and apparently paid little attention to the unique challenges facing juvenile suspects. See State ex rel. Juvenile Dep't of Clatsop v. Cecil, 34 P.3d 742 (Or. Ct. App. 2001) (statement by 12-year-old with I.Q. of 73 was valid as he indicated understanding of rights); State ex rel. Juvenile Dep't of Washington v. DeFord, 34 P.3d 673 (Or. Ct. App. 2001) (11-year-old with cognitive ability of seven-year-old knowingly waived *Miranda* rights). Some recent decisions have ignored the immaturity of very young juveniles. See In re Joseph H., 237 Cal. App. 4th 517 (2015); Petition for Review Denied, No. S227929 (C.A. Oct. 16,

2015); (Court declines to review waiver and confession to killing of father by 10-year-old); Petition for Writ of Certiorari, *Joseph H. v. State of Cal.*, No. 15-1086, 2016, U.S. S.Ct. (Jan. 14, 2016). But increasingly, the empirically based concern about the immaturity of youths and their susceptibility to police tactics has influenced courts, a trend that seems likely to continue. See, e.g., In re Elias V., 188 Cal. Rptr. 3d 202 (Cal. Ct. App. 2015) (offering comprehensive discussion of research on juveniles' vulnerability to coercive police tactics in suppressing statement).

b. Objective and subjective dimensions of the standard. The requirement that courts evaluate the totality of circumstances in light of the juvenile's age, experience in the justice system, education, and intelligence incorporates objective factors into the court's inquiry. But courts also describe evidence of the juvenile's *actual* comprehension and response to coercive tactics, introducing a subjective component into the inquiry. Thus, the standard incorporates both subjective and objective elements. See, e.g., In re Elias V., 188 Cal. Rptr. 3d 202, 209-210 (Cal. Ct. App. 2015) ("[A]ge, intelligence, education and [the youth's] ability to comprehend the meaning and effect of this confession are factors . . . . to be weighed along with other circumstances.").

Courts point to evidence of the individual's subjective state of mind particularly in evaluating whether the juvenile did or did not understand the *Miranda* warnings. Sometimes this evidence is offered in support of a finding that the juvenile's waiver was valid. See, e.g., Gachot v. Stalder, 298 F.3d 414, 421 (5th Cir. 2002) (finding that although the juvenile had recently taken medication, "there is no evidence that it affected his intelligence, understanding, or judgment in deciding to make his statements," and stating that the juvenile "clearly understood his actions and the consequences of them and understood his rights."); United States v. Guzman, 879 F. Supp. 2d 312, 327 (E.D.N.Y. 2012) (discussing juvenile's exhibited understanding of his rights: "The Court finds that Guzman's demeanor was calm. . . . At no time did Guzman indicate that he did not understand the warnings."). On the other hand, evidence that the juvenile was confused about his or her rights supports exclusion of the statement. See, e.g., Ward ex rel. Crystal M. v. Ortega, 379 F. App'x 687, 689-690 (9th Cir. 2010) (finding juvenile's inculpatory statements were erroneously admitted where "the detective who interrogated Crystal testified that Crystal was confused about her right to an appointed attorney. Nothing in the record shows how the detective clarified that right.").

Illustration 1 is based on Ward ex rel. Crystal M. v. Ortega, 379 F. App'x 687, 689-690 (9th Cir. 2010).

c. The requirement of a knowing, intelligent, and voluntary waiver. Most courts that have evaluated the validity of juveniles' *Miranda* waivers have focused on whether the juvenile comprehended the rights and the waiver was knowing and intelligent. One court described the requisite awareness for a valid waiver as "being cognizant at all times of the State's intention to use [one's] statements to secure a conviction, and of the fact that one can stand mute and request a lawyer." The court noted that "one must at least understand basically what those rights encompass and minimally what their waiver will entail." People v. Bernasco, 562 N.E.2d 958, 964 (Ill. 1990).

Substantial social-science research supports the proposition that many juveniles, particularly younger juveniles, are less capable than older juveniles and adults of executing a knowing and intelligent waiver of their *Miranda* rights. Many younger juveniles are deficient in their basic comprehension of the meaning of *Miranda* rights and of waiver. Thomas Grisso's comprehensive study found that 10- to 12-year-old children were twice as likely to show inadequate understanding as youths aged 13 to 15, whose comprehension was significantly poorer than that of 16- and 17-year-olds. See Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134, 1153-1154, 1157-1160 (1980). In general, Grisso found that deficiencies in comprehending *Miranda* rights are significantly related to age and intelligence, and are pronounced in youths under age 16. Older juveniles' comprehension was found to be similar to that of young adults in laboratory tests. Id. at 1153-1155, 1160. See also THOMAS GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE (1981); *Protections for Juveniles in Self-Incriminating Legal Contexts, Developmentally Considered*, 50 CT. REV. 32 (2012). A large body of research has confirmed Grisso's findings. For further discussion of the body of research showing that younger juveniles have poorer comprehension of their *Miranda* rights than older youths and adults, see § 14.22, Reporters' Note to Comment *a*.

In his research, Grisso identified several abilities that continue to develop throughout adolescence that affect juveniles' capacities to competently exercise and waive rights. Some factors directly implicate the capacity for comprehending rights under any conditions: (a) basic knowledge of the world, including the risks associated with decisions; (b) understanding of abstractions such as "rights." Grisso identifies other factors that can affect the juvenile's performance, particularly under stressful conditions: (a) the ability to delay impulses by stopping to think about consequences before deciding; (b) the ability to use judgment that weighs long-term as well as short-term negative and positive consequences; and (c) a sense of autonomy and identity associated with not making decisions that are not acquiescent or oppositional to peers and adult authority figures. Grisso, *Protection for Juveniles in Self-Incriminating Legal Contexts, Developmentally Considered*, 50 CT. REV. 32 (2012). Comment *h* and its Reporters' Note further discuss factors affecting voluntariness.

Research studies indicate that individuals who understand their interrogation rights are more likely to invoke, and less likely to waive, those rights. It seems likely that juveniles' reduced comprehension contributes to their very high rate of waiver. Rona Abramovitch, Karen Higgins-Biss & Stephen Biss, *Young Persons' Comprehension of Waivers in Criminal Proceedings*, 35 CANADIAN J. CRIMINOLOGY 309, 321 (1993) ("Most of [the juveniles] who signed the waiver did not understand what it meant. Those who refused to sign had a somewhat better understanding of their rights[.]").

Although the research indicates that juveniles aged 16 and older have the capacity to comprehend *Miranda* rights similar to that of adults when tested in a laboratory setting, they likely are less capable than adults of making competent decisions under the pressure of an actual interrogation. Cognitive maturation proceeds at a faster pace during adolescence than emotional

development; thus an adolescent may be competent to make a decision under neutral decisions, but perform poorly on cognitive tasks under conditions of heightened emotional stress. Laurence Steinberg, Elizabeth Cauffman, Jennifer Woolard, Sandra Graham & Marie Banich, *Are Adolescents Less Mature than Adults? Minors' Access to Abortion, the Juvenile Death penalty, and the Alleged APA "Flip-flop,"* 64 American Psychologist 583 (2009); Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-taking,* 28 DEV. REV. 78 (2008). The factors associated with emotional immaturity that make adolescents vulnerable to police pressure likely also undermines their ability to comprehend their rights under stressful real world conditions. See Comment *h* and the Reporters' Note thereto. Developmental psychology and neuroscience studies confirm that several of the capacities that Grisso identifies as important to executing a competent and voluntary waiver develop throughout adolescence as the executive functions of the brain improve with maturity. These capacities include planning and strategic thinking, regulation of impulses, and consideration of long-term consequences. See, e.g., Steinberg, id.; Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting,* 80 CHILD DEV. 28 (2009); LAURENCE STEINBERG, ADOLESCENCE, 66-72 (10th ed. 2014); Peter Anderson, *Assessment and Development of Executive Function During Childhood*, 8 CHILD NEUROPSYCHOLOGY 71, 75-77 (2002) (finding that many executive processes are not well established until late adolescence or early adulthood); Sarah-Jayne Blakemore & Suparna Choudhury, *Development of the Adolescent Brain: Implications for Executive Function and Social Cognition*, 47 J. CHILD PSYCHOL. & PSYCHIATRY 296, 301 (2006) ("[b]ehavioral studies show that performance . . . on tasks including inhibitory control . . . continue to develop during adolescence").

Research studies confirm that adolescents perform more poorly than adults on cognitive tasks in stressful settings under conditions of emotional arousal. Sonia J. Lupien et al., *Effects of Stress Throughout the Lifespan on the Brain, Behaviour and Cognition*, 10 NATURE REVS. 434, 438 (2009) (reporting studies showing that adolescents are more sensitive to stress); Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & HUM. BEHAV. 3, 19 (2010) (studies show maturation during adolescence in the limbic system, which plays a key role in emotion regulation). Brain systems that are involved in self-regulation are relatively immature in adolescence, during a time when neural responses to emotional and social stimuli are heightened. B.J. Casey, Sarah Getz & Adriana Galvan, *The Adolescent Brain*, 28 DEVELOPMENTAL REV. 62, 62-77 (2008). In short, adolescents are often less able to use the cognitive skills they possess under stressful, emotional conditions; therefore, they may function less well than adults in the interrogation setting, where the law-enforcement goal is to create stressful conditions from which the only relief is confession. Thus, older juveniles evaluated under laboratory conditions might understand their *Miranda* rights adequately, but may be deficient as compared to adults in their capacity to deploy their cognitive abilities outside of that controlled setting.

Some courts have recognized that emotional stress can undermine comprehension, even in an older juvenile. In Com. v. Nga Truong, 28 Mass. L. Rptr. 223 (Mass. Super. Ct. 2011), the court suppressed the confession of a 16-year-old because the audio and video recording revealed a

frightened, meek, emotionally compromised teenager who, the court concluded, never understood the implications of her statements.

Courts have also recognized that a juvenile's lack of comprehension can result from misleading statements by police. Illustration 3 is based on Ryan v. Doody, in which the Ninth Circuit Court of Appeals found the police warnings to be rambling and confusing, after the juvenile said he was not familiar with *Miranda* rights. 649 F.3d 986 (9th Cir. 2011). Most offensive to the court were frequent statements that the warnings were "a formality," together with the suggestion that the youth was entitled to an attorney only if he was involved in the crime. Id. at 1002-1003.

The legal standard requires an evaluation of the juvenile's waiver on the basis of education and intelligence as well as age. A youth with an intellectual disability may be particularly likely to lack the ability to comprehend rights and make a valid waiver decision. Grisso found that 15- and 16-year-old youths with low intelligence performed as poorly as younger juveniles in their comprehension of *Miranda* rights. Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights, supra*; see also Thomas Grisso et al., *A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. & HUM. BEHAV. 333 (2003). Further, in a review of a large body of research, Grisso reported that as many as 40 percent of youths in the justice system have diagnosable mental disorders, which can also undermine comprehension. See THOMAS GRISSO, DOUBLE JEOPARDY: ADOLESCENT OFFENDERS WITH MENTAL DISORDERS 6-13 (2004).

Courts often give substantial weight to intellectual disability in both adults and juveniles, although juveniles with disabilities are considered to be doubly disadvantaged. See, e.g., In re T.B., 11 A.3d 500 (Pa. Super. Ct. 2010) (waiver by 15-year-old with I.Q. of 67 who read on a third-grade level was not knowing and intelligent); J.G. v. State, 883 So. 2d 915 (Fla. Dist. Ct. App. 2004) (waiver of *Miranda* rights suppressed when juvenile was enrolled in "emotionally handicapped" courses and had Fs in six of seven recent classes); Brown v. Crosby, 249 F. Supp. 2d 1285 (S.D. Fla. 2003) (waiver suppressed when juvenile had low I.Q.); In re M.W., 731 N.E.2d 358 (Ill. App. Ct. 2000) (waiver suppressed when juvenile had characteristics of an intellectually disabled person); People v. Bernasco, 562 N.E.2d 958 (Ill. 1990) (17-year-old juvenile's waiver suppressed due in part to the fact that he had a fourth-grade reading and comprehension level); Cooper v. Griffin, 455 F.2d 114 (5th Cir. 1972) (waiver of two teenage juveniles suppressed when each had an I.Q. between 61 and 67).

This response is not uniform, and evidence of intellectual disability is not dispositive under the totality-of-the-circumstances standard. See, e.g., State ex rel. D.D., 848 A.2d 907 (N.J. Ch. Div. 2003) (15-year-old with history of severe learning disability knowingly and intelligently waived his *Miranda* rights); W.M. v. State, 585 So. 2d 979 (Fla. Dist. Ct. App. 1991) (waiver by mentally disabled 10-year-old found valid); State v. Flowers, 497 S.E.2d 94 (N.C. Ct. App. 1998) (juvenile's waiver found valid, despite a clinical psychologist testifying that the juvenile's full scale I.Q. of 56 substantially impaired his ability to understand his *Miranda* rights); Albarran v. State, 96 So. 3d 131, 153 (Ala. Crim. App. 2011) ("We have often held that 'the fact that a defendant may suffer from a mental impairment or low intelligence will not, without other evidence, render a confession involuntary'").

d. Justice-system experience. Age and experience are often correlated, such that younger juveniles are deemed disadvantaged both by lack of justice-system experience and by general immaturity. In A.M. v. Butler, 360 F.3d 787 (7th Cir. 2004), the court noted juvenile's young age (11) combined with his lack of prior experience in the justice system and other factors in finding his statement to be involuntary. Section 14.22 requires the assistance of counsel in interrogation for younger juveniles because of their extreme vulnerability.

Conversely, courts often reject the suppression claims of older youths who have substantial justice-system experience. In Fare v Michael C., the Supreme Court observed that age and experience in the system could be relevant to the evaluation of whether the juvenile's request to see his parents or a probation officer was an invocation of his right to counsel. Since Michael C. was almost 17 and had significant justice-system experience, his request to see his probation officer was found not to constitute an invocation of the right to counsel. 442 U.S. 707, 726 (1979).

Illustration 6 is adapted from Fare v. Michael C., 442 U.S. 707 (1979).

In finding juvenile waivers invalid or confessions involuntary, courts often focus on the youth's lack of prior interrogation experience. See e.g., In re T.B., 11 A.3d 500 (Pa. Super. Ct. 2010); Commonwealth v. Cain, 279 N.E.2d 706 (Mass. 1972); Williams v. Peyton, 404 F.2d 528 (4th Cir. 1968). Even an older youth's lack of experience can weigh against a valid waiver of rights. In Doody v. Ryan, a federal appellate court excluded the confession of a 17-year-old, in part because "the [state appellate court] failed to consider Doody's . . . lack of prior involvement with the criminal justice system, his lack of familiarity with *Miranda* warnings, [and] his non-native status . . ." 649 F.3d 986, 1015 (9th Cir. 2011). Rarely, prior experience has been seen as making a juvenile more vulnerable. In In re Jerrell C.J., the court noted that on two prior occasions, the juvenile had been allowed to go home after admitting involvement in crimes, experiences that "may have contributed to his willingness to confess in the case at hand . . . [S]uch an experience may have taught him a dangerous lesson that admitting involvement in an offense will result in a return home without any significant consequences." In re Jerrell C.J., 699 N.W.2d 110 (Wis. 2005).

Courts often cite extensive prior experience in the justice system as suggestive of a youth's greater understanding of rights. See, e.g., State v. Prater, 463 P.2d 640, 641 (Wash. 1970) (fact that a juvenile had 15 prior arrests was considered to outweigh any deficiency in the police officer's hurried and incomplete manner of informing the juvenile of his rights); Commonwealth v. Williams, 475 A.2d 1283 (Pa. 1984) (17-year-old juvenile's considerable experience with the legal system weighed in favor of valid waiver). More recently, a 17-year-old with mental disabilities, convicted of first-degree murder and armed robbery, was unsuccessful in challenging the validity of his *Miranda* waiver, in part due to his prior experience in the system. McIntosh v. State, 37 So. 3d 914 (Fla. Dist. Ct. App. 2010).

The research on the effect of prior experience in the justice system is not extensive and the findings are complex: Some research suggests that prior experience does not directly improve comprehension of *Miranda* rights, but other studies indicate that youths with prior experience are more likely to invoke their right to remain silent. Thomas Grisso's research found that prior court

experience bore no direct relation to a juvenile's understanding the words and phrases in the *Miranda* warning. However, experience was modestly correlated with increased understanding of the function and significance of the right to remain silent and to counsel. Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: And Empirical Analysis*, 8 CAL. L. REV. 1134 (1980). More recent research by Heather Zelle and colleagues found little correlation between prior arrests and comprehension. Heather Zelle, Christina Riggs, & Naomi Goldstein, *Juveniles'* Miranda *Comprehension: Understanding, Appreciation and Totality of Circumstances Factors*, 39 L. & HUM. BEHAV. 281 (2015). A few studies have found that juveniles with prior arrests may be more likely to invoke their *Miranda* rights. See M. Dyan McGuire, Michael G. Vaughn, Jeffrey J. Shook & Tamara Kenny, *Do Juveniles Understand What an Attorney is Supposed to Do Well Enough to Make Knowing and Intelligent Decisions About Waiving Their Right to Counsel?: An Exploratory Study*, J. OF APPLIED JUV. JUST. SERV. 7 (2015), http://npjs.org/jajjs/wp-content/uploads/2015/02/JAJJS-Article-McGuire.pdf. Another study found that juveniles with prior felony arrests waived their rights at significantly lower rates than juveniles with fewer or less serious prior interactions with law enforcement. See Barry Feld, *Real Interrogation: What Actually Happens When Cops Question Kids*, 47(1) L. & SOC'Y REV. 12-13 (2013). This may suggest that juveniles with extensive justice-system experience are better able to deal with the stress of interrogation than those without experience, or that experienced youths have learned the value of having legal counsel.

e. Communication of Miranda *rights.* Psychologists have observed that the standard version of the warnings given to suspects requires a sixth- or seventh-grade reading and comprehension level (and some versions require a higher level), an ability that many youths in the justice system may lack. Richard Rogers, *The Language of* Miranda *Warnings in American Jurisdictions: A Replication and Vocabulary Analysis*, 32 L. & HUM. BEHAV. 124, 129 (2004) (surveying variations in *Miranda* warnings and concluding that almost all versions required more than a fifth-grade reading level, while the standard version required a seventh-grade reading level). Thus many juveniles may fail to comprehend the words or the meaning and function of the rights embodied in *Miranda* warnings and will be unable to make a knowing intelligent waiver if the standard warnings are simply read to them.

Examination of whether police officers made an effort to explain *Miranda* warnings to the juvenile has been a key factor for courts evaluating the validity of the waiver in light of the juvenile's age and intelligence. For example, in Otis v. State, although a 14-year-old youth possessed a functional age of between nine and 12, he was found to have waived his rights because the officers carefully explained the meaning of the words on the waiver form. 217 S.W.3d 839, 846 (Ark. 2005). The same court later affirmed the importance of explaining rights to juveniles in T.C. v. State; in finding the juvenile's waiver to be invalid, the court observed that he "was given no explanation of the waiver-of-rights form the first time he signed it and instead was merely asked to read it for himself." 364 S.W.3d 53, 62 (Ark. 2010). See also Smith v. State, 918 A.2d 1144, 1151 (Del. 2007) (remanding for a new trial after court found explanation of *Miranda* warnings "quick and confusing"); State v. Tolliver, 561 S.W.2d 407, 409 (Mo. Ct. App. 1977) ("They merely

made an academic explanation of defendant's rights without any attempt to relate those rights to the facts of defendant's case"); In re W.C., 657 N.E.2d 908, 922 (Ill. 1995) ("It is not clear from this evidence, however, that W.C. would have been able to understand Sheridan's explanation of the Miranda warnings").

This response is far from universal. Waiver by a younger or intellectually impaired juvenile has sometimes been found valid with seemingly little consideration of whether efforts were made to explain *Miranda* warnings. See Reporters' Note to Comment *c*.

Some courts have indicated that the interrogating officers should communicate to the juvenile that the statement he makes could be used in a criminal proceeding if he or she is tried as an adult. See e.g., State v. Simon, 680 S.W.2d 346 (Mo. Ct. App. 1984) (officer has duty to inform juvenile that whatever he says may be used against him if he is prosecuted as adult); State v. Benoit, 490 A.2d 295 (N.H. 1985) (concurring opinion) (confession inadmissible in felony criminal proceeding unless juvenile advised that he could be tried as adult); State v. Farrell, 766 A.2d 1057 (N.H. 2001) (juvenile's rights not knowingly waived unless he was advised of possibility of adult prosecution); Quiriconi v. State, 616 P.2d 1111 (Nev. 1980) (ordinarily juvenile should be informed of the possibility of adult trial). Other courts have advised that this information be communicated by police. In State v. Fardan, 773 N.W.2d 303, 313 (Minn. 2009), the Minnesota Supreme Court observed, "We have suggested that 'the best course is to specifically warn the minor that his statement can be used in adult court, particularly when the juvenile might be misled by the 'protective, non-adversary' environment that juvenile court fosters.'") (citing State v. Loyd, 212 N.W.2d 671, 676-677 (Minn. 1973)).

Illustration 8 is based on Barry Feld's 2006 study of juvenile-interrogation practices in the St. Paul, Minnesota, Police Department. Barry C. Feld, *Juveniles' Competence to Exercise Miranda Rights: An Empirical Study of Policy and Practice*, 97 MINN. L. REV. 26, 78 (2006). The study reviewed 66 taped juvenile interrogations. Feld observed that "some officers took it upon themselves to elaborate on and to explain the meaning of the [*Miranda*] warnings to further clarify youths' understanding." The explanation of the right to counsel in the Illustration was offered by one officer.

Some police departments have adopted simplified *Miranda* warnings to be communicated to juvenile suspects. The International Association of Chiefs of Police ("IACP") recommends a simplified *Miranda* warning for children, designed to require only a third-grade reading level. The IACP recommended warnings are as follows: (1) You have the right to remain silent. That means you do not have to say anything; (2) Anything you say can be used against you in court; (3) You have the right to get help from a lawyer right now; (4) If you cannot pay a lawyer, we will get you one here for free; (5) You have the right to stop this interview at any time; (6) Do you want to talk to me; and (7) Do you want to have a lawyer with you while you talk to me? International Association of Chiefs of Police, *Reducing Risks: An Executive's Guide to Effective Juvenile Interview and Interrogation* 13 (2012).

Some courts have held that satisfaction of the requirement that *Miranda* rights must be explained to a parent or interested adult does not satisfy the requirement that officers must also

explain these rights to the juvenile, who must comprehend the rights and the consequences of waiver. See Nicholas v. State, 444 A.2d 373 (Maine 1982).

f. The requirement of a voluntary confession. In evaluating whether a defendant's statement made during interrogation can be admitted later into evidence, courts sometimes do not distinguish between the requirement that the waiver of *Miranda* rights be knowing, intelligent, and voluntary and that the statement itself be voluntary. This Section separates the two requirements for analytic and doctrinal clarity, although in practice they often overlap. The constitutional due process requirement of a voluntary confession is also independent of the Fifth Amendment privilege against self-incrimination, which was applied to the states only in 1964. See, e.g., Malloy v. Hogan, 378 U.S. 1 (1964).

Courts have long excluded involuntary confessions on due-process grounds. One of the first Supreme Court opinions to examine a confession by a juvenile, Haley v. Ohio, 332 U.S. 596 (1948) found a due-process violation in the trial court's admission of a youth's confession made after a lengthy interrogation. Modern courts also suppress statements on this ground. See Ryan v. Doody, 649 F.3d 986 (9th Cir. 2011) (finding that juvenile's will was overborne and his statement involuntary under the Due Process Clause). See also Crowe v. Cty. of San Diego, 608 F.3d 406 (9th Cir. 2010); United States v. Doe, 219 F.3d 1009 (9th Cir. 2000); State v. Presha, 748 A.2d 1108 (N.J. 2000). The distinction between an invalid waiver and an involuntary confession was clearly drawn by the court in Leon v. Commonwealth, 756 N.E.2d 1162 (Mass. App. Ct. 2001), for example; the court upheld the validity of the juvenile's waiver, but found that the confession was not voluntary. Some scholars have argued that the *Miranda* inquiry now dominates judicial review of juveniles' confessions, and that greater emphasis should be placed on the question of whether the youth's statement was voluntary. Martin Guggenheim and Randy Hertz, J.D.B. *and the Maturing of Juvenile Confession Suppression Law*, 38 WASH. U. J.L. & POL'Y 109, 176 (2012).

g. Coercive police conduct or conditions required. The Supreme Court has held that "coercive or improper police conduct" is a constitutional prerequisite for a finding that a statement made in interrogation was involuntary and should be excluded from evidence. Colorado v. Connelly, 479 U.S. 157, 167 (1986). Internal compulsion or pressure from someone other than an interrogating officer usually is not adequate. Thus, in *Connelly*, the Court rejected a claim that the confession of a mentally ill (adult) individual was involuntary in the absence of coercive police conduct; the defendant suffered from "command hallucinations," and believed that the voice of God was ordering him to confess. 479 U.S. at 163 (1986). The Court observed that prior Supreme Court cases evaluating confessions under the Due Process Clause had uniformly found statements to be involuntary only when there was some coercive police conduct: "Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." 479 U.S. at 164.

This limitation applies to juveniles' confessions as well; courts have held statements to be involuntary only when police coercion is involved. See State ex rel. Juvenile Dep't of Washington v. O'Farrell, 83 P.3d 931, 936 (Or. Ct. App. 2004) (holding juvenile confession was voluntary because "[p]olice coercion or other misconduct . . . is a necessary predicate to a finding of

involuntariness" and there was no evidence that the "youth's confession was anything more than the product of his 'internal pressures or personal cognitive limitations'" (citation omitted)); State v. Jackson, No. CA2002–01–013, 2002 WL 31155122, at *4 (Ohio Ct. App. Sept. 30, 2002) (upholding trial court's finding that confession was admissible because it was the "direct result of appellant's mother's admonitions, and not the result of coercive police activity," and mother was not acting as state agent). As this ruling indicates, a statement obtained in response to the urging of the juvenile's parent will usually not be suppressed unless the parent was acting as an agent of or in concert with the police. Because a parent will often pressure a child to confess, perhaps believing erroneously that it will serve the child's legal interest, a rule facilitating parental presence in interrogation offers limited protection to the juvenile. See discussion in § 14.22 , Comment *b*, and the Reporters' Note thereto.

Although some police coercion is necessary to a finding that a confession was involuntary, courts (including the Supreme Court) have emphasized that tactics that would be insufficient to support the conclusion that an adult's confession was involuntary can result in the suppression of a juvenile's statement. In Haley v. Ohio, the Court admonished, "A boy cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens." 332 U.S. 596, 599 (1948). An Arizona court pointed to factors that might be deemed routine in the interrogation of an adult, and found sufficient to render a juvenile's confession involuntary. These included the arguably coercive atmosphere of the police interrogation room, the focus of the investigation on the juvenile as the prime suspect, and police transportation of the juvenile to the station. See also State v. Jimenez, 799 P.2d 785, 790 (Ariz. 1990); In re J.F., 987 A.2d 1168, 1177 (D.C. 2010) (holding 14-year-old's confession inadmissible and noting his characteristics, particularly age, "indicate susceptibility to coercion and require us to more carefully scrutinize the police interrogative tactics."); In re D.L.H., Jr., 32 N.E.3d 1075, 1096 (Ill. 2015) (holding juvenile statements made during interrogation should have been suppressed where officer minimized the seriousness of the charges and used other interrogation tactics because "[t]hough an adult might very well have been left 'cold and unimpressed' with Adams's mode of questioning, respondent was just a boy of nine, functioning at the level of a seven- or eight-year-old, and thus far more vulnerable and susceptible to police coercion of this type." (quoting Haley v. Ohio, 332 U.S. 596, 599 (1948)); In re K.D.L., 700 S.E.2d 766, 771 (N.C. Ct. App. 2010) ("[W]e cannot forget that police interrogation is inherently coercive—particularly for young people."). Courts also express concern that juveniles are more likely than adults to respond to standard police tactics by giving confessions that are later shown to be false. As one court observed in a case involving an 11-year-old boy, the interrogation techniques used by the police "could easily lead a young boy to 'confess' to anything." A.M. v. Butler, 350 F.3d 787, 800 (7th Cir. 2004). The Reporters' Note to Comment *h* discusses the greater tendency of juveniles than adults to make false confessions.

h. Factors affecting voluntariness and youthful vulnerability. The waiver or confession of a juvenile can be found to be involuntary on the basis of the conduct of police interrogators seeking to induce the suspect to confess and/or on the conditions surrounding interrogation. Police in this

country typically employ a standard set of interrogation tactics known as the Reid technique. Saul M. Kassin et al., *Police-Induced Confession, Risk Factors, and Recommendations: Looking Ahead*, L. & HUM. BEHAV. 49 (2010) (description of technique) (hereinafter, "*Police-Induced Confession*"); FRED INBAU, JOHN REID, JOSEPH BUCKLEY, BRIAN JAYNE, CRIMINAL INTERROGATION AND CONFESSIONS (5th ed. 2013) (Reid technique training manual) (hereinafter, "Criminal Interrogation"). These techniques (described below) were designed to induce confessions in adult criminals, and in extreme cases, can be the basis for a determination that an adult's waiver or confession was involuntary. But the tactics are also employed in questioning juveniles, with whom they have been found to be particularly effective. See Jessica R. Meyer & N. Dickon Reppucci, *Police Practices and Perceptions Regarding Juvenile Interrogation and Interrogative Suggestibility*, 25 BEHAV. SCI. & L. 757, 762 (2007). See also Barry Feld, *Behind Closed Doors: What Really Happens When Cops Question Kids*, 23 Cornell J. L. & Pub. Pol'y 395, 413-415, 454-456 (2013) (Reid technique creates unique dangers of false confessions in juveniles).

Many cases in which juvenile confessions have been challenged as involuntary involve the use of these tactics, and courts have often found their use with young suspects to be coercive. In In re Elias V., 188 Cal. Rptr. 3d 202, 220-221 (Cal. Ct. App. 2015), the court offered a detailed description of the Reid technique and described the heightened vulnerability of juveniles to these practices in suppressing the youth's statement.

A preliminary step in the interrogation process is often to isolate the suspect from family or other supportive persons (including codefendants)**.** Inbau et al, Criminal Interrogation 43. Courts have recognized that isolating a juvenile can exacerbate the youth's susceptibility to pressure. Where officers have declined to allow the parent to be present during the juvenile's interrogation in response to a request by either the juvenile or a parent, courts often have held the waiver and\or confession to be invalid. See, e.g., Presha v. State, 748 A.2d 1108 (N.J. 2000) (exclusion of parent by police emphasized in decision to suppress); People v. Townsend, 300 N.E.2d 722, 724 (N.Y. 1973) ("[I]t is impermissible for the police to use a confession, even if it be otherwise voluntary, . . . when . . . they have sealed off the most likely avenue by which assistance of counsel may reach [the juvenile]."); In re Jerrell C.J., 699 N.W.2d 110, 118 (2005) (denial of juvenile's request to see parents was strong evidence of coercive police conduct); In re Lashun, 672 N.E.2d 331 (Ill. App. Ct. 1996) (confession suppressed because "mother's efforts to see son were clearly frustrated by police so they could maintain an intimidating atmosphere and obtain a confession[.]"); People v. Bevilacqua, 382 N.E.2d 1326, (N.Y 1978) (confession suppressed where police isolated juvenile from parents).

The location of the interview can compound the sense of isolation. Courts have observed that small rooms with closed doors, where interrogations are often conducted, are naturally coercive, and that juveniles are especially vulnerable to pressure in an isolated setting. See, e.g., In re Elias V., 188 Cal. Rptr. 3d 202, 220 (Ct. App. 2015) (interrogation conducted in a small room, with officers by the door, is "intimidating"); Com. v. Bell, 365 S.W.3d 216 (Ky. Ct. App.

2012) (juvenile was ordered into a closed room in his school, contributing to a coercive environment).

Several police tactics aim to break down the suspect's claims of innocence: these have sometimes been described as "maximization" techniques, and include the insistence on the suspect's guilt, rejection of all denials, and description of the dire consequences of remaining silent. Kassin et al., *Police-Induced Confession*, supra, at 49. Courts often find these tactics to be coercive when directed at juveniles, particularly the use of threats. In In re Art T., for example, a 13-year-old youth was told that until he told the truth he would look like a "cold blooded gang murderer. That is serious." In re Art T., 234 Cal. App. 4th 335, 341 (2015). See also Dye v. Com., 411 S.W.3d 227, 233 (Ky. 2013), reh'g denied (Sept. 26, 2013) ("repeatedly threatening a seventeen-year-old with the death penalty is objectively coercive."); Crowe v. Cty. of San Diego, 608 F.3d 406 (9th Cir. 2010) (concluding juvenile was compelled to confess by "psychological torture" which included threats and pressure by law enforcement); State ex rel. J.E.T., 10 So. 3d 1264, 1278 (La. Ct. App. 2009) (confession was coerced because juvenile was threatened by police to tell the truth "or else"); In re J. Clyde K., 192 Cal. App. 3d 710, 722 (Ct. App. 1987) (juvenile confession suppressed after officer told juvenile he would go to jail if he lied); In re Roger G., 125 Cal. Rptr. 625, 628 (Ct. App. 1975) (confession suppressed in part because "officer pointed out to [juvenile] that he might be incarcerated until he was 25, while another chimed in that [juvenile] might be certified as an adult defendant and receive a life sentence"). A related tactic involves interrogators' expressions of absolute certainty about the guilt of the suspect, and repeated accusations that the suspect is lying. See A.M. v. Butler, 360 F.3d 787 (7th Cir. 2004) (court notes repeated rejection of juvenile's denials of involvement); see also In re Jerrell C.J., 699 N.W.2d 110, 119 (Wis. 2005) (juvenile suspect repeatedly urged to tell a "different truth").

Another commonly used tactic that courts also find to be coercive with juveniles involves deception by police about the strength of the evidence or inculpatory statements by confederates. See, e.g., In re Elias V., 188 Cal. Rptr. 3d 202 (Cal. Ct. App. 2015) (law enforcement's use of false evidence while questioning juvenile suspect rendered confession involuntary); Com. v. Bell, 365 S.W.3d 216 (Ky. Ct. App. 2012) (juvenile's confession suppressed in part because law enforcement feigned superior knowledge of what allegedly transpired); Matter of B.M.B., 955 P.2d 1302 (1998) (coercion found in part because law enforcement erroneously suggested to juvenile suspect that they knew what happened); In re Shawn D., 20 Cal. App. 4th 200 (1993) (confession suppressed in part because law enforcement lied regarding the evidence against the juvenile); Quartararo v. Mantello, 715 F. Supp. 449 (E.D.N.Y. 1989), aff'd, 888 F.2d 126 (2d Cir. 1989) (confession vacated in part because police wrongly told juvenile the other suspects had confessed); Woods v. Clusen, 794 F.2d 293 (7th Cir. 1986) (juvenile's confession was involuntary in part because law enforcement deceived juvenile with respect to the strength of the evidence facing him).

Standard police tactics also include what have been called "minimization" techniques, aimed at enhancing the palatability of confessing. These tactics include downplaying the youth's personal responsibility for the crime, its seriousness, or intentional nature, and encouraging the

youth to discount the consequences of confession. Suggestions or promises that the juvenile will receive lenient treatment also fall in this category. See Kassin, et al., supra, at 50; J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011), Amicus Curiae Brief for the Center on Wrongful Convictions of Youth, 15-16 (describing the Reid technique, which includes both maximization and minimization techniques used in tandem).

Courts point to the use of minimizing tactics in finding juvenile waivers or confessions involuntary. Many cases involve the suggestion by interrogators that confession will lead to lenient treatment. For example, a Massachusetts court suppressed a juvenile's confession in part because she was told she would be placed in foster care rather than prison if she confessed. Com. v.Nga Truong, 28 Mass. L. Rptr. 223 (Mass. Super. Ct. 2011). Suppression was also ordered when the interrogator told the juvenile suspect he would help him if he confessed, but didn't explain limits of his capacity to do so. Ramirez v. State, 15 So. 3d 852 (Fla. Dist. Ct. App. 2009). See also United States v. Lall, 607 F.3d 1277 (11th Cir. 2010) (confession suppressed when officer affirmed that the state would not pursue charges if juvenile confessed, but did not disclose that the federal government could press charges). See also Juvenile Dep't of Washington Cty. v. S.C.G., 713 P.2d 689, 690-691 (Or. Ct. App. 1986) (officer minimized crime by suggesting to juvenile that a confession would merely result in juvenile getting treatment at a community center); S.B. v. State, 614 P.2d 786, 788 (Alaska 1980) (officer implied that if juvenile "came clean" the crime would not merit a serious charge); Miller v. Watson, 713 P.2d 689 (Or. Ct. App. 1986) (promise of mental-health treatment made statement involuntary). Even the somewhat trivial inducement of a promised T-shirt was found coercive by a Maryland court so as to render a juvenile's statement involuntary. In re Joshua David C., 698 A.2d 1155 (Md. Ct. Spec. App. 1995). See also Matter of B.M.B., 255 P.2d 1320 (Kan. 1998) (officer failed to inform juvenile suspect that he was under arrest and pretended to be an ally); In re J.F., 987 A.2d 1168, 1178-1179 (D.C. 2010) (conditioning juvenile's ability to leave the station on confessing to the crime was coercive; confession was suppressed).

Courts sometimes weigh heavily the conditions under which the youth is questioned, including the duration of an interrogation, the time of day, and whether breaks were given. In 1948, the Supreme Court determined that a confession offered after a five-hour interrogation, beginning at midnight, was invalid due to "the age of [the juvenile], the hours when he was grilled, [and] the duration of his quizzing. . . ." Haley v. Ohio, 332 U.S. 596, 600 (1948). Similarly, the Supreme Court found a confession obtained after five days of questioning, without alerting the 14-year-old's parents, to have violated due process. Gallegos v. Colorado, 370 U.S. 49 (1962). See also Crowe v. Cty. of San Diego, 608 F.3d 406, 431 (9th Cir. 2010) (juveniles interrogated for "hours and hours" constituted "psychological torture"); Doody v. Schriro, 548 F.3d 847, 867 (9th Cir. 2008) ([T]here is "coercive potential in unbroken hours of interrogation of a juvenile."); Taylor v. Maddox, 366 F.3d 992, 1013 (9th Cir. 2004) (three-hour interrogation that began after midnight was coercive); Thomas v. State of N.C., 447 F.2d 1320 (4th Cir. 1971) (19 hours of interrogation with "scant rest" rendered confession involuntary); In re Jerrell C.J., 699 N.W.2d 110, 116 (Wis. 2005) (citing *Haley* and pointing to "the need to exercise 'special caution' when assessing the

voluntariness of a juvenile confession, particularly when there is prolonged or repeated questioning or when the interrogation occurs in the absence of a parent, lawyer, or other friendly adult"). Courts view the failure to provide a juvenile with breaks, food, or fluids to be coercive, undermining the voluntariness of the statement made. See Reck v. Pate, 367 U.S. 433, 441 (1961); see also Taylor v. Maddox, 366 F.3d 992, 1015 (9th Cir. 2004) (no food or water provided and no break given).

Some courts have found juveniles' statements and/or *Miranda* waivers to be voluntary despite the use of aggressive tactics by interrogators. Thus, under the "totality of the circumstances" test, courts sometimes decline to give substantial weight to certain tactics (such as isolation from parents or threats) in light of other noncoercive police behavior (such as providing food, water, breaks, and only a brief period of questioning). See Ruvalcaba v. Chandler, 416 F.3d 555, 561 (7th Cir. 2005); Neely v. State, 126 So. 3d 342, 346-347 (Fl. Dist. Ct. App. 2013) ("While the fact that a juvenile's confession was given before he had the opportunity to talk with his parents or an attorney is certainly a factor militating against its admissibility, . . . the existence of this fact does not preclude a finding of voluntariness depending upon all of the other circumstances surrounding the confession"). See also, e.g., United States v. Guzman, 879 F. Supp. 2d 312, 321 (E.D.N.Y. 2012) (while "absence of a parent [is an] important factor," the confession was voluntary); Gilbert v. Merch., 488 F.3d 780, 793 (7th Cir. 2007) ("it is the totality of the circumstances underlying a juvenile confession, rather than the presence or absence of a single circumstance, that determines whether or not the confession should be deemed voluntary.").

Social-science research supports the conclusion that youths are especially vulnerable to police efforts to elicit confessions. Many studies confirm that juveniles, particularly younger juveniles, waive their rights and confess at a far higher rate than do adults. Jodi L. Viljoen, Jessica Klaver & Ronald Roesch, *Legal Decisions of Preadolescent and Adolescent Defendants: Predictors of Confessions, Pleas, Communication with Attorneys, and Appeals*, 29 L. & HUM. BEHAV. 253, 261 (2005) (finding of defendants questioned by the police, only 7.96 percent of those aged 14 and under remained silent); Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. & HUM. BEHAV. 333, 353-356 (2003) (laboratory study finding that children 15 years or younger are more likely than older teenagers to comply with authority and confess to an offense). The tendency of younger juveniles to confess is likely due in part to their lack of comprehension of rights. But studies have also found that certain questioning methods, such as the use of deception, and repeated, suggestive, and leading questions are particularly likely to elicit confessions (false or otherwise) by both younger and older juveniles. Meyer & Reppucci, supra, at 762 (2007). Juveniles are more inclined to confess than are adults when confronted with strong evidence against them, even if it is false. See, e.g., Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: Influence of Age and Suggestibility*, 27 L. & HUM. BEHAV. 141, 152 (2003) (hereinafter, "Redlich & Goodman, 2003") ("Age was associated with compliance with signing the false confession, particularly when false evidence was presented . . . [U]nder the same set of circumstances, minor children were more likely to falsely take responsibility than young adults."). When police convey certainty about the suspect's guilt

together with strong incriminating evidence, juveniles may believe they have no alternative but to confess. Indeed, the authors of the Reid technique caution police against using deception excessively with juveniles. John E. Reid & Associates, Inc., Critics Corner, http://www.reid.com/educational_info/criticfalseconf.html (last visited Aug. 22, 2016) (agreeing that juveniles are at higher risk for false confessions than adults and advising interrogators to exercise "extreme caution and care" when interrogating them).

Research on adolescent development sheds light on juveniles' susceptibility and inclination to confess as compared to adults. Immaturity in brain development that likely undermines adolescents' capacity to comprehend *Miranda* rights under the stress of interrogation also renders them vulnerable to police pressure. See discussion in Reporters' Note to Comment *c*. As explained earlier, because adolescent brain functioning (particularly the parts regulating executive functioning) is relatively immature, adolescents' capacity to make competent decisions tends to become diminished in threatening or stressful situations. See also Beatrix Luna, Aarthi Padmanabhan & Kirsten O'Hearn, *What has fMRI Told us about the Development of Cognitive Control in Adolescence?,* 72 BRAIN & COGNITION 101 (2010). Adolescents tend to focus on short-term consequences of their choices and, relative to adults, to discount long-term costs and benefits. Moreover, while areas of the brain related to impulse control and self-regulation are still developing in adolescence, impulsivity and reward-seeking increases at puberty and is elevated during adolescence. Teenagers also tend to weigh rewards more heavily than risks. Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-taking*, 28 DEVELOPMENTAL REV. 78 (2008); B.J. Casey, Sarah Getz & Adriana Galvan, *The Adolescent Brain*, 28 DEVELOPMENTAL REV. 62, 62-77 (2008) (brain systems involved in self-regulation are relatively immature in adolescence, a time when neural responses to emotional and social stimuli are heightened). In combination, these qualities contribute to an inclination to make impulsive decisions. Finally, juveniles, especially those under age 16, are more inclined to respond compliantly to adult authority figures than are adults. See Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. & HUM. BEHAV. 333 (2003); Krishna K. Signh & Gisli H. Gudjonsson, *Interrogative Suggestibility Among Adolescent Boys and its Relationship with Intelligence, Memory, and Cognitive Set*, 15 J. ADOLESCENCE 155, 160 (1992) (finding youth positively related to measures of suggestibility in response to questioning).

It seems likely that many juveniles, under the stressful conditions of interrogation, tend more than adults to focus on the short-term consequences of waiver and confession—ending the interrogation and going home—and to minimize (or misperceive) the long-term consequences—conviction of a serious crime based on evidence obtained in the confession. This response is encouraged by maximization techniques that exaggerate or distort the costs of remaining silent, and minimization techniques that aim to make the cost of confession seem modest as compared to the cost of continued interrogation.

A critical concern about the use of standard police tactics with juveniles is that youths are more likely than adults to succumb to pressure and confess falsely to crimes. The conviction of

five youths, aged 14 to 16, in the 1989 attack on a female jogger in Central Park, New York, provides a much-publicized example of juveniles induced through the concerted use of standard police tactics to confess to a crime they did not commit. In that case, the juveniles all confessed to, and were convicted of, the brutal attack after each separately was subjected to lengthy interrogation. The police used deception techniques, falsely telling each suspect that one of the five had already confessed and that the juveniles' fingerprints would be found on the jogger's clothing. Each individual youth was also told that the police believed he was a mere onlooker, and thus was a witness, not a suspect, and that he could return home if he confessed. Based on their confessions, the youths were convicted of various crimes ranging from attempted murder to sexual assault. The four younger juveniles served seven years and were released in 1997. Kharey Wise, age 16 at the time of the offense, served 13 years and was still in prison when Matthias Reyes, another prisoner, confessed to the crime in 2002. Wise was released and all convictions were vacated. See Miriam S. Gohara, *A Lie for A Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 791, 792 (2006); see also Sydney Schanberg, The Village Voice, *A Journey Through the Tangled Case of the Central Park Jogger* (Nov. 19, 2002). http://www.washingtonpost.com/archive/politics/1990/12/12/conviction-in-jogger-case-is-for-attempted-murder/5a0127a5-4910-490b-baa5-502bd5e58250/

Illustration 12 is based on the Central Park jogger case.

This case provides an example of the extreme vulnerability of juveniles to aggressive police tactics in the interrogation setting, and it has contributed to heightened judicial concern about the risk of false confessions. In J.D.B. v. North Carolina, the Supreme Court emphasized the risk of false confessions in requiring that the suspect's age be considered in the determination of whether a juvenile is in custody. 131 S. Ct. 2394, 2401 (2011) (discussing the risk of false confession and citing amicus curiae brief submitted by Center on Wrongful Convictions of Youth, supra). See also Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 919 (2004).

The research supports that juveniles are more inclined to give false confessions than are adults. A laboratory study found that a majority of participants, ranging from ages 12 to 26, complied with a request to sign a false confession without protest, and that younger subjects complied at a higher rate. Redlich & Goodman, supra, at 150-151. Juveniles also *actually* confess falsely at a disproportionately higher rate than do adults. See Drizin and Leo, supra, at 945 (in a sample of 125 proven false confessions, 63 percent of defendants were under the age of 25 and 35 percent were under 18; juveniles account for 10 percent of total arrests); Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005) (concluding that juveniles under the age of 18 were three times as likely to falsely confess as adults). A 2010 study found that almost twice as many wrongful convictions of juveniles, as compared to adults, involved a false confession. Joshua Tepfer, Laura Nirider, and Lynda Tricarico, *Arresting Development: Convictions of Innocent Youth*, 62 RUTGERS L. REV. 887 (2010). Even the creators of the Reid technique have recognized the problem. John E. Reid &

Associates, Inc., Critics Corner, supra (agreeing that juveniles are at higher risk for false confessions than adults and advising interrogators to exercise "extreme caution and care" when interrogating them).

Law-enforcement officials sometimes reject the possibility of a false confession on the ground that the youth's statement contained information about the crime that only the perpetrator would know. But experts have observed that juveniles often acquire information from the police in the course of the interrogation, a process called contamination, often with little awareness by police. This tendency, which is also observed in adult defendants, is often only evident on review of the video-recorded interrogation. Section 14.23 requires video-recording of juvenile interrogations, when feasible. See § 14.23, Comment *a* (describing recording of interrogation as protection against contamination). See Brandon Garrett, *Contaminated Confessions Revisited*, 101 VA. L. REV. 395 (2015) (describing risk of contamination).

i. Request for attorney post-waiver. A request for counsel by a suspect who has previously waived his *Miranda* rights must be unequivocal, measured by an objective standard of whether a reasonable officer would recognize that the individual was invoking his right to counsel. Some courts have extended *J.D.B.*'s "reasonable juvenile" standard, holding that when a juvenile's request is evaluated, the determination of whether the request was unequivocal must take into account the age of the juvenile. In In re Art T, 183 Cal. Rptr. 3d 784, 798 (Cal. Ct. App. 2015), the interrogating officers ran a video, insisting that it showed the 13-year-old suspect (who had waived his *Miranda* rights) participating in the shooting. At that point, the juvenile said, "Could I have an attorney? . . . because that's not me," a request that the state argued was conditional. Rejecting this argument and finding that the youth had invoked his right to counsel despite his earlier waiver, the appellate court concluded that the objective inquiry of whether the juvenile had invoked the right to counsel should be undertaken in light of the age of the juvenile. In doing so, the court relied heavily on the Supreme Court opinion in J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011). See § 14.20, Comment *a*. Like the Supreme Court in *J.D.B.*, the California court emphasized the vulnerability of juveniles in interrogation, and pointed to the many contexts in which the law recognizes the immaturity of minors. The opinion provides an example of the expanding influence of *J.D.B.* on interrogation law.

Illustration 13 is based on In re Art T, 183 Cal. Rptr. 3d 784 (Cal. Ct. App. 2015).

j. Burden and Standard of proof. In Lego v. Twomey, the Supreme Court upheld a procedure in which the State established the voluntariness of a confession by a preponderance of the evidence. 404 U.S. 477, 486 (1972). In Colorado v. Connelly, the Supreme Court extended *Lego*, holding that the state must demonstrate the validity of a *Miranda* waiver by a preponderance of the evidence. Colorado v. Connelly, 479 U.S. 157 (1986). The Court reasoned that, "If . . . the voluntariness of a confession need be established only by a preponderance of the evidence, then a waiver of the auxiliary protections established in *Miranda* should require no higher burden of proof." Id. at 169.

State courts have largely adopted the preponderance of the evidence standard in evaluating the admissibility of statements made in custody, and have not distinguished between juveniles and

adults. Thus, numerous courts have found that the state bears the burden of proof by a preponderance of the evidence that a juvenile validly waived his *Miranda* rights. See, e.g., Carr v. State, 545 So. 2d 820, 825 (Ala. Crim. App. 1989) ("Our review . . . leads us to conclude that the trial court's finding that Carr voluntarily and intelligently waived his rights . . . is supported by the preponderance of the evidence."); Quick v. State, 599 P.2d 712 (Alaska 1979); In re Andre M., 88 P.3d 552 (Ariz. 2004); People v. Nelson, 266 P.3d 1008 (Cal. 2012); People v. Blankenship, 30 P.3d 698 (Colo. App. 2000) (cases requiring that the state prove the validity of waiver by a preponderance of evidence); United States v. Guzman, 879 F. Supp. 2d 312 (E.D.N.Y. 2012) (citing Colorado v. Connelly).

Rules of criminal procedure also implement a "preponderance of the evidence" standard to be applied by courts considering the validity of a waiver. For instance, Ariz. R. Crim. P. 16.2(b) states, "The prosecutor shall have the burden of proving, by a preponderance of the evidence, the lawfulness in all respects of the acquisition of all evidence which the prosecutor will use at trial." See, e.g., State v. Carlson, 266 P.3d 369 (Ariz. Ct. App. 2011) (holding a juvenile's *Miranda* waiver was invalid, as the police failed to meet the burden of proof required of them under Ariz. R. Crim. P. 16.2(b)).

§ 14.22. Consultation with Counsel for Younger Juveniles

Unless otherwise provided by statute, a juvenile age 14 or younger can give a valid waiver of the right to counsel and the right to remain silent only after meaningful consultation with and in the presence of counsel.

Comment:

a. Waiver and confession by a younger juvenile. Although the waiver of rights in interrogation by any juvenile warrants special scrutiny, a waiver and confession by a juvenile under age 15 is reviewed with particular care, giving substantial weight to the individual's youth. Due to developmental immaturity, the younger juvenile is far less likely to understand *Miranda* rights than an older juvenile or adult, and thus is less capable of making a knowing and intelligent decision about waiver. A younger juvenile is also more susceptible to police tactics aimed at inducing a confession, and therefore is at higher risk of making an involuntary statement. Because the potential for an invalid waiver or involuntary statement is acute for the younger juvenile, some courts and legislatures have created prophylactic measures aimed at providing special protections.

This Section follows this reform trend, conditioning a valid waiver of *Miranda* rights by a juvenile age 14 or younger on consultation with counsel.

Special protection of younger juveniles in this setting is strongly supported by a substantial body of biological and behavioral research indicating that younger adolescents, due to developmental immaturity, are deficient in ways that are likely to undermine their ability to make minimally adequate decisions in interrogation. This research indicates that juveniles under age 15 are less able to comprehend their rights than are older juveniles and adults and also are particularly susceptible to aggressive police tactics. Preadolescent children and younger adolescents, due to cognitive and emotional immaturity, are seriously compromised in their decision making capacity generally, and are more likely to make impulsive, shortsighted decisions than are older adolescents and adults. These deficiencies are likely to be exacerbated in stressful situations. The ability to think hypothetically and to weigh the short- and long-term costs and benefits of consequential alternatives in making a decision does not mature until mid-adolescence. Research studies also document specifically that comprehension of *Miranda* rights improves with age during adolescence and that younger juveniles are seriously deficient in this regard. A younger juvenile also is less likely to have experience in the justice system. See § 14.21, Comment *e*.

Illustration:

1. Albert, age 12, had no prior contact with the justice system when he was brought to the police station without a parent for questioning about the murder of an elderly woman who lived next door. The police initially questioned Albert as a witness, as he earlier had told an officer that he had seen a neighbor enter the victim's house shortly before her death. Because Albert's answers to questions were inconsistent, the officer began to treat him as a suspect. After two hours, the officer read Albert's *Miranda* rights, which Albert said he understood. After two more hours of questioning, the officer told Albert he would be allowed to go home so he could attend a cousin's birthday party after he made a statement. Shortly thereafter, Albert confessed to the murder. Albert's confession was not voluntary and is not admissible in evidence.

Albert's young age, the duration of the interrogation, and the inducement of a promise that Albert could go home and end the interrogation after making a statement render the waiver and statement involuntary. Under this Section, Albert's decision to waive

would be invalid and his statement excluded automatically because he was not advised by counsel.

In adopting protective requirements for younger juveniles, courts have observed the tension between traditional interrogation doctrine and general legal principles regarding children and youth. The default boundary dividing legal childhood and adulthood is age 18, but the line varies, based on the level of maturity required in different legal domains as well as other policy goals. Thus, older minors are authorized to make consequential health-care decisions under the mature minor doctrine, obtain contraceptives, drive motor vehicles, and withdraw from school attendance. But courts and legislatures assume that younger minors (under age 15) are incapable of making important decisions on their own behalf. Thus, in virtually every other legal context, younger adolescents have little autonomy and are subject to adult decision making authority. Recognition of a waiver decision made without adult assistance by a young minor is inconsistent with this presumption of legal incapacity, particularly because in interrogation, the state law enforcement agent seeks to induce a waiver decision that almost always will be against the juvenile's interest.

b. Rationale for requirement of counsel to protect the younger juvenile's legal interest. Courts and legislatures have responded to the high risk of invalid waivers and involuntary confessions by younger juvenile by adopting one of two kinds of prophylactic rules, each of which seeks to offer protection to younger juveniles and mitigate their seriously disadvantaged position when interrogated by law enforcement. The more typical response is a rule requiring either the presence of or the opportunity for consultation with a parent or interested adult when a younger juvenile is questioned by law-enforcement officers (the "interested adult" rule). A few jurisdictions have adopted a more protective rule, either categorically excluding statements by younger juveniles or requiring consultation with counsel as a predicate to waiver generally or under some circumstances. This Section adopts the latter approach.

A rule facilitating the presence of parents in interrogation is premised on the assumption that a parent will act to protect the interests of his or her child in interrogation and that the parent can mitigate the disadvantages of the juvenile's immaturity. The interested-adult rule is grounded in the conventional assumption that parents' and children's interests are aligned; this assumption informs the legal regulation of the parent–child relationship, and supports the broad authority of parents to make consequential decisions for their children. In the interrogation context, courts and legislatures assume that the parent will offer emotional support and can provide helpful assistance

by advising the juvenile about the exercise or waiver of *Miranda* rights. The interested-adult rule is also compatible with the strong protection of parental rights under American law.

In the interrogation setting, however, a substantial risk exists that the parent will not protect the legal interests of the child adequately. Dealing with the situation in which a child is subject to custodial interrogation is stressful for the parent as well as for the child. The parent may be angry at the child for being in custody (and for presumably committing a crime), and concerned that the police might assign moral responsibility to the parent for the child's misconduct. A child in custody often has a history of misbehavior that has frustrated the parent. Further, the parent may believe, often with the encouragement of the interrogating officers, that the child's legal interest will be furthered by telling the truth and cooperating with the police. In most contexts, encouragement of truth-telling by a parent is good parenting; but in interrogation, confession is usually not helpful to the juvenile's legal interest; this is something that most parents likely will not understand. Finally, a parent may be concerned about the financial burden on the family of invoking the juvenile's right to counsel. For all of these reasons, the parent may join the police interrogator in urging the juvenile to confess, thereby undermining rather than protecting the juvenile's legal interest. In short, in the context of interrogation, many parents will be seriously compromised in their ability to adequately assist their child, either due to ignorance or due to their own conflicting interest. Even a parent whose only goal is to provide support is typically unable to offer effective assistance; often, the parent does more harm than good. This conclusion is supported by evidence that parents present in interrogation usually offer no advice to the child or advise the child to waive his or her *Miranda* rights and make a statement.

This Section adopts an alternative prophylactic rule that provides more legal protection to juveniles age 14 and younger facing police interrogation. For a younger juvenile, whose ability to comprehend *Miranda* rights and withstand police pressure to confess is severely compromised by immaturity, only consultation with counsel avoids the potential for serious a miscarriage of justice. For an individual in this age category, waiver is effective only after consultation with counsel; no statement by the juvenile is otherwise admissible in a later proceeding. The Section recognizes that the younger juvenile is usually not capable of making a rationally self-interested decision to exercise the right to counsel and that consultation with counsel is essential to fundamental fairness when the younger juvenile faces police interrogation.

Constitutional due process supports this prophylactic rule. The Supreme Court has emphasized the vulnerability of juveniles facing police questioning, and implicitly recognized that younger juveniles are especially vulnerable. In J.D.B. v. North Carolina, the Court required that the age of the juvenile be considered in determining whether the questioning was custodial, so as to require *Miranda* warnings. 131 S. Ct. 2394 (2011). In a series of Eighth Amendment opinions restricting state authority to impose harsh criminal sentences on juveniles, the Court observed with concern that juveniles are seriously disadvantaged in the criminal process, including in their ability to deal with police. Younger juveniles are more handicapped in this regard than their older peers. Because a parent will seldom adequately compensate for these youthful disabilities and often can augment the police efforts to induce confession, the presence of counsel is necessary to protect the juvenile's legal interest.

*c. Presence of counsel and other admissibility factor*s. The failure to satisfy the requirement of this Section will result in the suppression of any statement made by a juvenile age 14 or under in police custody. But the presence of an attorney in interrogation does not insulate the juvenile's statement from judicial scrutiny. The juvenile's statement will be admitted only if the requirement of this Section is satisfied, the interview is recorded under § 14.23 *and* the waiver was knowing, intelligent, and voluntary, and the statement made voluntarily, considering the juvenile's age, experience, education, and intelligence as required under § 14.21. Satisfaction of the requirement of this Section constitutes a necessary but not sufficient condition for admissibility of the juvenile's statement.

To execute a valid waiver of *Miranda r*ights, the juvenile whose waiver is subject to this Section must be competent to comprehend the meaning of the rights and the consequences of waiver. The presence of counsel does not prevent the juvenile from executing an invalid waiver of *Miranda* rights or making an involuntary statement. See § 14.21, Comments *c* and *i*. For example, if the minor is incapable of understanding the rights or the consequences of waiver despite the assistance of counsel, the waiver is invalid.

A younger juvenile is typically less able to make a competent decision to waive a constitutional right than is an older juvenile or adult. Comment *a* to § 16.3, *Competence to proceed in delinquency proceedings,* and the Reporter's Note thereto discuss the requirement that a juvenile must be competent to waive a constitutional right. Section 16.3, Comment *b*, discusses incompetence based on developmental immaturity in younger juveniles. In the interrogation

context, not only is the younger juvenile less capable of understanding the meaning of the right to remain silent (and of the abstract concept of "rights" generally), but he or she is usually less capable than an older juvenile or adult of weighing adequately the long-term consequences of making a statement that can later be used in evidence. Younger adolescents tend to overvalue the immediate consequences of decisions and to discount long-term consequences. Thus many juveniles, despite the assistance and advice of counsel, may be incompetent to validly waive their *Miranda* rights. See *Comment a* and Reporter's Note thereto.

Illustration:

2. Arno, age 13, was taken into the police station for questioning about a burglary of a local convenience store. His appointed attorney arrived at the station and spoke with Arno in a private room, explaining in simple language the consequences of waiver and of making a statement, and advising Arno not to answer any questions. Arno, who suffered from Attention Deficit Hyperactivity Disorder and moderate intellectual disability, wandered around the room restlessly as the attorney tried to discuss his situation with him and explain his rights. She reported afterward that Arno seemed to pay no attention to her advice and that she didn't think he understood anything she said. Arno kept saying, "I just want to get out of here." When the police officers entered the interrogation room, Arno immediately asked when he could leave. After 30 minutes of police questioning, to which Arno did not respond, Arno suddenly asked the officer, "Can I leave if I answer your questions?" The officer answered affirmatively. Arno's attorney warned Arno not to say anything, but Arno signed a *Miranda* waiver and made a statement confessing to the crime. Arno's attorney later petitioned to have Arno's statement suppressed on the ground that he did not understand the meaning of his rights or the consequences of waiver. She described Arno's behavior during interrogation and her inability to communicate with him. Arno's waiver was not valid and his statement is not admissible in evidence.

Although Arno was advised by counsel not to speak, his urgent desire to end the questioning led him to waive his rights. Arno did not comprehend the importance of his right to remain silent or understand that his statement could be used in a subsequent delinquency proceeding, and did not knowingly, intelligently, and voluntarily waive his right to remain silent.

REPORTERS' NOTE

a. Waiver and confession by a younger juvenile. Courts are more likely to exclude the statement of a younger juvenile than that of one who is older, and often emphasize the immaturity and lack of cognitive capacity of children and younger adolescents as the basis for suppression of the youth's confession. See, e.g., In re Moyer, No. 03CA116, 2004 WL 2496268 (Ohio Ct. App. 2004) (12-year-old juvenile's waiver was not knowing, voluntary, and intelligent, where little effort was made to explain rights and juvenile did not understand them); In re L.M., 993 S.W.2d 276, 289 (Tex. App. 1999) (quoting E.A.W. v. State, 547 S.W.2d 63, 64 (Tex. Civ. App. 1977)) ("a child of such immaturity and tender age [eleven] cannot knowingly, intelligently, and voluntarily waive her constitutional privilege against self-incrimination in the absence of the presence and guidance of a parent or other friendly adult, or of an attorney"); In re Julian B., 510 N.Y.S.2d 613, 617 (App. Div. 2d Dep't 1986) (in suppressing statements made by a seven-year-old, the court noted that "it should be obvious that particular care must be taken in giving the warnings and obtaining waivers from particularly young children, especially those who are intellectually limited."); T.C. v. State, 364 S.W.3d 53 (2010) **(**finding that 12-year-old honor student did not knowingly and intelligently waive rights).

Younger juveniles are also deemed more susceptible to coercion than are older youths or adults. In A.M. v. Butler, the court determined that an 11-year-old boy's confession was involuntary, noting that "the detectives leaned closely in towards him when they spoke, promising him that both God and the police would forgive him for what he did, and assuring him that if he told the truth he could go home to his brother's birthday party." 360 F.3d 787, 798 (7th Cir. 2004). The Court observed that the chosen interrogation techniques "could easily lead a young boy to 'confess' to anything." Id. at 800.

Illustration 1 is based on A.M. v. Butler.

Courts and legislatures in a substantial minority of states have established special protections for younger juveniles facing interrogation, requiring the presence of an interested adult or attorney. A few states categorically exclude statements by younger juveniles or mandate the presence of counsel. Other states, by statute or judicial opinion, require the presence of a parent or interested adult before younger juveniles can validly waive their *Miranda* rights. See discussion in Comment *b* and Reporter's Note thereto. The Restatement adopts a mandatory rule requiring the presence of counsel for juveniles for juveniles aged 14 or younger. Id.

The Supreme Court also has recognized the challenges younger juveniles face in interrogations. See J.D.B. v. North Carolina, 131 S. Ct. 2394, 2408 (2011) ("To hold . . . that a child's age is never relevant . . . would be to deny children the full scope of the procedural safeguards that *Miranda* guarantees to adults."). Barry Feld has observed a "de facto functional line" of age 16 in the Supreme Court's juvenile interrogation cases: "The . . . rulings in *Haley, Gallegos, Gault, Fare,* and *Alvarado* excluded statements elicited from those fifteen years of age or younger and admitted those obtained from sixteen- and seventeen-year-old youths." Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L.

& CRIMINOLOGY 219, 314 (2006). Feld cites cognitive research indicating that younger juveniles are especially encumbered in the interrogation process.

A substantial body of psychological and biological research supports Feld's observation that younger adolescents are less capable than older youths or young adults of making competent decisions regarding *Miranda* waivers. Reduced comprehension in younger juveniles is due to normal cognitive immaturity: Cognitive psychologists explain that general knowledge, information processing, memory, verbal ability, planning ability, and the capacity for hypothetical thinking improve with age from childhood through adolescence, with the maturing of the executive functions of the brain. The ability to plan and to anticipate future consequences depends on the capacity for hypothetical thinking, which does not reach adult levels until mid-adolescence. See LAURENCE STEINBERG, ADOLESCENCE 57 (10th ed. 2013). Steinberg offers a comprehensive analysis of cognitive and brain development in adolescence. Id. at 56-65. See also ROBERT SIEGLER, CHILDREN'S THINKING 44-46 (4th ed. 2004); JOHN FLAVELL, PATRICIA MILLER & SCOTT MILLER, COGNITIVE DEVELOPMENT 144-149(4th ed. 2001). A waiver decision also requires the cognitive capacity to weigh alternatives in making a choice (remaining silent vs. making a statement); this capacity also is not well developed until mid-adolescence. See Steinberg, 57. See also Barry C. Feld, *Juveniles' Competence to Exercise Miranda Rights: An Empirical Study of Policy and Practice*, 91 MINN. L. REV. 26, 46-48 (2006) (hereinafter *Juveniles' Competence*). It is not surprising that immaturity in younger juveniles impedes their comprehension of interrogation rights and the consequences of waiver. See Jodi Viljoen & Ronald Roesch, *Competence to Waive Interrogation Rights and Adjudicative Competence in Adolescent Defendants: Cognitive Development, Attorney Contact, and Psychological Symptoms*, 29 L. HUM. BEHAV. 723, 731-732 (2005) ("[A]ge, which was treated as a continuous variable, significantly predicted performance on all [but one of the] legal measures).

Several factors contribute to waiver decisions by juveniles that are not "knowing and intelligent." Younger juveniles particularly, as compared to adults, often lack the vocabulary to comprehend the meaning of the words of the warnings. Feld, *Juveniles' Competence*, supra, at 77. Thomas Grisso's important study found that 55.3 percent of younger juveniles "manifested inadequate (zero-credit) understanding of at least one of the four [*Miranda*] warnings" compared with 23.1 percent of adults. Further, 10- to 12-year-old children were twice as likely to show inadequate understanding as youths age 13 to 15, whose comprehension was significantly poorer than that of 17-year-olds. Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134, 1153-1154, 1157-60 (1980). Younger adolescents also have difficulty grasping the basic concept of a "right" as an absolute entitlement that they can exercise without adverse consequences. Relatedly, the juvenile may not understand (or may discount) the consequences of waiver, even though the warnings explain that the statement will be used against the juvenile. Id. at 1140 n.27. In general, Grisso found that deficiencies in comprehending *Miranda* rights are significantly related to age and intelligence, and are pronounced in youths under age 16; older juveniles' comprehension was found to be similar to that of young adults in laboratory tests. Id. at 1153-1155, 1160. See also THOMAS GRISSO,

JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE (1981); *Protections for Juveniles in Self-Incriminating Legal Contexts, Developmentally Considered*, 50 CT. REV. 32 (2012).

Many other studies have confirmed Grisso's findings that younger juveniles have significantly reduced comprehension of their *Miranda* rights. See Rona Ambramovitch, Karen Higgins-Biss & Stephen Biss, *Young People's Understanding and Assertion of their Rights to Silence and Legal Counsel*, 37 CANADIAN J. CRIMINOLOGY 1 (1995); Jodi Viljoen & Ronald Roesch, *Competence to Waive Interrogation Rights and Adjudicative Competence in Adolescent Defendants: Cognitive Development, Attorney Contact, and Psychological Symptoms*, 29 L. & HUM. BEHAV. 723 (2005); Allison Redlich, Melissa Silverman & Hans Steiner, *Pre-Adjudicative and Adjudicative Competence in Juveniles and Young Adults*, 21 BEHAV. SCIENCES & L. 393 (2003) (finding that age and suggestibility predict *Miranda* competence); Naomi Goldstein, *Juvenile Offenders' Miranda Rights Comprehension and Self-Reported Likelihood of Offering False Confessions*, 10 ASSESSMENT 359 (2003).

A more recent study by Thomas Grisso and colleagues examined the adjudicative competence of juveniles, and found that the abilities of young juveniles (under age 16) were significantly compromised as compared to adults. Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. & HUM. BEHAV. 333 (2003). One third of youths aged 11 to 13 and 20 percent of youths aged 14 and 15 performed similarly to adults found incompetent to stand trial due to severe mental illness. Id. at 356. As part of this study, subjects were presented with an interrogation vignette in which they were given the choice of remaining silent or confessing (without the coercive pressure of an actual interrogation). The percentage of subjects choosing confession decreased from over 50 percent of the 11- to 13-year-old subjects to 20 percent of young adults. Id. at 352, 353. Viljoen and colleagues found that only 8 percent of juveniles aged 14 and under asserted their right to counsel, and that poorer comprehension was highly correlated with waiver of rights. Jodi Viljoen, Jessica Klavers & Ronald Roesch, *Legal Decisions of Preadolescent and Adolescent Defendants: Predictors of Confessions, Pleas, Communication with Attorneys and Appeals*, 29 L. & HUM. BEHAV. 253 (2005).

Younger juveniles not only have poorer comprehension of their *Miranda* rights than older juveniles and adults; they also are more vulnerable to police tactics designed to induce confessions. Although juveniles generally are more prone to making impulsive decisions than adults, and less likely to consider the future consequences of their choices, these tendencies are correlated with age and are more pronounced in younger juveniles. For a discussion on the relationship between susceptibility to aggressive police tactics and age, see § 14.21, Comment *h*, and Reporter's Note thereto. Finally, juveniles, especially those under age 16, are more inclined to respond compliantly to adult authority figures than are adults. See Grisso et al., *Juveniles' Competence to Stand Trial, supra*; Krishna K. Signh & Gisli H. Gudjonsson, *Interrogative Suggestibility Among Adolescent Boys and its Relationship with Intelligence, Memory, and Cognitive Set*, 15 J. ADOLESCENCE 155,

160 (1992) (finding youth positively related to measures of suggestibility in response to questioning). These factors likely contribute to younger juveniles' higher waiver rates.

Grisso's research and studies by other social scientists have been cited by numerous courts in finding the waiver decisions of younger juveniles to be invalid. See, e.g., In re Elias V., 188 Cal. Rptr. 3d 202, 224 (2015) (confession by 14-year-old found involuntary, citing research findings by Grisso and others; "[r]esearch on juveniles' ability to exercise *Miranda* rights and their adjudicative competence consistently reports that, as a group, [younger] adolescents understand legal proceedings and make decisions less well than do adults."); A.M. v. Butler, 360 F.3d 787, 801 n.11 (7th Cir. 2004) (citing Grisso to assert that "[t]here is no reason to believe that this 11–year–old could understand the inherently abstract concepts of the *Miranda* rights and what it means to waive them."); In re Jerrell C.J., 699 N.W.2d 110, 135 (Wis. 2005) (research cited to show that juveniles often are "less capable than adults of understanding their Miranda rights[.]"); State v. Benoit, 490 A.2d 295, 300 (N.H. 1985) (citing Grisso research to demonstrate that younger juveniles do not "understand their privilege against self-incrimination and their right to counsel."); Matter of B.M.B., 955 P.2d 1302, 1310 (1998) (cited Grisso research to draw the distinction between "approaches for juveniles younger than 15 and juveniles 15 and older[,]" in finding waiver by 10-year-old invalid); Commonwealth v. A Juvenile, 449 N.E.2d 654, 656 (Mass. 1983) (citing Grisso to argue that there is a "need for caution in evaluating a [13-year-old] juvenile's waiver of his Fifth Amendment rights."); Etherly v. Schwartz, 649 F. Supp. 2d 892, 901 & n.8 (N.D. Ill. 2009) (citing Grisso research supporting conclusion that it was unlikely that the juvenile properly understood his *Miranda* rights); Nicholas v. State, 444 A.2d 373, 377 (citing Grisso in favor of a per se rule excluding confession when parent is not present).

Despite powerful evidence that younger juveniles are seriously disadvantaged in the interrogation setting, courts sometimes have upheld the waivers of younger juveniles and found their confessions to be voluntary. See State ex rel. Juvenile Dep't of Clatsop v. Cecil, 34 P.3d 742 (Or. Ct. App. 2001) (finding statement by 12-year-old voluntary as no coercion was used, and determining the youth "had a sufficient understanding of the Miranda warnings" despite counsel's argument that the youth had "borderline intellectual functioning."); In re Watson, 548 N.E.2d 210 (Ohio 1989) (voluntary waiver by 12- and 14-year-old juveniles); State v. DeFord, 34 P.3d 673 (Or. Ct. App. 2001) (11-year-old, with the cognitive ability of a seven-year-old, knowingly waived *Miranda* rights). In 2015, the California Supreme Court declined to review a finding that a 10-year-old validly waived his *Miranda* rights in a case involving the murder of the boy's father. Justice Goodwin Liu issued a strong dissent. In re Joseph H, 237 Cal. App. 4th 517 (2015); Petition for Review Denied (dissenting statement by Liu, J.) No. S227929 (Oct. 16, 2015); Petition for Writ of Certiorari, Joseph H. v. State of Cal., No. 15-1086, 2016, U.S. S.Ct. (Jan. 14, 2016).

These opinions finding valid waivers of *Miranda* rights by children and younger adolescents have not only ignored scientific evidence supporting the conclusion that younger juveniles are severely disadvantaged in interrogation; they are also inconsistent with the law's pervasive assumption that younger minors are incompetent to make consequential decisions. The default age of majority in this country is 18, but older minors are assumed to be capable of

performing as adults in some contexts. See, e.g., Elizabeth Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547 (2000) (explaining how the age of adulthood is determined for different purposes). But youths under the age of 15 have little legal autonomy and are presumed incompetent to make decisions on their own. Mandatory school attendance and child labor statutes, for example, typically prohibit minors from leaving school or working before age 16. Younger minors also cannot operate motor vehicles or make most medical decisions. See discussion in SAMUEL DAVIS ET AL., CHILDREN IN THE LEGAL SYSTEM, 32-33 (5th ed. 2014); Scott, id. at 553-556 (explaining that the age of legal adulthood varies across legal domains but is seldom younger than age 15); FRANKLIN ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE (1981) (characterizing adolescence as a period in which the law protects young persons as they learn to make consequential decisions without bearing harmful consequences). Even scholars who argue for expanding minors' autonomy rights recognize that only in mid-adolescence are teenagers competent to exercise these rights. See Vivian Hamilton, *Immature Citizens and the State*, 2010 BRIGHAM YOUNG U. L. REV. 1055 (2011) (arguing that 15-year-old minors should be allowed to make healthcare decisions without parental consent). Younger minors are also generally protected from bearing full responsibility for their choices and conduct. For example, in most states, the minimum age at which juveniles can be prosecuted and punished as adults for most serious criminal offenses is age 14. See Chapter 18.30, Infancy Defense, Comment *f* , and Reporter's Note thereto.

b. Background and rationale for requirement of consultation with counsel for younger juveniles. In recent years, courts and legislatures have acted to protect younger juveniles facing interrogation from the substantial risk that they will give an invalid waiver of *Miranda* rights or make an involuntary statement. Most reform measures have facilitated consultation between the juvenile and his or her parent or other interested adult. The rule in this section is a variation of an alternative prophylactic rule adopted by a few states under which the statement by a juvenile in custody who is 14 years old or younger is admissible in a subsequent legal proceeding only if the juvenile waived *Miranda* rights after consultation with an attorney, present at interrogation. Substantial evidence indicates that most parents are either unable or not inclined to protect their children's legal interest in the interrogation setting. Thus the goal of states adopting a prophylactic rule—providing protection for a particularly vulnerable group of juveniles—can only be accomplished through a rule that allows a juvenile to waive *Miranda* rights only after consultation with counsel present at the interrogation.

A significant minority of state courts and legislatures have adopted a per se rule requiring a juvenile be given the opportunity for consultation with or the presence of a parent or other interested adult during interrogation. Variations primarily involve the age of juveniles to which the rule applies. In most states, the interested-adult rule aims to protect younger juveniles, while in a few states, it applies to all juveniles.

Several courts have mandated the presence of an interested adult for a younger juvenile. See, e.g., Commonwealth v. A Juvenile, 449 N.E.2d 654, 657 (Mass. 1983) (parental presence required for juvenile under age 14; older juveniles must be given opportunity to consult); State v.

Presha, 748 A.2d 1108 (N.J. 2000) (statement taken during custodial interrogation of juvenile under age 14 is inadmissible in the absence of a legal guardian or parent, unless the adult was unwilling to be present or truly unavailable; for older juveniles, officers must use their best efforts to locate a parent or legal guardian before beginning the interrogation); In re B.M.B., 955 P.2d 1302, 1312 (Kan. 1998) (requiring that the parents, guardian, or attorney of the juvenile under age 14 be given an opportunity to consult with the juvenile before interrogation).

Other states by statute have also adopted a requirement of parental presence (and some of consent) limited to juveniles below a designated age, usually 16. See, e.g., Iowa Code Ann. § 232.11 (West 1990) (parental consent required for waiver of juveniles under age 16; notice required to parents of older juveniles); Mont. Code Ann. § 41-5-311(2) (West) (2009) (juvenile under age 16 must seek the advice (and consent) of their parent or guardian before waiving their rights; if the child and the parent or guardian cannot agree, the child may waive his rights only after consultation with counsel); N.C. Gen. Stat. Ann. § 7B-2101 (West) (1999) (presence and advice of parent, guardian, custodian, or attorney of juvenile under age 16 required for custodial admission or confession to be admissible); Okla. Stat. Ann. tit. 10A, § 2-2-301 (West) (presence of parent, guardian, attorney, adult relative, adult caretaker, or legal custodian of juvenile under age 16 required); Wash. Rev. Code Ann. § 13.40.140 (West) (2014) ("only a parent or guardian can waive the rights of a child under 12."); W. Va. Code Ann. § 49-4-701 (West) (May 17, 2015) (for defendants aged 14 and 15 "extrajudicial statements" to law enforcement or in custody are admissible only if made either in presence of counsel, or in presence of, and with the consent of, the juvenile's informed parent or custodian; presence of counsel required for juveniles under age 14); Conn. Gen. Stat. Ann. § 46b-137 (West 2012) (for juveniles under age 16, custodial statement admissible only if the juvenile's parent or parents or guardian is present and informed of juvenile's rights; rule applies to juveniles aged 16 and older under criminal court jurisdiction).

Some states require that all juveniles have the opportunity for consultation with and the presence of an interested adult, See e.g. Ind. Code. § 31-32-5-1 (West 1998); Colo. Rev. Stat. Ann. § 19-2-511 (West) (presence of the juvenile's parent, guardian, or legal or physical custodian required for statement to be admissible); N.D. Cent. Code Ann. § 27-20-26 (West) (2012) (counsel must be provided to child not represented by parent, guardian, or custodian at custodial interrogation).

A few states by statute require the presence of counsel for a younger child's statement to be admissible or preclude admissibility altogether**.** See discussion below.

It is not surprising that some states aiming to protect younger juveniles in interrogation have encouraged or required consultation with the juvenile's parents. Parents have the right and authority to make important decisions affecting their children's welfare, and generally are presumed to be well situated to do so. The Supreme Court has frequently reiterated this theme. See Meyer v. Nebraska, 262 U.S. 390 (1923) (recognizing parents' constitutional right to control the upbringing of their children, including educational decisions). In Bellotti v. Baird, the Court observed, "The state commonly protects its youth from adverse governmental action and from their own immaturity by requiring parental consent to, or involvement in, important decisions by

minors." 443 U.S. 622, 635 (1979). Courts assume that parents typically exercise their authority in their children's interest. See Parham v. J.R., 442 U.S. 584, 602 (1979) ("[t]he law's conception of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and judgment required for making life's difficult decisions. Courts recognize that natural bonds of affection lead parents to act in the best interests of their children.") (citing 1 W. Blackstone, Commentaries 447; 2 Kent, Commentaries on American Law 190.) See also Elizabeth Scott & Robert Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1998) (describing research confirming the importance of affective bonds and social norms in parents' decisions).

Although in most legal contexts, the law can rely on parents to act competently in ways that promote their children's welfare, this premise supporting parental authority does not hold in the context of interrogation. In this setting, parents may have an actual conflict of interest, or be motivated to advise their children in ways that undermine their legal interest. Often parents may simply fail to comprehend the child's legal interest in exercising *Miranda* rights, in part because the exercise of these rights is in tension with moral conventions internalized by many parents about encouraging children to tell the truth and to take responsibility for causing harm.

Even in states requiring the presence of an interested adult at a juvenile's interrogation, courts have recognized that a parent may have a conflict of interest with the juvenile or be incapable of adequately advising the youth. Some courts suppress juveniles' confessions on these grounds, indicating that the mere presence of a parent or other adult at interrogation does not in itself satisfy the requirement that the youth have the opportunity of consultation with an interested adult. In at least one state, by statute, a valid waiver requires the consent of both the juvenile and a parent or guardian who must have "no adverse interest." Ind. Code 31-32-5-1 (West 2015). Conflicts of interest have been found in cases in which the parent was the victim of the alleged crime or, more typically, had a close relationship with the victim. See, e.g., Matter of Steven William T., 499 S.E.2d 886 (W. Va. 1997) (mother's intimate partner could not be interested adult when mother was suspect in murder of father's girlfriend); State in re A.S., 999 A.2d 1136 (N.J. 2010) (vacating confession in part because the interested adult, the juvenile suspect's adoptive mother, was also the grandmother of the victim).

Some courts, however, have found a juvenile's waiver to be valid despite an apparent conflict of interest of this kind. For example, in State v. Whisenant, 711 N.E.2d 1016 (Ohio Ct. App. 1998), the court rejected the juvenile's claim that his father had a conflict of interest because the victim was his father's girlfriend, emphasizing that the youth was properly informed of his *Miranda* rights and appeared to understand them.

In states in which the presence of a parent is required in interrogation, courts have sometimes set aside a waiver of *Miranda* rights by a juvenile in the presence of a parent under other extreme circumstances. Thus a few courts have found that a waiver is invalid if the parent or other adult is overtly hostile to or estranged from the juvenile. See e.g., Commonwealth v. Phillip S., 611 N.E.2d 226, 231 (Mass. 1993) (if adult who was present on his or her behalf . . . was actually antagonistic toward the juvenile, a finding would be warranted that the juvenile has not been assisted by an interested adult."); In Interest of J.D.Z., 431 N.W.2d 272 (N.D. 1988) (holding

presence of mother and stepfather, who accused the juvenile of lying during interrogation did not provide the representation required by statute); People v. Legler, 969 P.2d 691 (Colo. 1998) (confession suppressed because juvenile's grandparent, the interested adult, was affirmatively interested in having juvenile kept in prison, and this adverse interest was objectively perceptible by law enforcement). Juveniles' statements have been suppressed when a parent acted functionally as an agent of the police. See e.g. State in re A.S., 999 A.2d 1136, 1138 (N.J. 2010) (holding juvenile confession inadmissible where adoptive mother, whose biological grandson was the victim of the offense of which juvenile was accused, misstated juvenile's rights when police had her read them to juvenile, badgered juvenile in front of police, and "became a de facto agent of the police").

These rulings are unusual, however. In general, courts are very reluctant to find a conflict of interest when a parent or other interested adult was present at interrogation. For example, the parent's emotional distress and anger about the child's situation has usually been found insufficient to result in a finding that the juvenile's waiver was invalid. See, e.g., Commonwealth v. Laudenberger, 715 A.2d 1156, 1159 (Pa. Super. Ct. 1998) (waiver upheld because "[t]he fact that [the juvenile's] mother was upset with him is as indicative of concern as it is of disinterest."); Com. v. Berry, 410 Mass. 31, 35-36 (1991) ("[i]t is clear that [his mother] was upset when the [juvenile] spoke to the police, as any concerned parent would be upon learning that a child had been charged with murder."). Further, waivers have often been upheld where a parent has encouraged the juvenile to confess, in the absence of overt hostility, even though this advice usually is contrary to the juvenile's legal interest. See State v. Hudson, 404 So. 2d 460, 464 (La. 1981) (holding juvenile confession admissible although parents urged juvenile to cooperate and tell the truth); Com. v. Philip S., 611 N.E.2d 226, 231 (Mass. 1993) (holding juvenile's statement admissible although mother repeatedly urged him to tell the truth, and rejecting "notion that a parent . . . who advises the child to tell the truth, or who fails to seek legal assistance immediately is a disinterested parent."); United States v. Erving L., 147 F.3d 1240, 1251 (10th Cir. 1998) (confession was voluntary because, to the extent juvenile's will was overborne, it was overborne by parent urging cooperation, not by interrogating officers); McNamee v. State, 96 So. 2d 1171 (Fla. Dist. Ct. App. 2005) (confession admissible, although father urged him to tell truth); State ex. Rel., Q.N., 843 A.2d 1140 (N.J. 2004) (confession upheld although mother urged son to confess); Com. v. Quint Q., 998 N.E.2d 363, 371 (Mass. App. Ct. 2013) (holding juvenile confession admissible although mother urged juvenile to admit to multiple housebreakings, because "her actions and her statements demonstrated a genuine concern for the juvenile. . . . Furthermore, throughout the interrogation there was no objective manifestation of animosity between the mother and the juvenile."). As there cases suggest, courts seldom recognize that a parent's urging the juvenile to "tell the truth" to interrogating officers is problematic, even though this advice often is harmful to the juvenile's legal interest.

These opinions suggest that parents, often acting with good intentions, generally provide inadequate protection to their children in interrogation. Good parents, in their role of moral counselors to their children, may often encourage honesty and cooperation with authority figures;

this inclination likely influences some parents seeking to assist their children in interrogation. Moreover under the stressful conditions of interrogation, a parent may urge cooperation in part to show the officers that he or she is a responsible parent and that the child's (presumed) misbehavior is not due to parental laxity. Some studies have found that parents in interrogation tend to assume a disciplinary role. See e.g., Lois B. Oberlander & Naomi E. Goldstein, *A Review and Update on the Practice of Evaluating Miranda Comprehension*, 19 BEHAV. SCI. & L. 453, 463 (2001) (finding that parents generally assumed authoritative or disciplinary roles in the presence of officers); Parents may also be motivated to urge waiver because they are encouraged by interrogating officers to believe that cooperation with the police will result in the most favorable outcome for their child. This standard police tactic is likely as effective with parents as it is with suspects (and particularly juvenile suspects) themselves. See § 14.21, Comment *h*, *Factors affecting voluntariness and youthful vulnerability*, and Reporter's Note thereto. But a parent's cooperation with the interrogating officer in urging the child to "tell the truth" often leads to harmful legal consequences of which parents may be unaware. Given the tendency of juveniles to submit to authority figures and the potential harm to the juvenile's interest of making a statement, a parent's urging the child to talk to law-enforcement officers seldom furthers the juvenile's interest. In short, although the purpose of a legal rule encouraging parental involvement is to provide protection, the rule in many cases does nothing to protect the legal interest of vulnerable younger juveniles (and indeed harms that interest),

Parents can also have an implicit conflict of interest when their advice to their child about invoking their right to counsel is constrained by personal financial concerns; this is an issue that scholars have raised but few courts have addressed. Hillary Farber has argued that a parent may urge the child to confess, against the child's interest, in response to police warnings about the likelihood that a lengthy and expensive investigation and trial will follow if the child does not confess. Hillary B. Farber, *The Role of the Parent/guardian in Juvenile Custodial Interrogations: Friend or Foe?*, 41 AM. CRIM. L. REV. 1277 (2004). See also Nancy J. Moore, *Conflicts of Interests in the Representation of Children*, 64 FORDHAM L. REV. 1819 (1996) (pointing to conflicts of interest between the interested adult, who, unless he or she is indigent, must hire the attorney, and the juvenile suspect). A few courts have addressed related issues. See, e.g., In re Ricky H., 468 P.2d 204 (Cal. 1970) (juvenile's waiver of right to counsel was suppressed because juvenile's concern about his father having to reimburse the county for attorney services implicated the knowingness and voluntariness of the waiver).

The interested-adult requirement presumes that the parent or other adult is capable of understanding *Miranda* rights and can competently advise juveniles about the waiver decision. The requirement in theory is not satisfied if the adult, although present at interrogation, does not or cannot comprehend the nature of the rights at stake. Some courts recognize that the interested adult must be competent to advise the child. In Commonwealth v. Phillip S., 611 N.E.2d 226, 231 (Mass. 1993), the Massachusetts Supreme Court observed that the requirement was not met if "it should have been reasonably apparent to officials questioning the juvenile, that the adult who was present on his or her behalf, lacked the capacity to appreciate the juvenile's situation and to give

advice." 611 N.E.2d at 231. An adult who is drunk, for example, cannot typically provide any sort of "meaningful" consultation with a juvenile. The statement of a Colorado juvenile was held inadmissible because his father was brought to the interrogation room while intoxicated. In re L., 513 P.2d 1069 (Colo. App. 1973). But as the above discussion indicates, most parents who are not otherwise disabled are poorly suited to advise their children facing police interrogation. Few parents are sophisticated enough to comprehend that invoking the right to counsel is usually in the juvenile's interest, and interrogating officers encourage parents to believe otherwise. Not surprisingly perhaps, the research evidence indicates clearly that parents present at interrogation either advise the juvenile to answer police questions and confess, or offer no advice at all. See below.

This review indicates that, under extreme circumstances, courts have sometimes found a juvenile's waiver invalid despite the presence of a parent. But the premise of the interested-adult rule is that that a parent can be relied upon to competently protect the child's interest in interrogation. The cases suggest that courts tend to accept this premise without scrutiny, and may be likely to uphold a waiver when the parent was present, despite compelling evidence that the parent did not helpfully assist the child. Indeed, some courts, in upholding waivers by juveniles, seem to equate the presence of a parent or other adult with meaningful consultation, even when the parent and child have a conflict of interest or the parent has not competently advised the juvenile. See, e.g., Foster v. State, 633 N.E.2d 337 (Ind. Ct. App. 1994) (in upholding waiver, court emphasized that a 45-minute consultation took place, despite evidence that the parents were pressured by law enforcement to urge cooperation and did so). With the adoption of a rule requiring the involvement of an interested adult, many courts are likely to presume that the juvenile's waiver of *Miranda* rights was valid, simply because a parent was present.

The presence and advice of a parent or other adult can provide support for some juveniles facing police interrogation. A juvenile may desire to have a parent present at interrogation for support and advice. Courts have suppressed statements by juveniles who waived their *Miranda* rights after asking to see a parent when this request was refused. See, e.g., Presha v. State, 748 A.2d 1108 (N.J. 2000) (exclusion of parent by police emphasized in decision to suppress); In re Jerrell C.J., 699 N.W.2d 110, 118 (2005) (denial of juvenile's request to see parents was strong evidence of coercive police conduct). Moreover, in considering whether a juvenile's waiver was invalid, courts weigh heavily the exclusion from interrogation of a parent who asks to see his or her child. In re Lashun, 672 N.E.2d 331, 337 (Ill. App. Ct. 1996) (confession suppressed because "mother's efforts to see son were clearly frustrated by police so they could maintain an intimidating atmosphere and obtain a confession."). See discussion of cases in § 14.21, Comment *h*, and Reporter's Note thereto (describing exclusion of parents as factor weighing against valid waiver). But the evidence suggests that, for many juveniles, little or no protection offered by the presence of parents. For whatever reasons, parents usually are ill-equipped to adequately fulfill this role. For a younger juvenile particularly, the presence and assistance of a parent is unlikely to compensate for the juvenile's inability to make a competent decision of whether to exercise or waive Miranda rights. Only the advice of counsel provides adequate protection.

Substantial research evidence confirms that parents do not provide the protection of younger juveniles facing interrogation that lawmakers assume will follow from the adoption of a rule promoting parental presence. The studies consistently indicate that parents seldom advise their children to exercise their *Miranda* rights. In an early comprehensive study, Thomas Grisso found that the vast majority of parents did not offer any information to the child about the right to counsel during interrogation. About two-thirds did not offer any advice at all and those that did usually advised their children to waive their rights. Thomas Grisso & Melissa Ring, *Parents' Attitudes toward Juveniles' Rights in Interrogation*, 6 CRIM. JUSTICE & BEHAV. 211, 213-214 (1979). More recent research confirms that parents seldom counsel their children to exercise *Miranda* rights. See, e.g., Barry C. Feld, KIDS, COPS, AND CONFESSIONS: INSIDE THE INTERROGATION ROOM 187-206 (2012). A majority of parents in Feld's study gave no guidance whatsoever. The study also found that no parents had advised their child to remain silent. In a 2005 study of 30 adolescents with parents present at interrogation, 55 percent were told to confess and 33 percent were urged to tell the truth. Jody L. Viljoen, Jessica Klaver & Ronald Roesch, *Legal Decisions of Preadolescent and Adolescent Defendants: Predictors of Confessions, Pleas, Communication with Attorneys, and Appeals*, 29 L. & HUM. BEHAV. 253, 261 (2005). None of the parents advised their child to stay silent. Id. See also Lois B. Oberlander & Naomi E. Goldstein, *A Review and Update on the Practice of Evaluating Miranda Comprehension,* 19 BEHAV. SCI. & L. 453, 463 (2001) (finding that the interested-adult requirement does not reduce waiver of *Miranda* rights; and finding that parents generally assumed authoritative or disciplinary roles in the presence of officers); Hillary Farber, *The Role of the Parent/Guardian in Juvenile Custodial Interrogations: Friend or Foe*, 41 AM. CRIM. L. REV. 1277, 1291 (2004) (finding that conflicts of interest often affect the interested adult's ability to act in the juvenile's best interest). Further, many parents of juvenile suspects may not be competent to provide meaningful consultation. In one study, "Only 42.3% of the adults expressed an adequate understanding of each of the four warnings when asked to paraphrase each warning." Farber, id. at 1291. Research studies also indicate that many parents have misconceptions about the interrogation process that can undermine their effectiveness in counseling their children. In a study by Jennifer Woolard and colleagues, most parents reported that police will notify parents if the adolescent is considered a witness or suspect and that the police must tell the truth during interrogations. See Jennifer L. Woolard et al., *Examining Adolescents and their Parents; Conceptual and Practical Knowledge of Police Interrogation: A Family Dyad Approach*, 37 J. YOUTH AND ADOLESCENCE 685 (2008).

Most scholars who have examined this issue are skeptical about the benefit of the interested-adult requirement, and argue that only a rule requiring the presence of counsel when juveniles are interrogated provides meaningful protection to vulnerable youths. See, e.g., Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134 (1980) (advocating for per se requirement of counsel); Ellen Marrus, *Can I Talk Now? Why Miranda Does Not Offer Adolescents Adequate Protections*, 79 TEMP. L. REV. 515, 527 (2006) (advocating that an attorney must be present at all juvenile interrogations); Kimberly Larson, *Improving the "Kangaroo Courts": A Proposal for Reform in Evaluating Juveniles' Waiver of*

Miranda, 48 VILL. L. REV. 629, 661 (2003) (juveniles under 16 should be required to consult with an attorney); Joseph Sanborn, *How Parents Can Affect the Processing of Delinquents in the Juvenile Court*, 7 CRIM. JUST. POL'Y REV. 1, 2 (1995) (arguing for consultation with counsel, and not parents, because parents frequently pressure their children to waive rights).

A few states, by statute provide that a juvenile can only waive his or her right to silence and counsel on advice of counsel. See, e.g., W. Va. Code Ann. § 49-4-701 (West) (May 17, 2015) (custodial statement of juvenile under age 14 admissible only if made in presence of counsel); 705 Ill. Comp. Stat. Ann. 405/5-170(a) (West) (2013) (minor under age 13 suspected of murder, aggravated manslaughter, or rape must be represented by counsel during entire custodial interrogation and cannot waive the right to counsel). In 2016, the Illinois legislature extended this requirement to juveniles under the age of 16. S.B. 2370 (effective 1\1\ 2017). The original Illinois statute was enacted in 2000, in response to several high-profile cases involving false confessions by very young juveniles. Hillary Farber, supra, at 1310. Also in 2016, the California legislature adopted a statute requiring consultation with counsel in interrogation for all youths under age 18. S.B. 1052. This bill introduced in response to In re Joseph H., in which the California Supreme Court found the waiver of *Miranda* rights by a 10-year-old charged with the murder of his father to be valid. *Joseph H.*, 237 Cal. App. 4th 517 (2015); Petition for Review Denied, No. S227929 (C.A. Oct. 16, 2015); Petition for Writ of Certiorari, Joseph H. v. State of Cal., No. 15-1086, 2016, U.S. S.Ct. (Jan. 14, 2016). New Mexico excludes all statements by juveniles under age 13, and presumes that statements by 13- and 14-year-old juveniles are inadmissible. N.M. Stat. Ann. § 32A-2-14(West 2009).

This Section requires the presence of and consultation with counsel as a condition of a valid waiver of *Miranda* rights by a younger juvenile in custody. This rule is justified because persuasive evidence supports that alternative rule, requiring the presence of a parent or interested adult, affords little of the protection it is assumed to provide; indeed parents, often inadvertently, can harm the juvenile's interest. Moreover, a substantial risk exists that courts, influenced by conventional assumptions about the parental role, will tend to treat the presence of a parent as a sufficient condition for a valid waiver, or, at a minimum, as a factor that weighs heavily in favor of admissibility of the juvenile's statement. To be sure, if a juvenile desires a parent's presence, the parent should be permitted to be in the interrogation room. But the presence of a parent does not obviate the importance of having an attorney present to advise the younger juvenile. Only the presence and advice of counsel can compensate for the disadvantages created by cognitive and emotional immaturity in the younger juvenile.

This Section's prophylactic rule is also compatible with a recent legal and constitutional trend recognizing that juveniles, and particularly younger juveniles, need special protections in the justice system due to their developmental immaturity. [Indeed, the adoption of the interested-adult rule in many jurisdictions is part of this trend.] In recent decades, courts and legislatures have acknowledged that younger juveniles may be incompetent to participate in delinquency or criminal proceedings due to developmental immaturity. See § 18.__, Competence in Delinquency Proceedings; § __, Competence of Juveniles in Criminal Proceedings. The Supreme Court in a

series of recent opinions has underscored the vulnerability of juveniles facing interrogation and criminal prosecution. In J.D.B. v. North Carolina, the Court mandated that the age of a juvenile be considered in determining whether police questioning is custodial, implicitly recognizing that younger juveniles are particularly vulnerable and likely to feel constrained. 131 S. Ct. 2394 (2011). See § 14.20, Rights of a Juvenile in Custody; Definition of Custody, Comment *d*, and Reporter's Note thereto. The Court also pointed to the disadvantages that juveniles face in the criminal process, and specifically in dealing with law enforcement, in a series of Eighth Amendment opinions strictly limiting the imposition of harsh criminal sentences on juvenile offenders. In Graham v. Florida, 560 U.S. 48 (2010) (prohibiting life without parole for non-homicide offenses) and Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012), (prohibiting mandatory life without parole for homicide), the Court expressed concern that a harsh sentence imposed on a juvenile could result from the youth's inability to deal competently with the police and prosecutors, or to provide adequate assistance to defense counsel. These disabilities are especially acute for younger juveniles, whose immaturity severely limits their ability to make self-interested decisions about the exercise or waiver of procedural rights. In 2016, the Court held that *Miller* applied retroactively to prisoners whose sentences were final before the case was decided because *Miller* created a new substantive constitutional rule. 577 U.S. __ (2016). Underscoring the *Miller* principle that "children are different," 132 S. Ct. at 2469, *Montgomery* emphasized again the importance of youthful immaturity to the justice system's response to juveniles suspected and convicted of crimes. These opinions have had a major impact on courts and legislatures and have contributed to the implementation of a developmental approach that recognizes differences between juveniles and adults in the justice system. A prophylactic rule conditioning waiver by a younger juvenile on assistance of counsel at interrogation embodies this contemporary developmental approach.

*c. Presence of counsel and other admissibility factor*s. The decision of whether to exercise or waive a constitutional right is made by the individual defendant and not by his or her attorney. In interrogation, the decision to waive *Miranda* rights is made by the suspect. Under the rule adopted in this Section, a juvenile's decision to waive the right to remain silent can be made only after consultation with counsel, but the juvenile must be competent to waive the right. The requirement of § 14.21 that the waiver of the right to remain silent is valid only if it is knowing, intelligent and voluntary applies to the younger juvenile who makes this decision with the assistance of counsel.

Substantial research evidence reviewed in the Reporter's Note to *Comment a* supports that younger juveniles are less capable of giving a valid waiver than are older juveniles and adults. In general, competence to make a consequential decision implicates several cognitive abilities that are not fully developed until mid-adolescence or beyond. The individual must be capable of comprehending the meaning of the decision and of the alternative options available, of weighing and comparing the short- and long-term costs and benefits of each alternative and of making a rational choice between them. These capacities are not well developed in younger juveniles, who tend to focus on immediate consequences of decisions and are far less able than adults to understand and weigh accurately long-term costs and benefits. For discussions of cognitive

development in adolescence as it implicates decisionmaking capacity, see Daniel Keating, *Cognitive and Brain Development*, in R. LERNER & L. STEINBERG (EDS.) HANDBOOK OF ADOLESCENT PSYCHOLOGY (2D ED. 2004); LAURENCE STEINBERG, ADOLESCENCE 56-65 (10TH ED., 2013); ROBERT SIEGLER, CHILDREN'S THINKING (4TH ED. 2004); JOHN FLAVELL, PATRICIA MILLER AND SCOTT MILLER COGNITIVE DEVELOPMENT (4TH ED. 2001).

In recent years, courts in many states have recognized that a juvenile, due to developmental immaturity, may not be competent to face criminal prosecution or delinquency adjudication. See § 16.3, Adjudicative Competence in Delinquency Proceedings, Comment *b*, *Developmental incompetence*, and Reporters Note thereto; See § 17.__, Adjudicative Competence in Criminal Proceedings, Comment *c*, *Developmental incompetence*, and Reporters Note thereto. Research studies indicate that more than 30 percent of juveniles under age 14 and 20 percent of juveniles aged 14 and 15 perform as poorly on competence measures as adults found incompetent to proceed due to mental illness and intellectual disability. Thomas Grisso, Laurence Steinberg, Jennifer Woolard, Elizabeth Cauffman, Elizabeth Scott, Sandra Graham, Fran Lexcen, N. Dickon Reppucci & Robert Schwartz, *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. AND HUMAN BEHAVIOR 333 (2003). Although consultation with counsel can assist younger juveniles to understand their rights and resist police pressure, a significant percentage of younger juveniles are likely to be incompetent to validly waive *Miranda* rights, even after consultation with counsel. When a younger juvenile waives *Miranda* rights under this rule, an inquiry into the validity is appropriate.

§ 14.23. Video-Recording of Interrogation Required

(a) All questioning by a law-enforcement officer of a juvenile during custodial interrogation shall be video-recorded, unless it is not feasible to do so.

(b) The failure to comply with subsection (a) without good cause will result in the exclusion of any statement made by the juvenile during the interrogation in a subsequent delinquency or criminal proceeding adjudicating a felony charge.

Comment:

a. Rationale and background. Video-recording of the interrogation in its entirety is invaluable to the court assessing the validity of a suspect's waiver of *Miranda* rights or the voluntariness of a statement. A recording provides the court with objective and accurate evidence of police questioning and of the defendant's responses; without a recording, the court must weigh the conflicting accounts of the defendant and the police officer. Although video-recording of all interrogations is highly beneficial, full recording is particularly important when a court determines the admissibility of a statement by a juvenile suspect, because juveniles are more susceptible to

police pressure to confess and less likely to comprehend the meaning of *Miranda* rights than are adults. Recording that commences after questioning has begun or that omits any substantive part of the interview is not adequate.

Recording the entire interrogation can improve fairness and accuracy of the proceeding in several ways. By creating objective evidence for later review, video-recording provides a superior means of protecting the defendant's right to remain silent and right to counsel, allowing the court to observe and evaluate whether the police used excessively aggressive tactics and whether the defendant appeared to comprehend the rights at stake. Video-recording provides otherwise unavailable evidence of nonverbal actions and expressions, as well evidence of the tone of questioning. Also, because interrogating officers are aware that the interview is recorded, video-recording likely deters the use of inappropriate police tactics. But the state also benefits from the recording of interrogation, which can deter and provide evidence against a defendant's spurious or insubstantial claim that the police behaved inappropriately. Moreover, the interrogating officers can direct full attention to the interview itself without the need to take notes and can review the defendant's responses and behavior with greater accuracy. In general, the requirement of video-recording brings transparency to what otherwise is a secretive process, and can enhance confidence in the integrity of police practices. This overriding goal likely has motivated the recent legislative and judicial trend toward requiring that custodial interrogations of both adult and juvenile suspects be recorded, at least when the questioning involves a serious crime. Because of the increased vulnerability of juvenile suspects, some jurisdictions require recording only when a juvenile is subject to interrogation.

Video-recording of interrogation is frequently required by statute, but several courts have either established the requirement or directed a court rules commission to do so. The authority of the court to condition the admissibility of a statement obtained from a suspect in custody on video-recording of the interrogation inheres in the judicial role of assuring the fairness of criminal proceedings and the accuracy of evidence. Thus the requirement does not directly regulate police practice, but fulfills the judicial function of preserving the integrity and accuracy of criminal proceedings. In re Jerrell C.J., 699 N.W.2d 110 (Wis. 2005).

b. Limitations and exceptions. When a suspect is subject to police interrogation in a place of detention, video-recording will be undertaken. A place of detention includes a police station, jail or detention facility, or other location where interrogation ordinarily occurs. Video-recording

will be undertaken in other locations unless it is not feasible to do so. With advances in mobile-phone technology, video-recording usually can be undertaken not only in a place of detention, but in other locations as well, without difficulty and at modest cost, so long as the integrity of the recording process is preserved. If the questioning takes place in a location in which recording is not feasible, the requirement does not apply, unless the location is chosen for the purpose of avoiding recording.

The requirement of video-recording is suspended if the recording equipment unexpectedly malfunctions. Because video-recording promotes the integrity of the justice system and the criminal process, it is not waivable by the juvenile, except under extraordinary circumstances. Recording may be suspended if the juvenile, after consultation with counsel or a parent or interested adult, repeatedly refuses to respond to questions unless the interview is not recorded, and the purpose of the recording has been explained to the juvenile. The explanation and refusal by the juvenile will be video-recorded.

This Section requires recording whenever a juvenile is interrogated by law enforcement, regardless of the offense. Some statutes limit the requirement to the interrogation of a suspect (adult or juvenile) suspected of involvement in a felony. As Comment *c* explains, the exclusion of an unrecorded statement from admissibility in a subsequent delinquency or criminal proceeding is limited to the adjudication of a felony charge.

*c. Remedy for failure to video-record entire interrogatio*n. If the law-enforcement officer interrogating the juvenile fails to record the interview in its entirety without good cause, the juvenile's statement ordinarily is not admitted into evidence in a subsequent delinquency or criminal proceeding adjudicating a felony charge. The exclusion from evidence of a nonrecorded statement encourages police officers to routinely record every interrogation, except under circumstances in which recording is not feasible, as described in Comment *b*. The importance of recording in assuring the accuracy of the evidence admitted against the juvenile and in preserving the integrity and fairness of the proceeding ordinarily justifies the exclusion of an unrecorded statement. Recording of the entire interrogation is not burdensome; because of the many benefits of the requirement, a sanction that strongly encourages compliance is desirable. Exclusion of the statement on this basis will not apply if the interrogation was undertaken in another jurisdiction that does not have a recording requirement.

REPORTERS' NOTE

a. Rationale and background. Approximately 20 jurisdictions have adopted the requirement that custodial interrogation of suspects by law-enforcement officers must be routinely recorded. In many states, the requirement is established by statute. Some statutes specifically require the recording of interrogations of juveniles (sometimes with separate statutory provisions requiring recording of the interrogation of adult suspects). See, e.g., N.C. Gen. Stat. Ann. § 15A-211 (West 2014) (custodial interrogations at a place of detention, of juveniles in criminal investigations, and of adults in *certain* criminal investigations, must be recorded); Tex. Fam. Code Ann. § 51.095 (West 2014) (conditions for admissibility of statements of juveniles include electronic recording); 705 Ill. Comp. Stat. Ann. 405/5-401.5 (West 2015) (statements by juveniles under age 18 are presumed inadmissible for crimes involving homicide, sexual crimes, aggravated arson, and armed robbery unless recorded); Cal. Penal Code § 859.5 (West 2015) (custodial interrogation in a fixed place of detention of a minor suspected of committing murder must be video-recorded in its entirety); Wis. Stat. Ann. § 938.195 (West 2014) (custodial interrogation of juvenile at place of detention must be recorded; custodial interrogation of juvenile not at place of detention must be recorded if feasible).

Other statutes require electronic recording of all suspects in interrogation. Many statutes include exceptions to the recording requirement and\or limit the requirement to serious crimes. See Reporters' Note to Comment *b* discussing exceptions. See, e.g., Conn. Gen. Stat. Ann. § 54-1o (West 2014) (unless an exception applies, a statement of a person under investigation or accused of serious crime made as a result of a custodial interrogation at a place of detention is presumed inadmissible unless the interrogation was recorded); Mich. Comp. Laws Ann. §§ 763.7 through 763.11 (West 2013); Mo. Ann. Stat. § 590.700 (West 2014); Mont. Code Ann. §§ 46-4-407 through 46-4-411; Neb. Rev. Stat. §§ 29-4501 through 4508; N.M. Stat. Ann. § 29-1-16 (West 2014); Or. Rev. Stat. § 133.400 (limited to adults and adult prosecution of 15- to 17-year-old offenders); Vt. Stat. Ann. tit. 13, § 5585 (West 2014).

Several state supreme courts have established an electronic-recording requirement, either for juveniles facing interrogation or for all suspects. The Wisconsin Supreme Court required that all interviews of juvenile suspects in detention facilities be recorded, and that unrecorded statements would usually be inadmissible in subsequent proceedings. In re Jerrell C.J., 699 N.W. 2d 110 (Wis. 2005). The court found authority to exclude unrecorded statements in its power to supervise and regulate the admissibility of evidence in state courts, rejecting the state's argument that it lacked the authority to exclude evidence acquired through a police practice that did not violate the U.S. Constitution or state law. The Wisconsin legislature subsequently codified this requirement. (See above). See also State v Scales, 518 N.W.2d 587 (Minn. 1994) (creating a mandatory electronic recording requirement for juveniles, with suppression of a statement in case of substantial violation). Several state courts have established a general requirement that interrogation be electronically recorded. The Alaska Supreme Court based its directive on the due process clause of the state constitution. Stephan v. State, 711 P.2d 1156 (Alaska 1985). In Commonwealth. v. Di Giambattista, 813 N.E.2d 516, 533 (Mass. 2004), the Massachusetts

Supreme Court encouraged the use of recording somewhat indirectly. On the basis of its supervisory power, the court ruled that if the state failed to provide at least an audiotape recording of a defendant's confession, the defendant is "entitled to a jury instruction advising that the State's highest court has expressed a preference that such interrogations be recorded whenever practicable" and that the evidence of this alleged statement should be weighed with "great caution and care[.]"). A few state supreme courts have directed committees to formulate court rules of evidence requiring electronic recording in custodial interrogation. See N.J. Ct. R. 3:17 (West 2015) (based on ruling in State v. Cook, 847 A.2d 530 (N.J. 2004); Ind. R. Evid. 617 (West 2015) (rule promulgated after state supreme court asked subcommittee to develop and propose such a rule); Ark. R. Crim. P. 4.7 (based on ruling in Clark v. State, 287 S.W.3d 567 (Ark. 2008).

In jurisdictions in which state law does not establish a requirement that interrogations be electronically recorded, many localities and police departments have established the practice voluntarily. For example, in California, which limits the statutory recording requirement to juveniles charged with murder, many cities, including Los Angeles, San Francisco, and San Diego, require that interrogations be recorded. Thomas Sullivan and colleagues undertook a comprehensive study of voluntary recording policies and practices and found a high level of satisfaction among almost 250 law-enforcement agencies that had adopted the practice. Thomas Sullivan, *Police Experiences with Recording Custodial Interrogations, Special Report*, Center on Wrongful Convictions at Northwestern University School of Law (Summer 2004). The report lists localities that in 2004 had adopted voluntary policies.

In 2014, the Department of Justice adopted a presumption of electronic recording for all custodial interrogations. In the memorandum announcing the policy change, Attorney General Eric Holder identified several advantages of electronic recording:

> Creating an electronic record will ensure that we have an objective account of key investigations and interactions with people who are held in federal custody. It will allow us to document that detained individuals are afforded their constitutionally protected rights. And it will also provide federal law enforcement officials with a backstop, so that they have clear and indisputable records of important statements and confessions made by individuals who have been detained. This policy will not – in any way – compromise our ability to hold accountable those who break the law. Nor will it impair our national security efforts. On the contrary: it will reduce uncertainty in even the most sensitive cases, prevent unnecessary disputes, and improve our ability to see that justice can be served.

Press Release, Department of Justice, Attorney General Holder Announces Significant Policy Shift Concerning Electronic Recording of Statements (May 22, 2014), http://www.justice.gov/opa/pr/attorney-general-holder-announces-significant-policy-shift-concerning-electronic-recording. The Department of Justice's change to a longstanding policy, which affected "the FBI, the Drug Enforcement Administration (DEA), the Bureau of Alcohol, Tobacco, Firearms, and Explosive[s] (ATF), and the United States Marshals Service (USMS)," see id., serves as further evidence of the compelling advantages of—and the due process values

served by—electronic recording. The press release continued, "Federal agents and prosecutors throughout the nation are firmly committed to due process in their rigorous and evenhanded enforcement of the law. This new recording policy not only reaffirms our steadfast commitment to these ideals . . . ." See id.

Many scholars have advocated for the widespread adoption of a video-recording requirement for custodial interrogations, arguing that such recordings provide courts with objectively accurate evidence of the interrogation. For example, Thomas Sullivan has argued that while "[a]lmost all federal agents . . . make handwritten notes of their interviews, and later prepare typewritten summaries," written records are "incapable of accurately and completely capturing precisely what was said and done during the interviews; they are a far cry from what would be shown by electronic recordings of the events they purport to portray." Thomas P. Sullivan, *The Evolution of Law Enforcement Attitudes Toward Recording Custodial Interviews*, 38 J. PSYCHIATRY & L. 137, 166 (2010); see also Steven A. Drizin & Beth A. Colgan, *Let the Cameras Roll: Mandatory Videotaping of Interrogations Is the Solution to Illinois' Problem of False Confessions*, 32 LOY. U. CHI. L.J. 337, 401 (2001) (noting that video-recording of an interrogation "would show exactly what happened and allow a trier of fact to base decisions regarding admissibility and believability on a broader and more accurate base of information"); Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xxix (advocating for video-recording requirement for all suspect interrogations, and noting that absent video-recording, "when the process ends we often have very different accounts of what happened inside the interrogation room").

Scholars have also argued that the adoption of a video-recording requirement could deter police use of coercive interrogation tactics. For instance, Welsh White has argued that "interrogators' knowledge that interrogations are being videotaped will deter them from employing prohibited interrogation methods. Interrogators' awareness that their methods are being closely scrutinized will lead them to avoid tactics likely to result in censure or exclusion of evidence." *False Confessions and the Constitution: Safeguards against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 154 (1997); see also Thomas P. Sullivan, *The Time Has Come for Law Enforcement Recordings of Custodial Interviews, Start to Finish*, 37 GOLDEN GATE U. L. REV. 175, 179 (2006) (arguing only the "few errant officers who use improper interrogation tactics and/or misstate what occurred during the session" are negatively impacted by the introduction of a video-recording requirement).

Several scholars have pointed out that the video-recording requirement offers systemic benefits as well as protection of defendants, increasing police credibility and public confidence in law enforcement. Lisa Lewis posited that "[v]ideotaping interrogations lends credibility to police work by demonstrating to prosecutors, judges, and juries that the statements were legally obtained." Lisa Lewis, *Rethinking* Miranda*: Truth, Lies, and Videotape*, 43 GONZ. L. REV. 199, 222 (2008); see also Drizin & Colgan, supra, at 363 (noting "if the claims that these confessions are false are untrue, then a view into the interrogation room could save police from any question of culpability, or even the appearance of impropriety."). Judge Alex Kozinski has contended that

given the "surprising frequency of false confessions" and the ready availability of video-recording equipment, "we should be deeply skeptical of any interrogation we cannot view from beginning to end." Kozinski, supra, at xxix. Thomas Sullivan has also argued that maintaining video recordings of all custodial interrogations would not only reduce "wrongful convictions of innocent defendants" but would also eliminate law-enforcement costs associated with "the threat of civil litigation and judgments based on allegations of coercive tactics, failure to give warnings, and false testimony as to what occurred." Thomas P. Sullivan et al., *The Case for Recording Police Interrogations*, 34 LITIG. 30, 36 (2008); Brian C. Jayne, et al., *Empirical Experiences of Required Electronic Recording of Interviews and Interrogations on Investigators' Practices and Case Outcomes*, John E. Reid & Assocs., Inc. (2004) (noting that when police are incorrectly thought to have "elicit[ed] false confessions, electronic recordings may be the most effective means to dispel these unsupported notions").

Police officers have found recording of custodial interrogations helpful, often despite their early resistance. Thomas Sullivan assembled reports from many police departments that had adopted video-recording requirements, and found that "[v]irtually every officer who has had experience with custodial recordings enthusiastically favors the practice." Thomas P. Sullivan, *Police Experiences with Recording Custodial Interrogations*, 88 JUDICATURE 132, 133-134. Sullivan identified a number of reasons the practice is helpful to police officers. For one, "[r]ecordings permit detectives to focus on suspects rather than taking notes, which distracts both officers and suspects." Id. at 134. Recordings can also become useful for the police officers after the interrogation: "Later review of recordings often reveals previously overlooked inconsistencies and evasive conduct not captured in written reports." Id; see also Lewis, supra, at 222 ("Where police officers are exercising their discretion inappropriately, videotaping contributes to increased professional police practices because the videotapes provide a useful training tool."); Matthew D. Thurlow, *Lights, Camera, Action: Video Cameras As Tools of Justice*, 23 J. MARSHALL J. COMPUTER & INFO. L. 771, 810 (2005) ("Videotaping allows officers to learn from their own mistakes and the mistakes of other officers. Police departments can accumulate videotape data to find patterns and trends to better tailor interrogations to fit particular criminal profiles.").

Many scholars have emphasized that the arguments for adopting a video-recording requirement are especially strong as applied to juveniles. See, e.g., Barry C. Feld, *Real Interrogation: What Actually Happens When Cops Question Kids*, 47 L. & SOC'Y REV. 1, 27 (2013) (noting juveniles' overrepresentation among false confessors and observing "consensus that recording interrogations reduces coercion, diminishes dangers of false confessions, and increases reliability"). Requiring video recordings when juveniles are interrogated could mitigate some of the danger that juveniles will make false confessions. Laurel LaMontagne, for example, argues that absent video-recording of juvenile interrogations, interrogators are likely to make subsequent "attribution errors": "They will prompt juveniles with leading questions, thereby supplying them with details, and later attribute these details as coming directly from the juveniles." Laurel LaMontagne, *Children Under Pressure: The Problem of Juvenile False Confessions and Potential Solutions*, 41 W. ST. U. L. REV. 29, 51 (2013). Nashiba Boyd notes that "[m]ost commentators

promote the use of videotaping as a remedy to involuntary juvenile confessions." Nashiba F. Boyd, *"I Didn't Do It, I Was Forced to Say That I Did": The Problem of Coerced Juvenile Confessions, and Proposed Federal Legislation to Prevent Them*, 47 How. L.J. 395, 422 (2004); see also LaMontagne, supra, at 51 ("Videotaping allows the jury or judge to see how the juvenile was interrogated and observe whether any overly coercive police tactics were used."). In short, the increased vulnerability of juveniles makes the adoption of a video-recording requirement especially useful as a means to protect their rights in custodial interrogation.

b. Limitations and exceptions. Many states limit the electronic-recording requirement to interrogations that focus on particular serious crimes or categories of crimes. For example, some states limit the recording requirement to investigations of felonies or "violent felonies." For statutes limiting the requirement to juvenile felony interrogations, see Wis. Stat. Ann. § 968.073(2) (felonies); N.C. Gen. Stat. Ann. § 15A-211(b) (violent felonies); Or. Rev. Stat. Ann. § 133.400(1) (crime requiring adult prosecutions of juvenile offenders (§ 137.707)). For Oregon adults, the recording requirement is limited to violent felonies. Many general statutes also limit the requirement in this way. See, e.g., Mich. Comp. Laws Ann. § 763.8(3) ("major felonies."); Vt. Stat. Ann. tit. 13, § 5585(b) (West) (homicide and sexual assault); N.J. Ct. R. 3:17(a) (numerous specified violent crimes and burglary, and "any crime involving the possession or use of a firearm"); Ind. R. Evid. 617(a) (felonies); Or. Rev. Stat. Ann. § 133.400(1) (aggravated murders, crime triggers a mandatory minimum sentence); Neb. Rev. Stat. Ann. § 29-4503(2) (crimes resulting in death or felonies involving (i) sexual assault, (ii) kidnapping, (iii) child abuse, or (iv) strangulation); Mo. Ann. Stat. § 590.700(2) (variety of violent crimes); 725 Ill. Comp. Stat. Ann. 5/103-2.1(b-5) (felonies, including murder, arson, and certain sex offenses); D.C. Code Ann. § 5-116.01 ("a crime of violence"); Me. Rev. Stat. Ann. tit. 25, § 2803-B (West) (serious crimes).

Most statutes limit the recording requirement to interrogations conducted in detention facilities. See N.C. Gen. Stat. Ann. § 15A-211 (West) (applies to "custodial interviews of juveniles conducted at any place of detention."). Under the Wisconsin statute, a custodial interrogation conducted not at a place of detention must be recorded *if feasible*. Wis. Stat. Ann. § 938.195(2)(a)-(b). Other statutes also include this limitation. See also Ark. R. Crim. P. 4.7(b)(2) (not required where not feasible); Conn. Gen. Stat. Ann. § 54-1*o*(e) (not practical); N.M. Stat. Ann. § 29-1-16(B)(same); 725 Ill. Comp. Stat. Ann. 5/103-2.1(b-10). It should be noted, however, that video-recording has become much less expensive and easier in recent years, a development reflected in the growing use of camera recorders in police cars.

Statutes also establish exceptions to the recording requirement. For example, if the suspect agrees to answer questions only if the interview is not recorded, refuses to be recorded, or asks that the recording cease, the requirement is suspended. In Wisconsin and North Carolina, the exception applies to juveniles. See State v. Moore, 864 N.W.2d 827 (Wis. 2014) (under *Jerrell C.J.*, 15-year-old juvenile's confession was voluntary and admissible despite some of the statement being unrecorded because juvenile made a clear and affirmative choice to refuse to cooperate unless the recording device was turned off). See also Wis. Stat. Ann. § 972.115 (codifying exception); N.C. Gen. Stat. Ann. § 15A-211(e). Several general statutes,

applying to all suspects, also include this exception. E.g., Vt. Stat. Ann. tit. 13, § 5585(c)(1); N.M. Stat. Ann. § 29-1-16(B); Mont. Code Ann. § 46-4-409(1); Mo. Ann. Stat. § 590.700(3). Many statutes require that the suspect's refusal itself must be recorded. See N.J. Ct. R. 3:17(b); Ind. R. Evid. 617(a); Conn. Gen. Stat. Ann. § 54-1*o*(e); Ark. R. Crim. P. 4.7(b)(2); Wis. Stat. Ann. § 972.115(2)(a); N.C. Gen. Stat. Ann. § 15A-211(e); 725 Ill. Comp. Stat. Ann. 5/103-2.1(b-10); D.C. Code § 5-116.019(c). Because a juvenile may be less likely than an adult to understand the benefit of recorded interrogation, ordinarily recording should cease only after the juvenile has consulted with counsel or an interested adult about his or her decision to answer questions only if the interrogation is not recorded.

Another exception from required recording arises when equipment malfunctions. See, e.g., N.C. Gen. Stat. Ann. § 15A-211(e); Vt. Stat. Ann. tit. 13, § 5585(c)(1); N.J. Ct. R. 3:17(b); Ind. R. Evid. 617(a); Wis. Stat. Ann. § 972.115(2)(a); Mont. Code Ann. § 46-4-409(1). Many states provide that a spontaneous statement need not be recorded. See, e.g., N.C. Gen. Stat. Ann. § 15A-211(g); N.J. Ct. R. 3:17(b); Ind. R. Evid. 617(a); Conn. Gen. Stat. Ann. § 54-1*o*(e); Ark. R. Crim. P. 4.7(b)(2); Wis. Stat. Ann. § 972.115(2)(a); Tex. Crim. Proc. Code Ann. art. 38.22 § 5; Or. Rev. Stat. Ann. § 133.400(2); N.M. Stat. Ann. § 29-1-16(C); Mont. Code Ann. § 46-4-409(1); Mo. Ann. Stat. § 590.700(3); 725 Ill. Comp. Stat. Ann. 5/103-2.1(b-10). Some statutes include a catch-all provision creating an exception to the recording requirement for "good cause." See, e.g., N.C. Gen. Stat. Ann. § 15A-211(e); Wis. Stat. Ann. § 968.073(2); Or. Rev. Stat. Ann. § 133.400(2); N.C. Gen. Stat. Ann. § 15A-211(e); N.M. Stat. Ann. § 29-1-16(F). Others set aside the requirement under exigent circumstances or where recording is not feasible. See Vt. Stat. Ann. tit. 13, § 5585(c)(1) (exigent circumstances); Wis. Stat. Ann. § 972.115(2)(a) (same); Mont. Code Ann. § 46-4-409(1) (same); Mo. Ann. Stat. § 590.700(3) (same).

*c. Remedy for failure to record the entire interrogatio*n. Compliance with the requirement to video-record statements in interrogation is not burdensome, and excluding unrecorded statements from admissibility in later criminal or delinquency proceedings is the best means to encourage compliance by law enforcement agencies. The Alaska Supreme Court articulated a compelling argument for suppressing unrecorded statements unless the failure to record is excused. Stephan v. State, 711 P.2d 1156 (Alaska 1985). First, the court observed, an exclusionary rule is the best means to overcome law-enforcement resistance to recording, providing "crystal clarity" to law-enforcement agencies. 711 P.2d at 1163. Only an exclusionary rule, the court suggested, can effectively change agency policy and practice. Further, the court found that an exclusionary rule is critical to preserving the integrity of judicial proceedings, which is undermined when a court must decide admissibility. Finally, an exclusionary rule provides critically important protection of individual rights, which are threatened if an officer is allowed to arbitrarily decline to record a suspect's interview.

Other states have also established an exclusionary rule under which the unexcused failure to record interrogation as required by statute or court rule ordinarily renders the statement inadmissible, or creates a presumption against admissibility. See State v. Scales, 518 N.W.2d 587,

592-593 (Minn. 1994) (statement is inadmissible where there was "substantial violation" of recording requirement); In re Dionicia M., 791 N.W.2d 236, 241 (Wis. 2010) (juvenile court wrongly treated *Jerrell* as a balancing test; custodial interrogations of juveniles must be recorded when feasible or will be excluded); State v. Barnett, 789 A.2d 629 (N.H. 2001) (recorded interrogation inadmissible unless the statement is recorded in its entirety). See also Ind. R. Evid. 617; Wis. Stat. Ann. §§ 938.195, 938.31; Wis. Stat. Ann. §§ 968.073, 972.115; Tex. Fam. Code Ann. § 51.095 (listing set of situations where statements of juveniles are admissible); Mont. Code Ann. § 46-4-409(1) (statement presumed inadmissible); 725 Ill. Comp. Stat. Ann. 5/103-2.1 (same).

In some states, the failure to record is a factor to be considered in determining whether the juvenile's waiver was valid or the statement voluntarily made, but failure does not automatically result in exclusion of the unrecorded statement. Misskelley v. State, 915 S.W.2d 702 (Ark. 1996), for example, held that a court evaluating a juvenile's confession should weigh the absence of recording in the totality-of-the-circumstances mix, but declined to exclude the statement for that reason alone. In a few states, the failure to record interrogation will result in a cautionary instruction to the jury if the statement is admitted. N.J. Ct. R. 3:17 (West 2015); Com. v. DiGiambattista, 813 N.E.2d 516, 533-534 (Mass. 2004) (juvenile is "entitled to jury instruction"). See also Mont. Code Ann. §§ 46-4-407 to 411 (where statement made despite failure to record is admissible, jury must receive cautionary instruction); N.C. Gen. Stat. Ann. § 15A-211 (West 2014) (jury is instructed to consider failure to record without good cause in determining whether statement is reliable and voluntary); Cal. Penal Code § 859.5 (West 2015) (requiring jury instruction if statement is admitted); Mich. Comp. Laws Ann. §§ 763.7 to 11 (West 2013); Neb. Rev. Stat. §§ 29-4501 to 4508; Vt. Stat. Ann. tit. 13, § 5585.

Several states allow unique sanctions. See, e.g., Mo. Ann. Stat. § 590.700 (West 2014) (governor may withhold state funds appropriated to agency found to have not made a good faith attempt to comply).

A few states impose no specific sanction for the failure to record an interrogation. See Md. Code Ann., Crim. Proc. § 2-402; N.M. Stat. Ann. § 29-1-16 specifies no consequence for failure to record; D.C. Code Ann. § 5-116.01. Maine limits the sanction to a civil penalty. Me. Rev. Stat. tit. 25, § 2803-B to C (noncompliance is civil violation punishable by fine not to exceed $500).

Most scholars and commentators have argued that the unexcused failure to record should result in the exclusion of the statement. Gail Johnson, *False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations*, 6 B.U. PUB. INT. L.J. 719, 746 (1997) (citing Stephan v. State, 711 P.2d 1156, 1163 (Alaska 1985) ("confession is generally such conclusive evidence of guilt that a rule of exclusion is justified"); Steven A. Drizin and Beth A. Colgan, *Let the Cameras Roll: Mandatory Videotaping of Interrogations Is the Solution to Illinois' Problem of False Confessions*, 32 LOY. U. CHI. L.J. 337, 363 (2001) (arguing for exclusion); Thomas Sullivan, Video Recording of Custodial Interrogation: Everybody Wins, 95 J. Crim. L. & Criminology 1127 (2005) (proposing model statute that presumes that unrecorded statement is inadmissible).

APPENDIX

BLACK LETTER OF TENTATIVE DRAFT NO. 1

§ 2.10. Duty to Provide Reasonable Economic Support

(a) Parents must provide reasonable economic support to their minor children.

(b) A parent's obligation ends when the child is not enrolled in high school and reaches the age of majority or the child is emancipated, whichever comes first. If the child reaches the age of majority and is enrolled in high school, a parent's obligation ends when the child graduates high school or reaches age 21, whichever comes first.

§ 2.30. Parental Authority and Responsibility for Medical Care

(1) Authority

(a) A parent or guardian has broad authority to make medical decisions for a child.

(b) A parent does not have authority to consent to medical procedures or treatments that provide no health benefit to the child and pose a substantial risk of serious harm to the child's physical or mental health.

(c) A parent does not have authority to consent to medical procedures or treatments that impinge on the child's constitutional rights to bodily integrity or reproductive privacy.

(2) Responsibility

(a) A parent, guardian, custodian, or temporary caregiver has a duty to provide necessary medical care for the child.

(b) Medical care is necessary if it is required to prevent serious harm or a substantial risk of serious harm to the child's physical or mental health or to the safety of others.

§ 3.20. Physical Abuse

(a) In a criminal proceeding, physical abuse is

(1) a person purposely, knowingly, or recklessly inflicting serious physical harm on a child or creating a substantial risk of serious physical harm to a child, or

(2) a parent, guardian, custodian, or person caring for a child purposely, knowingly, or recklessly causing another person or permitting another person to inflict serious physical harm on a child or creating a substantial risk of serious physical harm to a child.

(b) In a civil child-protection proceeding, a court may find a child has been physically abused if

(1) a parent, guardian, or custodian inflicts serious physical harm on a child, or creates a substantial risk of serious physical harm to a child, in a manner that substantially deviates from the standard of care exercised by a reasonable parent, or

(2) a parent, guardian, or custodian causes another person to inflict serious physical harm on a child, or create a substantial risk of serious physical harm to a child, in a manner that substantially deviates from the standard of care exercised by a reasonable parent.

§3.24. Defenses: Parental Privilege to Use Reasonable Corporal Punishment

(a) In the context of criminal proceedings, the use of corporal punishment by a parent, guardian, or other adult acting as a parent is privileged, provided that such punishment is reasonable, determined in part by whether the corporal punishment caused, or created a substantial risk of causing, serious physical harm or gross degradation.

(b) In the context of civil child-protection proceedings, the use of corporal punishment by a parent, guardian, or other adult acting as a parent is privileged, provided that such punishment is reasonable, determined in part by whether the corporal punishment caused, or created a substantial risk of causing, physical harm beyond minor pain or transient marks.

§ 3.26. Medical Neglect

(a) In a criminal proceeding, medical neglect is the unjustifiable failure or refusal of a parent, guardian, custodian, or temporary caregiver to provide medical care necessary to prevent serious harm or a substantial risk of serious harm to the child's physical or mental health.

(1) In a criminal proceeding in which the failure or refusal to provide necessary medical care results in the death of the child, the failure or refusal to provide such care is unjustifiable if it involves a gross deviation from the standard of care that a reasonable parent would observe in the actor's situation.

(2) In all other criminal proceedings, the failure or refusal to provide necessary medical care is unjustifiable if the obligated individual purposely, knowingly, or recklessly fails or refuses to provide such care.

(b) In a civil child-protection proceeding, the failure or refusal of a parent, guardian, or custodian to provide medical care to a child is medical neglect if the parent, guardian, or custodian fails to exercise the minimum degree of care necessary to prevent serious harm or a substantial risk of serious harm to the child's physical or mental health.

§ 14.20. Rights of a Juvenile in Custody; Definition of Custody

(a) A juvenile in custody has the right to the assistance of counsel and the right to remain silent when questioned about the juvenile's involvement in criminal activity by a law-enforcement officer.

(b) A juvenile is in custody if, under the circumstances of the questioning:

(1) a reasonable juvenile of the suspect's age would feel that his or her freedom of movement was substantially restricted such that the juvenile was not at liberty to terminate the interview and leave, and

(2) the officer is aware that the individual being questioned is a juvenile or a reasonable officer would have been aware that the individual is not an adult.

§ 14.21. Waiver of Rights in a Custodial Setting

(a) A statement made by a juvenile in custody is admissible in a subsequent delinquency or criminal proceeding only if

(1) the juvenile has given a knowing, intelligent, and voluntary waiver of the right to remain silent and the right to assistance of legal counsel;

(2) the statement was made voluntarily; and

(3) the requirements of § 14.22 and § 14.23 are satisfied.

(b) The determination of whether the juvenile has given a knowing, voluntary, and intelligent waiver of rights under subsection (a)(1) and made a voluntary statement under subsection (a)(2) is based on consideration of the totality of the circumstances surrounding the interrogation, in light of the juvenile's age, education, experience in the justice system, and intelligence. Circumstances surrounding the interrogation include police conduct and conditions of the questioning.

§ 14.22. Consultation with Counsel for Younger Juveniles

Unless otherwise provided by statute, a juvenile age 14 or younger can give a valid waiver of the right to counsel and the right to remain silent only after meaningful consultation with and in the presence of counsel.

§ 14.23. Video-Recording of Interrogation Required

(a) All questioning by a law-enforcement officer of a juvenile during custodial interrogation shall be video-recorded, unless it is not feasible to do so.

(b) The failure to comply with subsection (a) without good cause will result in the exclusion of any statement made by the juvenile during the interrogation in a subsequent delinquency or criminal proceeding adjudicating a felony charge.