

The Contested Place of Religion in Family Law

Edited by

ROBIN FRETWELL WILSON

University of Illinois College of Law



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By Faith Alone
When Religious Beliefs and Child Welfare Collide

Robin Fretwell Wilson

Roger and Stephany Joslin Professor of Law, University of Illinois College of Law

Shaakirrah R. Sanders

Associate Professor of Law, University of Idaho College of Law

In 2016, a Myanmar immigrant who had received political asylum in the United States invoked Indiana's newly enacted Religious Freedom Restoration Act ("RFRA") after being charged with battery for leaving thirty-six bruises and marks on her son's back; she had disciplined him with a coat hanger to save his soul.¹ She claimed both a cultural and a religious defense. Seventeen months before, Texas authorities arrested and indicted Minnesota Vikings running back Adrian Peterson for "whooping" his son with a small tree branch, sparking a national debate over how harshly parents should discipline children.² During the deluge of publicity, Peterson explained that he was trying to teach his son right from wrong, exactly as his parents had done in East Texas. Six months before, in the heart of Philadelphia, eight-month-old Brandon Schaible died from a treatable infection because his parents refused to give him antibiotics. Brandon's parents believe "prayer offered in faith will make the sick person well," even though Brandon's older brother had also died of pneumonia that the Schaibles also treated through prayer.³

As this chapter shows, these stories have more in common than they are different. How to discipline one's child, like the decision to treat "by faith alone," sometimes runs deep in religious and cultural belief systems. The state's regulation of childrearing not only impacts the parent's liberty, but also a community's ability to hold onto its identity and transmit norms. Too often,

¹ See Section III.D *infra*. ² *Id.*

³ Eliana Dockterman, *Faith-Healing Parents Jailed After Second Child's Death*, TIME (Feb. 19, 2014), <http://time.com/8750/faith-healing-parents-jailed-after-second-childs-death/>; James 5:14–15 (New International Version) ("Is anyone among you sick? Let them call the elders of the church to pray over them and anoint them with oil in the name of the Lord. And the prayer offered in faith will make the sick person well.").

the state's solicitude for parental autonomy dictates the child's fate. This chapter explores the limits of the broad and constitutionally recognized grant of parental power and documents the veritable kaleidoscope of exemptions for practices that expose children to real and present harm.

Parents in the U.S. generally have the right to raise and rear their children in the manner they see fit. Yet parental rights intersect with and are sometimes restrained by states' power to legislate and regulate for the general welfare of their citizens, including children who lack the wherewithal to protect themselves from illness or abuse by others. In their *parens patriae* role, states stand in the shoes of parents, safeguarding children even when a parent's "religion or conscience"⁴ prevents them from doing so.

Standard wisdom holds that government protections of the parent-child relationship reflect a deep respect for religious liberty and individual autonomy. But as this chapter shows, these practices are deeply important to maintaining cultural identity, too. States credit parents' philosophical objections to modern medicine, not just their religious ones. Some take into account cultural reasons for corporal punishment; the majority give parents latitude to physically discipline in neutral terms, without referencing religious beliefs. States cast broad envelopes of discretion around childrearing, in part because of a general agnosticism about which childrearing practices produce the best outcomes for children.

Section I of this chapter reviews the constitutional parameters of the parent-child relationship, which help map the boundaries of parents' parental rights and free exercise of religion when their children might be harmed by the parents' beliefs and actions. It discusses four cases often invoked as proof of thick parental rights to the care, custody, and control of minor children and dependents – *Meyer v. Nebraska*, *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*, *Prince v. Massachusetts*, and *Wisconsin v. Yoder*.⁵ The section shows that the U.S. Supreme Court brackets parental authority derived from the Constitution: parents may not harm their children.

Section II evaluates the degree of harm to children that results from corporal punishment and faith healing. It presents a schism in views among social scientists about whether corporal punishment always harms children and shows that ethnic and cultural identity can moderate the experiences and effects of physical discipline. Section II then examines the few studies of faith healing

⁴ *Prince v. Massachusetts*, 321 U.S. 158, 166–67, 169 (1944).

⁵ *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925); *Prince*, *supra* note 4; *Wisconsin v. Yoder*, 406 U.S. 205, 230–234 (1972).

practices and shows that the overwhelming majority of children who have died as a result suffered from wholly treatable ailments.

Section III shows the degree of respect for parental autonomy, religion, and cultural practices reflected in state statutes that otherwise require parents to secure needed medical treatment for and to not abuse or neglect their children. As this section and Appendix 1 show, faith healing and corporal punishment laws define the fault lines between parental freedom and child abuse and neglect in each state. Section III then shows that states compensate for the latitude given to parents by charging adults in the community as mandatory reporters of child abuse and by authorizing judges to consent to needed treatment. This section provides descriptions of the law that have been sorely missing in the national discussion of these questions.

Using a single state, Idaho, as a case study, Section IV illustrates how a state's regulation of child abuse, medical neglect, involuntary manslaughter, and lesser crimes operates to confer on parents in Idaho effective immunity from civil sanction when they act "by faith alone." This overlapping statutory scheme has proven hard to reform, even as children continue to die. This is so, in part, because lawmakers are unsure whether attempts to constrain parental choices would ensure that children receive necessary medical care – or would instead backfire, pushing communities and families further from the law. Rather than only prosecuting parents, we conclude that strengthening linkages between the outside world and insular communities holds great promise for protecting children from harm at the hands of their parents.

I CONSTITUTIONAL PARAMETERS OF THE PARENT-CHILD RELATIONSHIP

There is a "play in the joints"⁶ between "the private realm of family life" and the state's exercise of police powers that leaves both children unprotected *and* parents at risk of second-guessing by the state. A quadrangle of cases establishing parental rights to rear children does not give parents unfettered discretion, however.

Meyer v. Nebraska represents the earliest announcement of parental rights grounded in the U.S. Constitution. *Meyer* considered a Nebraska law prohibiting public and private schools from teaching children any language other than English before the eighth grade.⁷ Like so many laws today, Nebraska did not adopt a blanket ban⁸ – it allowed the teaching of "ancient" or "dead"

⁶ *Locke v. Davey*, 540 U.S. 712, 718–19 (2004). ⁷ *Meyer*, *supra* note 5, at 396–97.

⁸ See Rienzi, Chapter 4, this volume, for a discussion of employers "grandfathered" out of the contraceptive coverage mandate.

languages, including Latin, Greek, and Hebrew.⁹ But schools could not instruct students in German, French, Spanish, Italian, and any other “alien speech.”¹⁰ Robert Meyer violated the law when he taught German to a ten-year-old student at a Zionist parochial school. He faced a thirty-day jail sentence and a \$25 to \$100 fine.¹¹

The *Meyer* Court wedged the “natural duty” of parents to choose a suitable education for minor children under the heading of parental autonomy.¹² Writing for the *Meyer* majority, Justice James McReynolds included religious worship and childrearing among the categories of constitutional parental liberty interests.¹³ McReynolds asked whether Nebraska properly exercised its constitutional police powers, which Nebraska claimed were to foster American ideals by establishing English as “the mother tongue” for all children within the state.¹⁴ McReynolds acknowledged the allure of establishing a “homogeneous people with American ideals” given the atrocities of World War I.¹⁵ But Nebraska’s exercise of its police powers ultimately amounted to using a “prohibited means” to promote a “desirable end.”¹⁶

Meyer shows how states can overstep both the “letter and spirit” of the U.S. Constitution.¹⁷ Practically, Nebraska’s ban on modern language courses left “complete freedom as to other matters” and showed a preference for ancient or dead languages.¹⁸ That preference proved fatal when Nebraska failed to show how knowledge of any foreign language harmed a child’s health, morals, or understanding of citizenship.¹⁹ Nor could Nebraska demonstrate that knowledge of a modern foreign language posed a danger to national security.²⁰

Meyer demonstrates how laws, even well-intentioned ones, can intrude on questions reserved to parents. “[P]roiciency in a foreign language seldom comes to one not instructed at an early age,” intruding on a parent’s right to decide a child’s education.²¹ Nebraska also encroached on the teacher’s right to choose a profession: German teachers would have fewer choices if Nebraska’s ban stayed in place.²² In an early framing of now-familiar substantive due process and equal protection doctrines, the *Meyer* Court declared “the protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue.”²³

While *Meyer* struck down the law at issue, the Court did not question Nebraska’s ability to override parental choices on educational matters that further the safety and morals of school-aged children.²⁴ States could “compel

⁹ Meyer, *supra* note 5, at 400–01. ¹⁰ *Id.* at 401. ¹¹ *Id.* at 396–97. ¹² *Id.* at 400.

¹³ *Id.* at 399. ¹⁴ *Id.* at 398. ¹⁵ *Id.* at 402. ¹⁶ *Id.* at 401. ¹⁷ *Id.* at 402.

¹⁸ *Id.* at 403. ¹⁹ *Id.* at 401–03. ²⁰ *Id.* at 403. ²¹ *Id.* ²² *Id.*, at 400. ²³ *Id.* at 401.

²⁴ *Id.* at 402.

attendance” at school.²⁵ States could also require that *all* schools “give instruction in English,” even if states could not selectively ban the teaching of other languages without more evidence.²⁶

Like *Meyer*, the second case in this foursome, *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*, also turned on whether the State reasonably exercised its police powers. Oregon required parents to send their eight-to sixteen-year-old children to a public school; the “manifest purpose” was to increase public school attendance.²⁷ Again, Justice McReynolds wrote for the majority.

Oregon, McReynolds concluded in *Pierce*, failed to show that a private school education was inherently harmful to children. Children are not “a mere creature of the state.”²⁸ Oregon intruded on the “liberty of parents and guardians to direct the upbringing and education of children under their control.”²⁹ Oregon’s law also diminished the profitability and value of private schools, especially that of the military academies and orphanages that challenged the statute.³⁰ Thus, while states may generally impose educational requirements, states cannot demand a standardized education only in public schools.³¹

While *Meyer* stood on both substantive due process and equal protection grounds, *Pierce* firmly established substantive due process as the substrate of parental rights. In both cases, the states showed no harm from the prohibited activity – the teaching of modern foreign languages or a private school education. Nor did Nebraska and Oregon point to particular circumstances or emergencies that demanded such extreme measures.

The third case, *Prince v. Massachusetts*, occupies the space at the intersection of “parental right[s] as secured by the due process clause,” “freedom of religion under the First Amendment,” and state authority to intrude on such rights.³² There, Sarah Prince and her nine-year-old niece, who was in Prince’s legal custody, distributed religious periodicals on the streets of Brockton, Massachusetts.³³ They asked for a five-cent donation for each periodical, implicating a Massachusetts labor law that applied to boys under twelve and girls under eighteen.³⁴ Because both were ordained ministers in the Jehovah’s Witness faith, both Prince and her niece claimed a religious duty to leaflet.³⁵

At first blush, *Prince* presents just “another episode in the conflict between Jehovah’s Witnesses and state authority.”³⁶ Yet, swirling in *Prince* are questions not only of the rights of religious communities and individuals poised against the State but also of the rights of families and children and the state’s role in

²⁵ *Id.* ²⁶ *Id.* ²⁷ *Pierce*, *supra* note 5, at 530–31. ²⁸ *Id.* at 534. ²⁹ *Id.* at 535.

³⁰ *Id.* at 531–34. ³¹ *Id.* at 535. ³² *Prince*, *supra* note 4, at 164. ³³ *Id.* at 161.

³⁴ *Id.* at 160–61. ³⁵ *Id.* at 161–64. ³⁶ *Id.* at 159.

protecting children.³⁷ Here, a parent's right to teach her children the tenets and practices of her chosen faith overlap with a child's independent right to observe and "preach the gospel."³⁸

Prince articulated the cardinal rule "that the custody, care and nurture of the child reside first in the parents," a "private realm of family life" that states must respect.³⁹ But the state can act to safeguard children from abuse and to give children the opportunity to grow into free, independent, and well-developed citizens.⁴⁰

Turning to whether Massachusetts sufficiently rationalized the need for child labor restrictions,⁴¹ *Prince* identified "the crippling effects of child employment" as an appropriate evil justifying the exercise of police power.⁴² *Prince* established "psychological or physical injury" to children as a baseline for deciding when an action that would be protected free exercise for an adult properly becomes a subject for the state's concern for protecting children.⁴³ "The zealous though lawful exercise" of religious liberty "may and at times does create situations . . . wholly inappropriate for children, especially of tender years, to face."⁴⁴ That which is "permissible for adults . . . may not be so for children."⁴⁵

Prince recognizes that the state "as *parens patriae*" may act "to guard the general interest in youth's well being," even if the parent's view is premised on "religion or conscience."⁴⁶ The rights of religion and parenthood do not prevent the state from requiring "compulsory vaccination" or protecting children from communicable disease, ill health, or death.⁴⁷ The *Prince* Court explained: "Parents may be free to become martyrs themselves. But it does not follow that they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."⁴⁸ While *Prince* cautioned that religious training and indoctrination of children will continue to receive constitutional protection from state intervention that exceeds the state's police power⁴⁹ – and that the state should use delicacy when balancing parental control and state authority⁵⁰ – it painted outer boundaries of a parent's prerogatives, whether or not religiously motivated.

Dwyer (Chapter 8, this volume) critiques the fourth case, *Wisconsin v. Yoder*,⁵¹ which he argues accorded religious parents, and religious communities, significant autonomy in a contest with the state over what best serves a child's welfare. In *Yoder*, Amish families challenged application of a

³⁷ *Id.* at 164. ³⁸ *Id.* ³⁹ *Id.* at 166. ⁴⁰ *Id.* at 165. ⁴¹ *Id.* at 167. ⁴² *Id.* at 168.

⁴³ *Id.* at 169–70. ⁴⁴ *Id.* ⁴⁵ *Id.* at 169. ⁴⁶ *Id.* at 166–67, 169. ⁴⁷ *Id.* at 166–67.

⁴⁸ *Id.* at 170. ⁴⁹ *Id.* ⁵⁰ *Id.* at 165. ⁵¹ *Yoder*, *supra* note 5, at 230–234.

Wisconsin law that required all children to attend school until age sixteen; the Amish believed children should be educated only through eighth grade.⁵² The Court stressed how additional years of education would interfere with the Amish's community-preserving strategy. The Wisconsin law, it noted, "takes [youth] away from their community, physically and emotionally, during the crucial and formative adolescent period of life." State-supported high school could not, "in curriculum or social environment . . . impart the values promoted by Amish society."⁵³ A key witness testified that compulsory high school attendance might result in great psychological harm to Amish children because of the conflicts it would produce.⁵⁴ That same witness opined that such conflicts might hasten the destruction of the Old Order Amish church community as it existed in the U.S. at that time.⁵⁵

As in *Meyer*, *Pierce*, and *Prince*, *Yoder* recognized that states may act against parents' wishes to safeguard child welfare. But the Amish "introduced persuasive evidence undermining" Wisconsin's argument that additional education advanced "the welfare of the child and society as a whole."⁵⁶ Specifically, "foregoing one, or at most two, additional years of compulsory education will not impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society."⁵⁷

Dwyer argues that the thrust of *Yoder* is to give Amish parents an "other-determining power," not a personal liberty – that is, *Yoder* allows believers not only to decide questions of their own fate but also those of their children. Yet, *Meyer*, *Pierce*, *Prince*, and *Yoder* all articulate a no-harm-to-children principle for the basis of the State's ability to supervise the choices parents make for children. In some instances, the government makes the needed showing; in others, such as *Yoder*, it does not.

Next, this chapter briefly reviews the evidence of harm to children from two specific practices that are bound up with religious identity, both for individual believers and for religious communities: corporal punishment and faith healing. This chapter demonstrates the differing views among social scientists that corporal punishment always harms children and shows that ethnic and cultural identity moderates the experiences and effects of physical discipline. It also examines the few studies of faith healing practices and shows that the overwhelming majority of children who have died suffered from wholly treatable ailments.

⁵² *Yoder*, *supra* note 5, at 207. ⁵³ *Id.* at 211–12. ⁵⁴ *Id.* at 212. ⁵⁵ *Id.* ⁵⁶ *Id.* at 234.

⁵⁷ *Id.*

II THE EVIDENCE OF HARM TO CHILDREN FROM CERTAIN RELIGIOUS CHILDREARING PRACTICES

The balancing of religious liberty, family autonomy, and individual rights is nowhere more difficult than when a child's life or welfare hangs in the balance. Recently, a national discussion has erupted about how some parents parent. Adrian Peterson's indictment on charges of reckless or negligent injury to a child for "whopping" his son surfaced questions about the propriety of spanking and even harsher physical discipline.⁵⁸ As child deaths from faith healing continue to mount in parts of the country, including in Idaho, both citizens and policy makers are revisiting the wisdom of shielding parents from state oversight.

This section briefly presents empirical evidence about each practice, evaluating in particular when decisions about rearing children carry a substantial risk to those children.

A Distinguishing Between Spanking and Use of Excessive Force

As Section III will show, corporal punishment is allowed, to varying degrees, in forty-four of fifty states and the District of Columbia as exceptions to laws prohibiting the physical abuse of children. But how parents should discipline a child, and if they should use physical discipline at all, remains a divisive matter. Some believe in physical discipline to instill valuable lessons in a child, as vignettes that follow later illustrate. Others say parents should never spank a child, arguing for verbal discipline instead.

Whatever the reason for the use of discipline, a mottled snapshot has emerged about the possibility of harm from corporal punishment. Perhaps the most well-known work on corporal punishment and its effect on children comes from Murray Straus and Richard Gelles's seminal 1985 book, based on thirty-minute interviews of more than 6000 American families.⁵⁹ The authors would later say they found an astonishing prevalence of parental violence toward children: "each year a minimum of 1.7 million children are severely assaulted by their parents and . . . an additional 5.4 million children are hit with objects."⁶⁰ Importantly, Straus defined corporal punishment as "the use

⁵⁸ Ben Goessling & Darren Rovell, *Adrian Peterson Booked, Released*, ESPN.COM (September 14, 2014), www.espn.com/nfl/story/_/id/11514522/adrian-peterson-minnesota-vikings-indicted-child-case; Offit, Chapter 12, this volume; Section IV *infra*.

⁵⁹ Richard Gelles & Murray A. Straus, *PHYSICAL VIOLENCE IN AMERICAN FAMILIES* (1985).

⁶⁰ Murray A. Straus & Carrie L. Yodanis, *Corporal Punishment by Parents: Implications for Primary Prevention of Assaults on Spouses and Children*, 2 U. CHI. L. SCH. ROUNDTABLE 35 (1995).

of physical force with the intention of causing [bodily] pain, but not injury, for purposes of correction or control of the child's behavior."⁶¹ Straus gave as examples "spanking on the buttocks, hand slapping, shoving, grabbing or squeezing hard, ear twisting, pinching, and putting hot sauce or soap on a child's tongue (for example, for cursing)."⁶²

Over time, social scientists would catalog the effects of corporal punishment to include increased depression, suicide, criminal behavior, participation in domestic violence, criminality, and delinquency.⁶³ For example, Straus and another colleague reported that those who experienced corporal punishment showed "restricted development of cognitive ability."⁶⁴ Summarizing this body of work in 2012, Straus concluded that when parents spank their children, "over the long term, there are greater odds that your child could become everything you don't want your child to become – an abuser, a depressed person, a person with temper-control issues. There is even evidence that children who are spanked end up with lower IQs."⁶⁵ Many, Straus included, attributed acceptance of corporal punishment in the U.S. to religious beliefs⁶⁶ – with some basis, as we show later.

To say Straus and Gelles have been influential across the world would be an understatement. The Council of Europe recommended legal prohibitions on corporal punishment and thirty-one European nations followed suit.⁶⁷ Some read the United Nations Convention on the Rights of the Child ("CRC"), to which the U.S. is not a signatory, to prohibit corporal punishment.⁶⁸ The CRC has sparked a movement to eradicate all corporal punishment, inside the home and outside: "50 [UN] states have prohibited all corporal punishment of

⁶¹ MURRAY A. STRAUS, BEATING THE DEVIL OUT OF THEM: CORPORAL PUNISHMENT IN AMERICAN FAMILIES AND ITS EFFECTS IN CHILDREN 4 (2001).

⁶² Murray A. Straus, *Prevalence, Societal Causes, and Trends in Corporal Punishment by Parents in Worldwide Perspective*, 73 L. & CONTEMPORARY PROBLEMS 1, 1–2 (2010).

⁶³ See Leonard P. Edwards, *Corporal Punishment and the Legal System*, 36 SANTA CLARA L. REV. 983, 992–993 (1996).

⁶⁴ Murray A. Straus & Mallie J. Paschall, *Corporal Punishment by Mothers and Development of Children's Cognitive Ability: A Longitudinal Study of Two Nationally Representative Age Cohorts*, 18 J. AGGRESSION, MALTREATMENT & TRAUMA 459 (2009).

⁶⁵ Bryan Marquard, *Dr. Murray A. Straus, 89; UNH Researcher Studied Violence*, BOSTON GLOBE (May 26, 2016), www.bostonglobe.com/metro/2016/05/26/murray-straus-unh-researcher-who-led-groundbreaking-studies-corporal-punishment-domestic-violence-dies/RlmWlvtNGe5I5TFUQFq1NM/story.html.

⁶⁶ See Straus, *supra* note 61.

⁶⁷ Council of Europe, *Corporal Punishment*, www.coe.int/en/web/children/corporal-punishment.

⁶⁸ Convention on the Rights of the Child, article 19, www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx.

children, including in the family home, 56 others have ‘expressed a commitment to full prohibition.’”⁶⁹

Nonetheless, in recent years, social scientists have collected in meta-analyses, analyzed, and summarized scientific studies of corporal punishment and its effects, a systematic review that allows for meaningful comparisons across studies.⁷⁰ Together, these studies show that the severity of corporal punishment’s effects may not be nearly as great as Straus and Gelles originally posited. For instance, a recent meta-analysis of forty-six published studies found “a trivial to small, but generally significant relationship between the use of spanking and [corporal punishment] and long-term negative outcomes.”⁷¹ How researchers defined corporal punishment mattered greatly.⁷²

Another meta-analysis looked at seventy-one studies, mostly from the U.S., conducted between 1961 and 2000 and capturing data from 47,751 people.⁷³ It found that most studies typically parse spanking from corporal punishment: studies characterized the former as “a mild open-handed strike to the buttocks or extremities,” while the latter is defined as a “more severe use of physical punishments, such as striking the face, hitting with an object or shaking or pushing a child.”⁷⁴ Even as to the latter, across studies researchers reported only “small negative behavioral and emotional effects of corporal punishment and almost no effect of such punishment on cognition.”⁷⁵ Where researchers separated out the effects of spanking itself, spanking correlated with less severe effects than other forms of corporal punishment.⁷⁶

Whether child aggression correlates with physical discipline may be a function of and moderated by the culture within which children find themselves. For example, Duke University professor Kenneth Dodge posits a biopsychosocial model of adolescents who chronically engage in conduct problems.⁷⁷ The notion is that biological dispositions and the contexts in which children grow up may influence early development of adolescent chronic conduct problems.⁷⁸ But this risk is moderated by the child’s

⁶⁹ *Id.*

⁷⁰ A meta-analysis is a review of available literature addressing a specific research question, to assess what the body of data, rather than a single study, demonstrates.

⁷¹ Christopher J. Ferguson, *Spanking, Corporal Punishment and Negative Long-Term Outcomes: A Meta-Analytic Review of Longitudinal Studies*, 33 *CLINICAL PSYCHOLOGY REV.* 196, 204 (2013).

⁷² *Id.* at 197.

⁷³ Elizabeth Oddone Paolucci & Claudio Violato, *A Meta-Analysis of the Published Research on the Affective, Cognitive, and Behavioral Effects of Corporal Punishment*, 138 *J. OF PSYCHOLOGY* 197 (2004).

⁷⁴ Ferguson, *supra* note 71, at 197. ⁷⁵ *Id.* ⁷⁶ *Id.* ⁷⁷ *Id.* ⁷⁸ *Id.*

experiences with parents, peers, and social institutions, which can add to that risk or mediate it.⁷⁹

The effects of spanking may differ by ethnic status, too. Researchers speculate that “the link between physical punishment and child aggression may be culturally specific.”⁸⁰ So, while physical discipline correlated with higher externalizing scores for European-American children, they did not for other children.⁸¹ A demographic profile correlates with use of spanking:

A large body of studies has indicated that spanking is more likely to be used by parents who are younger, less educated, of lower income, single, and/or are more depressed and stressed. Studies have also indicated that spanking is most commonly used by parents who were themselves spanked, who live in the South, and/or who identify themselves as conservative Christians.⁸²

Racial differences also appear to exist. African American parents reportedly spank their toddlers “more than their White counterparts.”⁸³

Spanking’s most ardent supporters crop up among self-identified “born-again Christians,” African Americans, people in the South, Black women, and men. In a national survey, researchers at the University of Chicago asked individuals if it is “sometimes necessary to discipline a child with a good, hard spanking.”⁸⁴ Across all groups, seven in ten Americans approved of spanking

⁷⁹ Kenneth A. Dodge & Gregory S. Pettit, *A Biopsychosocial Model of the Development of Chronic Conduct Problems in Adolescence*, 39 *DEV. PSYCHOL.* 349 (2003).

⁸⁰ Kirby Deater-Deckard, Kenneth A. Dodge, John E. Bates, & Gregory S Pettit, *Physical Discipline among African American and European American Mothers: Links to Children’s Externalizing Behaviors*, 32 *DEV. PSYCHOL.* 1065 (1996).

⁸¹ *Id.*

⁸² Lisa J. Berlin et al., *Correlates and Consequences of Spanking and Verbal Punishment for Low-Income White, African American, and Mexican American Toddlers*, 80 *CHILD DEV.* 1403, 1404 (2009).

⁸³ *Id.* See also Jennifer E. Lansford, *The Special Problem of Cultural Differences in Effects of Corporal Punishment*, 73 *L. & CONTEMPORARY PROBLEMS* 89 (2010) (reviewing research suggesting different outcomes for corporal punishment based on culture); LaShaun Williams, *Spanking Is Part of Black Culture*, *N.Y. TIMES* (Aug. 14, 2011), www.nytimes.com/roomfordebate/2011/08/14/is-spanking-a-black-and-white-issue/spanking-is-part-of-black-culture?module=ArrowsNav&contentCollection=undefined&action=keypress®ion=FixedLeft&pgtype=undefined.

⁸⁴ Harry Enten, *Americans’ Opinions On Spanking Vary By Party, Race, Region And Religion*, *FIVE THIRTY EIGHT* (Sep. 15, 2014), <http://fivethirtyeight.com/datalab/americans-opinions-on-spanking-vary-by-party-race-region-and-religion/>. See also GSS 1972–2014 *Cumulative Datafile*, SURVEY DOCUMENTATION AND ANALYSIS, <http://sda.berkeley.edu/sdaweb/analysis/dataset=gss14; Favor Spanking to Discipline Child, GSS DATA EXPLORER, https://gssdataexplorer.norc.berkeley.edu/variables/646/vshow> (giving four possible answers: strongly agree, agree, disagree, or strongly disagree).

sometimes.⁸⁵ This fraction has been remarkably stable since it was first measured in 1986, although the fraction of supporters ebbed in the late 1980s and 1990s before rebounding in later years.⁸⁶

Religious, cultural, racial, regional, and political differences correlate with support for spanking as a way to discipline children. Eighty percent of born-again Christians supported spanking, 15% more than among non-born-again Christians, of whom 65% supported it. Geographically, people in the South (about 80%) are about 17% more likely to support spanking than people from the Northeast (about 63%), 5% higher than for people from the Midwest (about 75%) and 10% higher than people in the West (about 70%). Republicans are more likely than Democrats or independents to support spanking. Age, however, did not matter much. Millennials are “slightly more supportive than their elders,” although the difference is not statistically significant.⁸⁷

Racial differences emerged, too. More than 80% of African Americans support spanking, versus 71% of Whites.⁸⁸ Within groups, differences appear by gender, too. Eighty-one percent of Black women reported agreement with spanking a child versus 62% of White women and 62% of Hispanic women.⁸⁹ Eighty percent of Black men agreed with spanking a child, compared to a slightly lower percentage of White men (76%) and Hispanic men (73%).

Still, spanking is associated with religious beliefs for good reason. Many who engage in corporal punishment invoke Bible verses to ground that choice, as the case described in the Introduction and Section III.D makes clear. Further, as Figure 13.1 shows, only the adherents of Judaism disagreed with spanking more often than they agreed, while self-identified Catholics, Protestants, and those in other faith traditions all supported spanking by margins of roughly two to one. True, 61% of those who claimed no religious affiliation also supported spanking, but the influence of faith was statistically significant.

⁸⁵ Scott Clement, *Millennials Like to Spank Their Kids Just as Much as Their Parents Did*, WASH. POST (Mar. 5, 2015), www.washingtonpost.com/news/wonk/wp/2015/03/05/millennials-like-to-spank-their-kids-just-as-much-as-their-parents-did/.

⁸⁶ *Id.* ⁸⁷ *Id.* ⁸⁸ *Id.*

⁸⁹ *Percentage of Adults Who Agree that it is Sometimes Necessary to Give a Child a “Good Hard Spanking,” by Race and Hispanic Origin, and Sex: 2014*, CHILD TRENDS, www.childtrends.org/wp-content/uploads/2012/10/51_fig2.jpg. Church groups that have engaged in corporal punishment have been prosecuted. See Trisha Renaud, *House of Prayer Case Becomes Forum on Corporal Punishment*, *Daily Report* (Fulton County GA) (Oct. 14, 2002) (describing prosecution of members of one small African American church for corporal punishment – which stemmed from the “church’s self-proclaimed battle to strengthen its families” – reigniting “a long-standing cultural debate about the discipline of children and corporal punishment”).

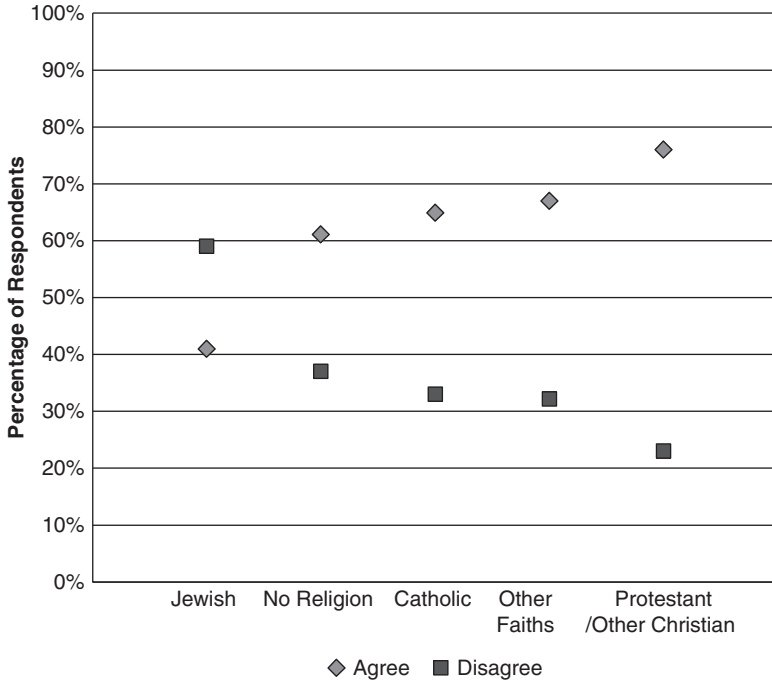


FIGURE 13.1 Agreement with Spanking by Religion

B Treating Children by Faith Alone Leads to Preventable Deaths

While corporal punishment may not have the health effects on the scale originally feared by Gelles and Straus, faith healing has been shown to be extremely dangerous and even deadly for children. Faith healing religions believe that the use of prayer and other spiritual means are all that are necessary when one is sick, as Offit poignantly chronicles (Chapter 12, this volume). Because religious fundamentalists who practice faith healing often live in insular communities, it is difficult to measure – other than by media accounts or anecdote – how often parents engage in faith healing or whether it results in *avoidable* harms.

A 1998 national study by Seth Asser and Rita Swan published in the peer-reviewed *Pediatrics* remains the leading study of the scale of preventable deaths.⁹⁰ (Rita Swan's heroic transformation from a mother who prayed over her child until his death from spinal bacterial meningitis to arguably the most

⁹⁰ Seth M. Asser & Rita Swan, *Child Fatalities From Religion-Motivated Medical Neglect*, 101 *PEDIATRICS* 625, 625–29 (1998).

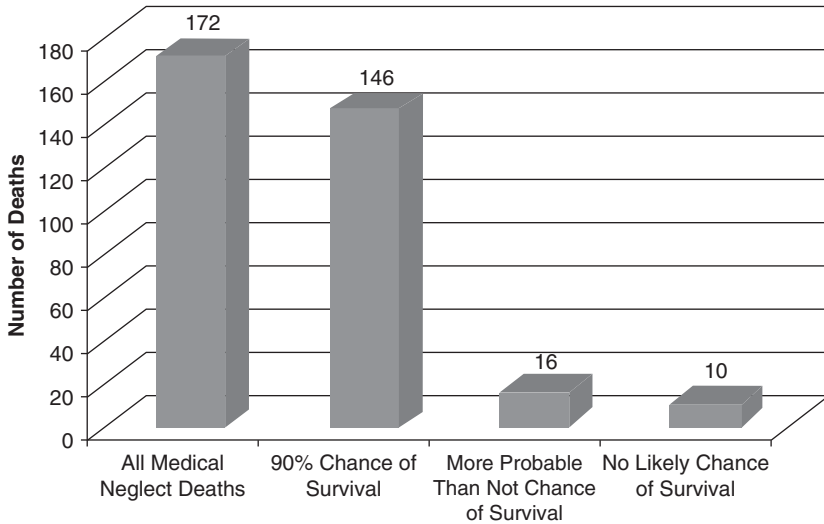


FIGURE 13.2 Deaths of Children in Faith Healing Homes

influential crusader against medical neglect exemptions in the U.S. is also chronicled by Offit.) Asser and Swan reviewed 172 child deaths in the U.S. from 1975 to 1995 in which faith healing parents denied their children medical care.⁹¹ As Figure 13.2 shows, of the 172 children who died, 146 had a 90% chance of survival if treated using modern medicine.

For sixteen children, the prognosis was not as clear: they likely would have survived if treated with modern medicine. But for 10 of the 172 children, or slightly more than 5%, the child would likely have died even if the parents had used modern medicine to treat their condition.

Whether a child's death is in fact preventable varies dramatically with the underlying condition. For children who have cancer, the prognosis often is not good, whatever means parents choose. But among those children who died of non-cancer-related illnesses, the results are especially sobering, as Figure 13.3 shows. Of the 172 children, 98 died from a condition other than cancer. Of those 98, medical care likely would have been futile only for 2 children, less than 2%. Ninety-two children had an excellent prognosis for survival, four others had a reasonable chance of survival.

This study did not capture later deaths from medical illnesses of seventy-eight children in Oregon or of twelve children in Idaho belonging to the Followers of Christ Church, a group profiled in Section IV. While information is not

⁹¹ *Id.*

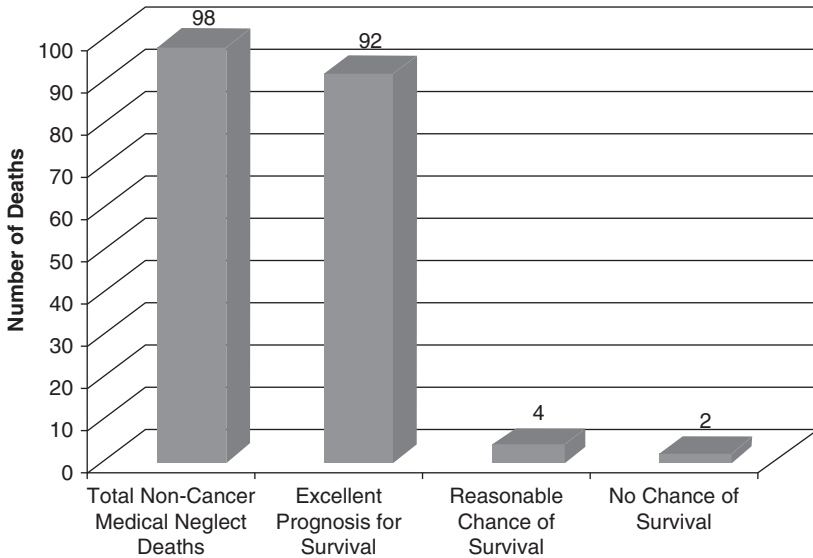


FIGURE 13.3 Deaths by Selected Characteristics

available on whether modern medicine could have saved the children who died in Idaho, it appears that twenty-one of the seventy-eight children in Oregon, or roughly 26%, “could have lived if they had received medical treatment.”⁹²

The distinction between preventable and unavoidable deaths matters to the state’s police power, as Section I shows. It is the ability to prevent a child’s death that vests the State with the power to override a parent’s religious conviction to avoid harm to a child. Yet we continue to see wholly preventable deaths.

Consider the case of Brandon Schaible. Two decades after a measles epidemic raged through fundamentalist religious communities in Philadelphia,⁹³ seven-month-old Brandon died in his home from treatable pneumonia.⁹⁴ Brandon’s parents, Herbert and Catherine, attended First-Century Gospel Church, a group that believes “prayer offered in faith will make the sick person well.”⁹⁵ His parents had refused to administer antibiotics

⁹² Richard A. Hughes, *The Death of Children by Faith-Based Medical Neglect*, 20 J. L. & REL. 247 (2004).

⁹³ Offit, Chapter 12, this volume.

⁹⁴ Dockerman, *supra* note 3; David Osborne, U.S. “Faith Healers” Sent to Prison for Death of Second Sick Child, INDEPENDENT (Feb. 20, 2014), www.independent.co.uk/news/world/americas/us-faith-healers-sent-to-prison-for-death-of-second-sick-child-9142463.html.

⁹⁵ James 5:14–15, *supra* note 3.

to save their young son. Pronounced dead on April 13, 2013, Brandon suffered for several days before succumbing.

Four years earlier, the Schaibles had lost another child to pneumonia after a treatment regimen of only prayer; they received probation, one term of which was to seek medical care for any child who became sick. This time, authorities charged the Schaibles with involuntary manslaughter and child endangerment. The parents pleaded no contest to third-degree murder. Sentencing the Schaibles to time behind bars, presiding Judge Benjamin Lerner told the couple, “You’ve killed two of your children . . . not God, not your church, not religious devotion – you.”

Next, this chapter shows that the choice the Schaibles made to “treat” by prayer alone is authorized by state laws across much of the country.⁹⁶ In most states, a respect for parental autonomy, for religion, and for cultural practices overwhelms the general requirement that parents must secure needed medical treatment for children and not abuse or neglect them. Section III discusses how faith healing and corporal punishment laws define the fault lines between parental freedom and child abuse and neglect in each state. States compensate for the latitude given to parents by naming all or some adults in the community as mandatory reporters of child abuse and by authorizing judges to consent to needed treatment.

III STATE LAWS GIVE WIDE SWATH TO RELIGIOUS AND CULTURAL PRACTICES

Faith healing and corporal punishment operate at the edge between parental freedom and child abuse and neglect. As the cases examined in Section I show, states have the power to safeguard children. Yet most states do not use that power; instead, they provide a buffer for many parental choices about how to raise children. While corporal punishment laws are generally not keyed to religious belief *per se*, they reflect a healthy respect for cultural and ethnic diversity. Statutory protections for faith healing, by contrast, are geared explicitly to religious belief, although philosophical objections to vaccination are also given credence.

A Religious and Cultural Underpinnings of the Law

The discretion given to faith healing is anchored to respect for religious belief by its very terms. As Offit (Chapter 12, this volume) shows, these laws have their

⁹⁶ See Section III *infra*.

genesis in protecting the actions of fundamentalist religious believers, reaching back to the influence of Christian Scientists in the Nixon Administration. Although some states credit a parent's philosophical objections to vaccination, generally when it comes to treatment of illness, the discretion accorded parents is expressly for religious objections.⁹⁷

Corporal punishment laws generally do not tie protections for parental choices as to discipline to the parent's religious beliefs *per se*. But some are anchored to religious liberty expressly. Indiana's law specifically references religious beliefs: "This chapter does not do any of the following: (1) Limit the right of a parent, guardian, or custodian of a child to use reasonable corporal punishment when disciplining the child. (2) Limit the lawful practice or teaching of religious beliefs."⁹⁸ However, the majority of state statutes draw boundaries around permitted corporal punishment without invoking religious belief.

All but two states include emotional factors in their definitions of child abuse.⁹⁹ Six states – Kentucky, Minnesota, Oregon, South Dakota, Tennessee, and Wyoming – consider the child's "culture" in cases of alleged emotional abuse.¹⁰⁰ Colorado takes into account the "culture" in which the child is enmeshed when investigating *any* form of child abuse: "In all cases, those investigating reports of child abuse shall take into account accepted child-rearing practices of the culture in which the child participates including, but not limited to, accepted work-related practices of agricultural communities."¹⁰¹

B The Degree of Discretion Accorded Parents

Every state by statute draws a line between permissible childrearing behavior and acts that constitute abuse of children. This section first identifies and locates critical provisions in the law of the fifty states on corporal punishment. It then extends Offit's analysis of medical neglect laws to examine mechanisms that states have instituted to safeguard children, notwithstanding exemptions for the religious or philosophical beliefs of parents.

⁹⁷ Offit, Chapter 12, Figure 12.1, this volume. ⁹⁸ IND. CODE ANN. § 31-34-1-15 (2016).

⁹⁹ U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau, *Definitions of Child Abuse and Neglect*, CHILD WELFARE INFORMATION GATEWAY 4 (April 2016), www.childwelfare.gov/pubPDFs/define.pdf.

¹⁰⁰ KY. REV. STAT. ANN. § 600.020 (West 2015); MINN. STAT. ANN. § 626.556 (2015); OR. REV. STAT. ANN. § 419B.005 (2015); S.D. CODIFIED LAWS § 26-8A-2 (2015); TENN. CODE ANN. § 37-1-602 (2015); WYO. STAT. ANN. § 14-3-202 (2015).

¹⁰¹ COLO. REV. STAT. ANN. § 19-1-103 (2014).

1 The Laws of Child Physical Abuse

As Figure 13.4 and the Appendix 1 show, states locate the outer boundary of permissible discipline in different places. Just six states follow the Straus and Gelles view: any willful act that causes harm, physical injury, or pain constitutes abuse of a child, period.¹⁰² In Massachusetts, for example, “abuse” encompasses “the willful infliction of injury, unreasonable confinement, intimidation, including verbal or mental abuse, or punishment with resulting *physical harm, pain* or mental anguish or assault and battery; provided, however, that verbal or mental abuse shall require a knowing and willful act directed at a specific person.”¹⁰³

By contrast, the overwhelming majority of states place a wide range of disciplinary behaviors outside the scope of prohibited child abuse. Thirty-three states and the District of Columbia allow the use of “reasonable” or “not excessive” force.¹⁰⁴ Colorado law expressly permits “A parent, guardian, or other person entrusted with the care and supervision of a minor [to] use *reasonable and appropriate physical force* upon the minor . . . when and to the extent it is *reasonably necessary* and appropriate to maintain discipline or promote the welfare of the minor.”¹⁰⁵ Note that the choice to discipline the child at all must be a reasonable one. In a variant on this formulation, the District of Columbia permits “[p]arents [to] use force as long as it is not excessive,” but treats “excessive corporal punishment” as child abuse.¹⁰⁶

In eight states, discipline slips over from permitted behavior to prohibited child abuse when it poses substantial risk of death or serious injury to a child.¹⁰⁷ Consider Kentucky, which treats as “justifiable” a parent’s “physical force . . . upon another person” in her care when she “believes that the force used is necessary to promote the welfare of a minor” and “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*.”¹⁰⁸

¹⁰² See Appendix 1 (listing Delaware, Florida, Iowa, Massachusetts, North Carolina, and Vermont).

¹⁰³ MASS. GEN. LAWS CH. 111, § 72F (2016).

¹⁰⁴ See Appendix 1 (listing Alabama, Arizona, Arkansas, California, Colorado, Connecticut, District of Columbia, Georgia, Idaho, Indiana, Kansas, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming).

¹⁰⁵ COLO. REV. STAT. 18-1-703 (2014) (emphasis added).

¹⁰⁶ D.C. CODE § 16-2351 (2015).

¹⁰⁷ See Appendix 1 (listing Hawaii, Illinois, Kentucky, Michigan, North Dakota, Pennsylvania, and South Carolina).

¹⁰⁸ KY. REV. STAT. § 503.110 (West 2015) (emphasis added).

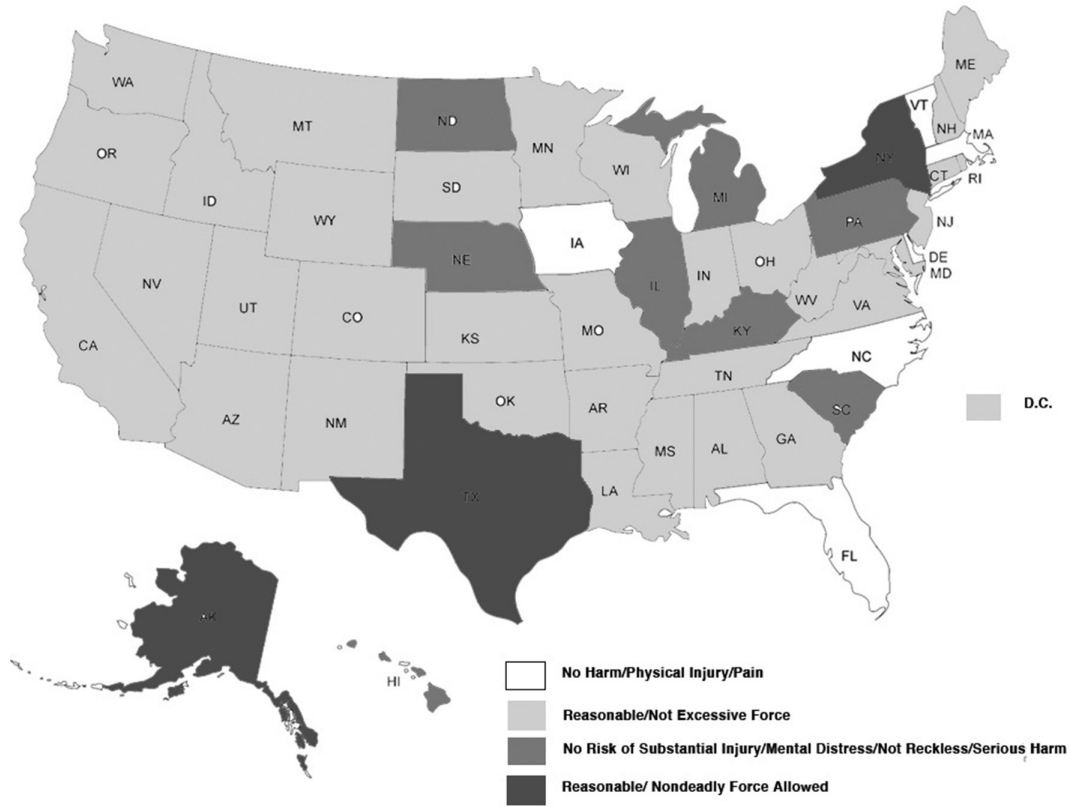


FIGURE 13.4 State Standards for Reasonable Discipline

Three states prohibit the use only of deadly force.¹⁰⁹ For example, New York expressly permits “[a] parent, guardian or other person entrusted with the care and supervision of a person under the age of twenty-one [to] 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.”¹¹⁰ As before, the parent disciplining the child must still be reasonable in the choice.

Altogether, forty-four states and the District of Columbia permit corporal punishment by parents. Some specifically contemplate the need to “safeguard” a child’s welfare by preventing or punishing the child’s misconduct.¹¹¹ Many, including Missouri, draw a sharp line between “spanking” and other acts: “Discipline including *spanking*, administered in a *reasonable* manner, shall not be construed to be abuse.”¹¹²

Sometimes faith-driven concessions carry over to the religious education children receive in preschool or primary and secondary schools. Four states expressly carve out religiously affiliated day care centers, exempting them from laws banning corporal punishment.¹¹³ Sixteen states waive certain health and safety standards required of non-religiously affiliated day care programs.¹¹⁴

2 The Laws of Medical Neglect

As Offit shows (Chapter 12, this volume), states make one set of rules about vaccination and another set of rules about needed medical treatment. As to the former, all but three states retain religious exemptions for childhood vaccination and school immunizations when the parent has a religious objection. Some give the same treatment to a parent’s philosophical objection.

As to the duty to secure needed medical treatment for a child, the country remains a checkerboard. Eight states give parents a religious defense to negligent homicide, manslaughter, and capital murder when a child dies as a result of faith healing.¹¹⁵ Seventeen states have religious exemptions for

¹⁰⁹ See Appendix 1 (listing Alaska, New York, and Texas).

¹¹⁰ N.Y. PENAL LAW § 35.10 (McKinney 2016).

¹¹¹ NEB. REV. STAT. § 28-1413 (emphasis added).

¹¹² MO. REV. STAT. § 210.110 (2015) (emphasis added).

¹¹³ Amanda Marcotte, *Religious Exemptions Kill: Church Day Care Deaths and Injuries Show the Dangers of Expanding the Privileges into Law*, SALON (Apr. 16, 2016), www.salon.com/2016/04/16/religious_exemptions_kill_church_day_care_deaths_and_injuries_show_the_dangers_of_expanding_the_privileges_into_law/.

¹¹⁴ *Id.*

¹¹⁵ See Offit, Chapter 12, this volume. See also Kirtlan G. Naylor, *Child Deaths in Idaho 2013: A Report of Finding by the Idaho Child Fatality Review Team*, IDAHO CHILD FATALITY

parents to child endangerment or neglect charges, acts that would otherwise be a felony.¹¹⁶ Sixteen states make no religious allowances.

These laws provide immunity to parents from child neglect and child abuse laws.¹¹⁷ The exemptions also may undermine a state's legitimate interest in the well-being of its most vulnerable citizens. The weighing of competing interests here would seem easy in one sense. On one side the child has the most significant of fundamental rights at stake, her life.¹¹⁸ On the other are parents' interests in parenting, in privacy and autonomy from the state, and in transmitting and norming their child's values. Whether the child's right is seen as fundamental or whether the parents' rights have constitutional import as religious values or through the parent-child relationship may not matter much in the end – the state will surely have a compelling government interest in safeguarding a child's life when parents will not. The next subsection probes whether there are less restrictive ways to protect children.¹¹⁹

C Mechanisms to Protect Children

States use two important devices to mute the risk to children: mandatory duties to report and judicial authorization of needed treatment.

1 The State's Eyes and Ears

All fifty states and the District of Columbia statutorily require certain persons and institutions to report suspected child abuse or neglect.¹²⁰ As Figure 13.5 shows, mandatory reporters typically include people who have frequent contact with children: doctors, teachers, and clergy. One can think of mandatory

REVIEW TEAM (May 2016), <http://idcartf.org/ckfinder/userfiles/files/annual%20report%20child%20deaths%202013-may2016.pdf>.

¹¹⁶ Offit, Chapter 12, this volume; *Religious Defenses In State Penal Codes*, CHILDREN'S HEALTHCARE IS A LEGAL DUTY, INC., <http://childrenshealthcare.org/wp-content/uploads/2014/07/State-exemptions-criminal2.pdf>. It is not atypical for parents facing prosecution for child abuse to plead to a lesser charge. *Accord* *Dinkler v. State*, 699 SE 2d 541 (Ga. App. 2010) (concluding that although trial court should have instructed jury about the lesser-included charge of battery in a child abuse prosecution, “[i]n light of the overwhelming evidence of the commission of the greater offense . . . the failure to give the battery charge was harmless error”).

¹¹⁷ See Jerry A. Coyne, *Faith Healing Kills Children*, SLATE (May 21, 2015), www.slate.com/articles/health_and_science/medical_examiner/2015/05/religious_exemptions_from_medical_care_faith_healing_kills_children.html.

¹¹⁸ *Id.* ¹¹⁹ See PART I of this volume.

¹²⁰ *Mandatory Reporters of Child Abuse and Neglect*, CHILDREN'S BUREAU (2016), [www.childwelfare.gov/pubPDFs/manda.pdf#page=2&view=Reporting by other persons](http://www.childwelfare.gov/pubPDFs/manda.pdf#page=2&view=Reporting%20by%20other%20persons).

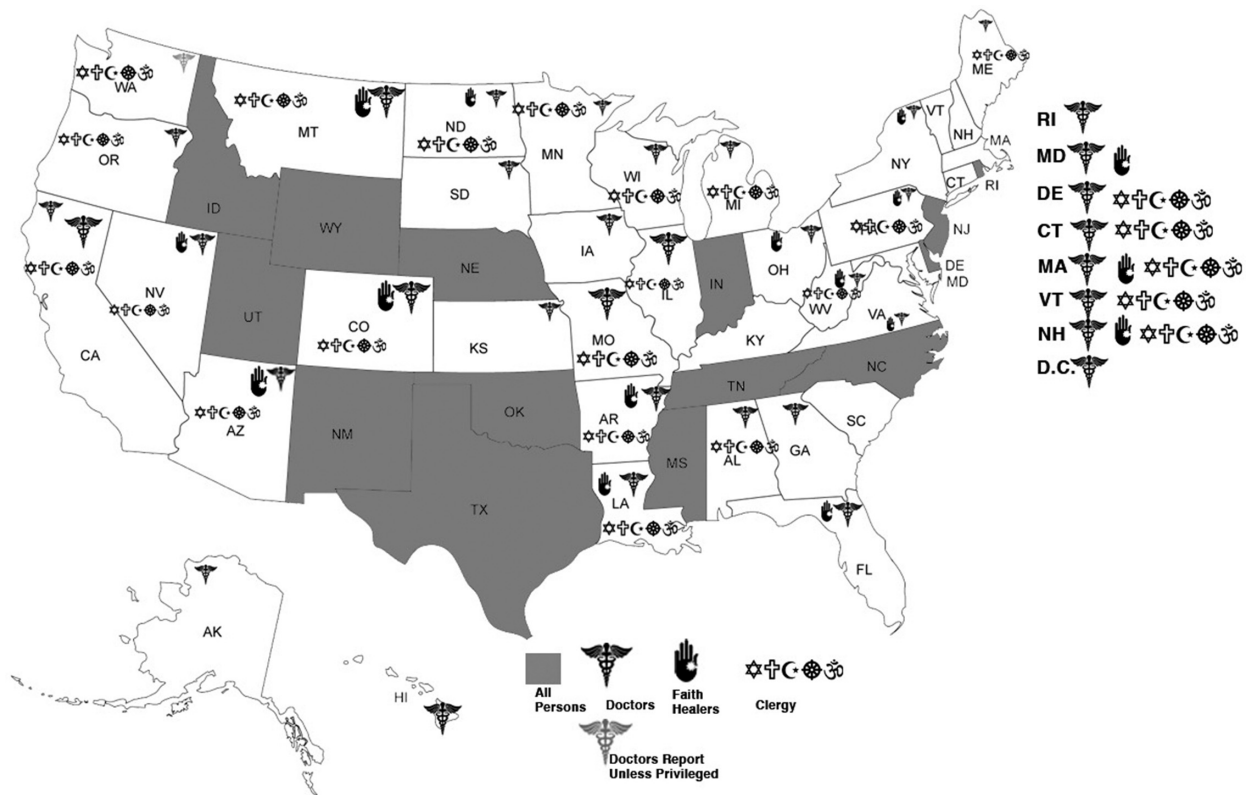


FIGURE 13.5 State Reporting Requirements

Source: Adapted from *Mandatory Reporters*, *supra* note 120.

reporters as the first line of defense for children neglected or abused by parents or others.

Several states, including Tennessee, specifically require Christian Science practitioners and faith healers to report suspected neglect, in addition to clergy.¹²¹ Other states, including Idaho, impose reporting requirements on anyone who has reason to believe a child has been abused.¹²² Some states extend duties to the clergy, although a subset of states treat information gained through confession differently, requiring no report.¹²³

Although a powerful safeguard for most children, children in insular communities are effectively shut off from the state's eyes and ears. These communities are secluded, often homeschool their children, and may never be exposed to professionals with reporting duties, other than perhaps clergy and faith healers themselves.¹²⁴ Just consider whether church leaders and faith healers are likely to report a practice that they are urging parents to follow. Section IV discusses how difficult it is to change behavior within tight-knit communities.

2 Overriding Parental Wishes Through Judicial Authorization of Treatment

The judicial bypass is a mechanism that allows a state to intervene to authorize needed care for a child in need. One can think of it as the state defining *ex ante* when it has a compelling interest to override parental wishes and when it does not. Sixteen states authorize the court to order needed medical treatment for the child when the parents will not.¹²⁵

A judicial bypass works in tandem with the background law around treatment duties. As Figure 13.6 shows, sixteen states give no religious exemptions

¹²¹ *Id.*; TENN. CODE ANN. §§ 37-1-403; 37-1-605 (2015).

¹²² IDAHO CODE § 16-1605 (2016) (“[A]ny person who has reason to believe that a child has been abuse, abandoned, or neglected is required to report.”).

¹²³ New Hampshire, North Carolina, Oklahoma, Rhode Island, Texas, and West Virginia do not recognize the clergy-penitent privilege as grounds for failure to report child abuse. *Mandatory Reporters*, *supra* note 120.

¹²⁴ Dwyer, Chapter 8, this volume.

¹²⁵ ALA. CODE § 26-14-7.2 (2016); COLO. REV. STAT. § 19-3-103 (1993); FLA. ANN. STAT. § 39.01 (2016); IDAHO CODE ANN. § 16-1602 (2016); IND. CODE ANN. § 31-34-1-14 (1997); IOWA CODE ANN. § 232.68 (2016); KAN. STAT. ANN. § 38-2202 (2016); KY. REV. STAT. ANN. § 600.020 (2016); LA. CHILD. CODE ART. 603 (2015); MICH. COMP. LAWS ANN. § 722.634 (1975); MO. ANN. STAT. § 210.115 (2016); MONT. CODE ANN. § 41-3-102 (2013); NEV. REV. STAT. ANN. § 432B.020(2) (2004); OHIO REV. STAT. ANN. § 2151.03(B) (2006); OKLA. STAT. ANN. TIT. 10A § 1-1-105 (2016); 23 PA STAT AND CONST. STAT. ANN. § 6304 (2015); *see generally* U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau, *Definitions of Child Abuse and Neglect*, CHILD WELFARE INFORMATION GATEWAY 4 (Apr. 2016), www.childwelfare.gov/pubPDFs/define.pdf.

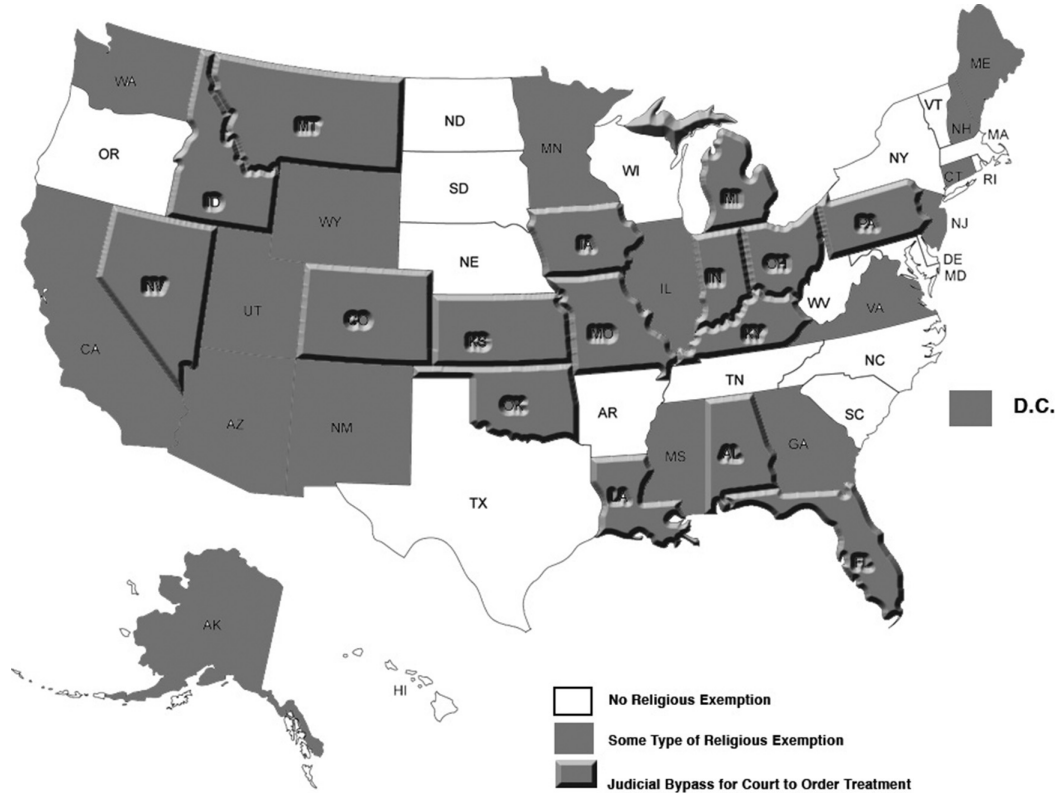


FIGURE 13.6 State Faith-Healing Exemptions

Source: Adapted from U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau, Definitions of Child Abuse and Neglect, *Child Welfare Information Gateway 4* (Apr. 2016), www.childwelfare.gov/pubPDFs/define.pdf.

to duties to treat children in need of medical attention, so a bypass mechanism would not be needed.¹²⁶ The remaining thirty-four states and the District of Columbia give some type of religious exemption.¹²⁷ Of these, states are nearly split on authorizing a judge to order needed care for the child over the parent's objection – sixteen states do; seventeen states do not.¹²⁸ In the latter states, the parent's refusal becomes the last word, potentially ending the child's life.

Importantly, a judicial bypass can keep children alive while honoring a parent's religious belief not to accept modern medicine. When children suffer from a treatable disease, having a judge authorize needed treatment can save a child's life.

Consider Alexandru Radita, a fifteen-year-old Canadian boy who died from untreated diabetes and starvation.¹²⁹ Found wearing a diaper in a closet, Alexandru, then just thirty-seven pounds, was so emaciated that he appeared mummified.¹³⁰ Alexandru's mother and father claimed as a defense to murder charges that it was against their religious beliefs to seek medical treatment from doctors; they were commanded to use prayer to heal. Alexandru's parents knew he, one of eight children, was diabetic and that medical attention would help him. After his parents failed to treat his diabetes at age five, Alexandru was hospitalized, removed from their care, and placed into foster care. Tragically

¹²⁶ See Figure 13.6 (listing Arkansas, Delaware, Hawaii, Maryland, Massachusetts, Nebraska, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, West Virginia, Wisconsin, and Vermont); Offit, Chapter 12, this volume.

¹²⁷ See Figure 13.6 (listing Alabama, Alaska, Arizona, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Ohio, Oklahoma, Pennsylvania, Utah, Virginia, Washington, and Wyoming); Offit, Chapter 12, this volume.

¹²⁸ See Figure 13.6 (showing judicial bypass in Alabama, Colorado, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Missouri, Montana, Nevada, Ohio, Oklahoma, and Pennsylvania; and no bypass in Alaska, Arizona, Colorado, Connecticut, District of Columbia, Georgia, Illinois, Maine, Minnesota, Mississippi, New Hampshire, New Jersey, New Mexico, Utah, Virginia, Washington, and Wyoming); see also Offit, Chapter 12, this volume; Alexandra Sandstrom, *Most States Allow Religious Exemptions from Child Abuse and Neglect Laws*, PEW RES. CTR. (Aug. 12, 2016). www.pewresearch.org/fact-tank/2016/08/12/most-states-allow-religious-exemptions-from-child-abuse-and-neglect-laws/.

¹²⁹ See Bill Graveland, *Alexandru Radita Trial Verdict: Parents Found Guilty Of Killing Diabetic Son*, HUFFINGTON POST (Feb. 24, 2017), www.huffingtonpost.ca/2017/02/24/alexandru-radita-trial-verdict_n_14993442.html.

¹³⁰ Bill Graveland, *"They Knew He Was Dying" Parents Guilty of 1st-Degree Murder in Son's Death*, OTTAWA CITIZEN (Feb. 24, 2017), www.ottawacitizen.com/health/verdict+expected+calgary+murder+trial+parents+diabetic+sons/12981497/story.html.

for Alexandru, he was later reunited with his parents, as are many children who are removed from their families.

Alexandru's death reveals gaping holes in society's safeguards for protecting children. When his family moved from one province to another, Alexandru slipped from state oversight. This means that if the Canadian province where he died had permitted judicial bypass, there was no opportunity for a judge to intervene because the state had lost track of Alexandru. It was in no position to keep him alive.

So, too, with Brandon Schaible, whose preventable death was described in the Introduction to this chapter. Brandon died of treatable pneumonia when his parents refused to administer antibiotics to the seven-month-old.¹³¹ Brandon's parents were enmeshed in a community that would have had a mandatory reporter, such as a teacher, healthcare worker, or pastor, among others designated as mandatory reporters under Pennsylvania law.¹³² If state officials had been made aware of Brandon's medical situation, the state's judicial bypass provision would have allowed a judge to authorize care when Brandon's parents would not.¹³³ But no one knew of Brandon's distress until it was too late.

In Brandon's case, the Commonwealth had good reason to take proactive steps to ensure his welfare. One of Brandon's siblings had died under similar circumstances years before; the attorneys involved had asked the court to mandate supervision by a Department of Human Services caseworker, but that request was denied in favor of supervision by a probation officer.¹³⁴ That substitution meant that caseworkers versed in neglect and abuse would not be periodically monitoring the Schaibles, watching if Brandon needed help.

Now, when the probability of the child's survival is low and a family chooses prayer or spiritual means, judicial authorization of medical treatment would needlessly tread on religious beliefs. This places a premium on good predictive judgments by doctors and, by extension judges, about whether treatment can, in fact, benefit a child. When it would not, courts, and the state, should continue to allow the family to care for their child by faith alone.

¹³¹ Dockterman, *supra* note 3; Osborne, *supra* note 94.

¹³² *Mandatory Reporters*, *supra* note 120.

¹³³ U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau, *Definitions of Child Abuse and Neglect*, CHILD WELFARE INFORMATION GATEWAY 4 (Apr. 2016), www.childwelfare.gov/pubPDFs/define.pdf.

¹³⁴ Maryclaire Dale, *Philadelphia Parents Herbert, Catherine Schaible Sentenced in Son's "Prayer Death,"* WPVI-TV (Feb. 19, 2014), <http://6abc.com/archive/9437462/>.

D Cultural and Religious Influences on Parenting

Two recent cases illustrate how parental discipline straddles religious, ethnic, and cultural lines, and how parents' views are deeply engrained as a result of the parents' own upbringing. As Section II showed, corporal punishment is not confined to religious fundamentalists but is a multiethnic and multicultural practice, too. That overlap complicates whether and how the state should regulate the parent-child relationship. Quite simply, unless these practices harm children, regulating them may be tantamount to stamping out practices core to a community's identity, much as Rassbach (Chapter 7, this volume) explains as to male circumcision practices.

Consider Khin Par Thaing, the political asylum refugee from Myanmar living in Indiana described in the Introduction, who was charged in 2016 with child abuse after striking her seven-year-old son on his back with a coat hanger as punishment for fighting with his sister.¹³⁵ A teacher spotted welts and bruises on the boy's back and reported Thaing. An examination revealed thirty-six bruises or marks across his back, thighs, and left arm. According to court documents, Thaing hit her son with the coat hanger before telling him to kneel and pray for God's mercy. Indiana authorities charged her with felony battery. Thaing cited both her religious beliefs about childrearing and Myanmar cultural norms, invoking a cultural defense as well as a legal defense using Indiana's state RFRA.

In Myanmar, it is quite common for parents to use a rod to correct children's behavior.¹³⁶ For Thaing, a parent who "spares the rod, spoils the child," that is, a parent should not "withhold discipline from a child; if you strike him with a rod, he will not die. If you strike him with the rod, you will save his soul from Sheol," the "subterranean place of the dead."¹³⁷ Thaing ultimately pleaded guilty to battery and was sentenced to a year of probation.¹³⁸

Thaing is far from the only parent to face criminal charges for using physical punishment with children. National Football League ("NFL") player Adrian

¹³⁵ See Vic Ryckaert, *Son Had 36 Bruises. Mom Quoted the Bible as Defenses*, INDY STAR (Aug. 31, 2016), www.citationmachine.net/bibliographies/194258414?new=true.

¹³⁶ *Woman Uses Indiana Religious Objections Law in Defense Against Child Abuse Charges*, CHICAGO TRIBUNE (Aug. 31, 2016), www.chicagotribune.com/news/local/breaking/ct-woman-uses-indiana-religious-objections-law-in-defense-against-child-abuse-charges-20160831-story.html.

¹³⁷ Mark Taylor, *Executed God: The Way of the Cross in Lockdown America*, 1 RUTGERS J. L. & RELIG. 1 (1999) (giving Hebrew meaning for *Sheol*).

¹³⁸ Kristine Guerra, *Ind. Woman Who Used "Religious Freedom" Law as Defense for Beating Son Gets Probation*, CHICAGO TRIBUNE (Oct. 30, 2016), www.chicagotribune.com/suburbs/post-tribune/news/ct-religious-freedom-law-beating-defense-20161030-story.html.

Peterson made national headlines in 2014 for disciplining his four-year-old son with a tree branch or “switch” after the boy pushed his sibling off a scooter at Peterson’s Texas home.¹³⁹ That switch somehow wrapped around the boy’s genitals unbeknownst to Peterson.¹⁴⁰ The discipline left lacerations on the child’s legs, arms, and head.¹⁴¹ While Texas allows parents to use reasonable force when physically disciplining their child, Texas prosecutors thought Peterson’s decision to “whoop” the child with a small branch was excessive.¹⁴² Peterson was indicted by a grand jury for “recklessly or by criminal negligence caus[ing] bodily injury”; he maintained his innocence and no intentional wrongdoing.¹⁴³

Both Thaing’s and Peterson’s cases demonstrate the range of norms with regard to the types of allowable physical punishment for children. Peterson admitted to hitting his son with a branch but disputed it was excessive force.¹⁴⁴ He claimed a kind of cultural defense based on geography: using a switch to discipline his son is what “he experienced as a child growing up in East Texas.”¹⁴⁵ Disciplining his son would help the boy, he believed: “I could have been one of those kids that was lost in the streets without the discipline instilled in me by my parents and other relatives. . . . My goal is always to teach my son right from wrong and that’s what I tried to do that day.”¹⁴⁶ Peterson also emphasized the pain he felt as a father and said he will “reevaluate how I discipline my son going forward.”¹⁴⁷

Peterson’s case also demonstrates how good-faith explanations of why a parent would use physical punishment can be complicated by institutional interests. While the criminal case was pending, the NFL suspended Peterson from playing for the Minnesota Vikings.¹⁴⁸ Although the suspension came

¹³⁹ Elliott C. McLaughlin & Steve Almasy, *Adrian Peterson: Not a Child Abuser, But Sorry About “Hurt I Have Brought” to Son*, CNN (Sep. 17, 2014), www.cnn.com/2014/09/15/us/adrian-peterson-child-abuse-charges/.

¹⁴⁰ *Id.* ¹⁴¹ *Id.* ¹⁴² See Appendix 1; McLaughlin & Almasy, *supra* note 139.

¹⁴³ McLaughlin & Almasy, *supra* note 139; Tom Pelissero, *Adrian Peterson: “I Won’t Ever Use a Switch Again,”* USA TODAY SPORTS (Nov. 20, 2014), www.usatoday.com/story/sports/nfl/vikings/2014/11/20/adrian-peterson-roger-goodell-child-abuse-switch-minnesota-vikings/70025476/.

¹⁴⁴ McLaughlin & Almasy, *supra* note 139. ¹⁴⁵ *Id.*

¹⁴⁶ Jeff Gray, *Peterson Apologizes, Says He’s Not a Child Abuser*, SBNATION.COM (Sep. 15, 2014), www.sbnation.com/nfl/2014/9/15/6153477/adrian-peterson-statement-child-abuse-arrest.

¹⁴⁷ *Id.* (quoting Peterson as saying, “I am someone that disciplined his child and did not intend to cause him any injury . . . No one can understand the hurt that I feel for my son and for the harm I caused him.”).

¹⁴⁸ Bernie Augustine, *Adrian Peterson: Child Abuse Suspension Was Unfair*, N.Y. DAILY NEWS (Sept. 8, 2016), www.nydailynews.com/sports/football/adrian-peterson-child-abuse-suspension-unfair-article-1.2783232.

with pay, Peterson missed almost the entire 2014 season; he was reinstated in April 2015.¹⁴⁹ Ultimately, as part of a plea deal, Peterson pleaded no contest to a lesser misdemeanor of reckless assault, resolving his felony child abuse case.¹⁵⁰ Under the deal, Peterson avoided jail time, paid a \$4,000 fine and court costs, and completed eighty hours of community service.

Peterson's treatment may seem extraordinary, reflecting the hot spotlight of national media attention and fame. Examined against one state's – Idaho's – regulation of the parent-child relationship, Peterson's sanction for his treatment of his son pales in comparison.

This chapter next examines how, in Idaho, parental religious exemptions to child abuse, medical neglect, involuntary manslaughter, and lesser crimes operate to confer on parents in Idaho effective immunity from civil sanction when they act "by faith alone." Idaho's overlapping statutory scheme has proven hard to reform, even as children continue to die. This is so, in part, because Idaho lawmakers are unsure whether attempts to constrain parental choices would backfire, pushing faith healers, and the children the state wants to protect, further from the law.

IV A COMPLEX INTERPLAY OF STATE LAWS SHIELD PARENTAL DECISIONS: IDAHO AS A CASE STUDY

Despite the state's clear police power to protect children when their parents will not, real-world considerations hamstringing the state's protective role – not least of which is a workable strategy for influencing insular communities. Here, Idaho provides an important case study.

A The Shield Frustrating Child Protection

Idaho has erected a shield around parental decisions. Like the majority of the country, Idaho allows not only religious opposition but also philosophical opposition to vaccinating one's child.¹⁵¹ As Offit shows (Chapter 12, this volume), this means that common ailments including measles can rage through faith communities where every child is unprotected.

More troubling, Idaho shields parents from prosecution when a child dies from curable or preventable diseases. In fact, Idaho arguably provides greater

¹⁴⁹ *Id.*

¹⁵⁰ Eric Prisbell & Brent Schrotenboer, *Adrian Peterson Avoids Jail Time in Child Abuse Case*, USA TODAY (Nov. 4, 2014), www.usatoday.com/story/sports/nfl/vikings/2014/11/04/adrian-peterson-minnesota-vikings-child-abuse-plea-deal-misdemeanor/18466197/.

¹⁵¹ IDAHO CODE § 39-4802 (2016).

insulation for treating children “by faith alone” than any state in the country. Idaho exempts faith healing from its ordinary child abuse and neglect structure, as many states do.¹⁵² By a circuitous route, that decision erects a legal defense if a child dies as a result of faith healing.

Idaho generally imposes a duty on parents to protect the health and safety of children:

At all times the health and safety of the child shall be the primary concern. Each child coming within the purview of this chapter shall receive, preferably in his own home, the care, guidance, and control that will promote his welfare and the best interest of the state of Idaho.¹⁵³

Idaho bans both medical neglect and the infliction of pain or mental suffering.¹⁵⁴ A person charged with the care of a child who “willfully causes or permits any child to suffer, or . . . permits the . . . health of such child to be injured, or willfully . . . permits such child to be . . . endangered, is punishable by imprisonment” for “not less than one year nor more than ten years.”¹⁵⁵

However, Idaho exempts from the definition of abuse “treatment by prayers through spiritual means in lieu of medical treatment”¹⁵⁶ or “treatment by prayer or spiritual means alone.”¹⁵⁷ To avail oneself of the exemption, one must be a member of a “bona fide religious denomination that relies exclusively on this form of treatment.”¹⁵⁸ When abuse or neglect results in a child’s death, this would ordinarily be involuntary manslaughter,¹⁵⁹ that is, “the unlawful killing of a human being . . . in the perpetration of or attempt to perpetrate any unlawful act.”¹⁶⁰ The state has the burden of proof to show that an unlawful act occurred.

By its very terms, faith healing is not an unlawful act in Idaho. This means that if a death results because parents chose to treat by faith alone, rather than using modern medical interventions, the parents cannot be convicted of involuntary manslaughter and many other crimes, even if a child’s ailment was curable or her death preventable. Because the needed unlawful act is lacking, parents who engage in faith healing are effectively immune from prosecution.

¹⁵² IDAHO CODE § 18–1501(4) (2016); Figure 13.6 *supra*.

¹⁵³ IDAHO CODE § 16–1601 (2016). Idaho’s goal is not to remove children from the home but rather to provide children services in their own home, ensuring child welfare without infringing on the parent-child relationship.

¹⁵⁴ IDAHO CODE § 16–1602(31) (2016). ¹⁵⁵ IDAHO CODE § 18–1501 (1) (2016).

¹⁵⁶ IDAHO CODE § 16–1602(31) (2016). ¹⁵⁷ IDAHO CODE § 18–1501(4) (2016).

¹⁵⁸ IDAHO CODE § 16–1627(3) (2016). ¹⁵⁹ IDAHO CODE § 18–4006 (2016). ¹⁶⁰ *Id.*

Perhaps as devastating for child protection, the state's judicial bypass mechanism must take into consideration parental religious beliefs.¹⁶¹ State law directs "[t]he court [to] take into consideration any treatment being given the child by prayer through spiritual means alone, if the child or his parent, guardian or legal custodian are adherents of a bona fide religious denomination that relies exclusively on it."¹⁶²

Together, Idaho's statutes conspire to undermine the state's legitimate interest in the well-being of its most vulnerable citizens. Remarkably, Idaho's statutes insulating faith healing have not faced a state or federal court challenge in more than three decades.¹⁶³

Today, this is a very real issue in Idaho, one of the nation's most rural states. Idaho has effectively become a haven for faith healing communities, including the Followers of Christ Church, a faith healing "nondenominational congregation with roots in the 19th-century Pentecostal movement."¹⁶⁴ The effects of Idaho law are easily seen today in Canyon County, Idaho, home to the Followers of Christ.¹⁶⁵ Canyon County's Sheriff Kieran Donahue estimates there have been three deaths in the four months spanning from December 2016 to March 2017.¹⁶⁶ In one cemetery alone, more than 200 of the 592 graves contain minor children.¹⁶⁷

¹⁶¹ IDAHO CODE § 16-1627 (2016) ("(1) At any time whether or not a child is under the authority of the court, the court may authorize medical or surgical care for a child when: . . . A physician informs the court orally or in writing that in his professional opinion, the life of the child would be greatly endangered without certain treatment and the parent, guardian or other custodian refuses or fails to consent . . . In making its order under subsection (1) of this section, the court shall take into consideration any treatment being given the child by prayer through spiritual means alone, if the child or his parent, guardian or legal custodian are adherents of a bona fide religious denomination that relies exclusively on this form of treatment in lieu of medical treatment.")

¹⁶² IDAHO CODE § 16-1627(3) (2016).

¹⁶³ Robert Ehlert, "Unshackled" Former Idaho Supreme Court Justice Jim Jones Undaunted by His Cancer Diagnosis, IDAHO STATESMAN (Feb. 24, 2017), www.idahostatesman.com/opinion/opn-columns-blogs/robert-ehlert/article134782399.html.

¹⁶⁴ Jessica Bruder & Dana Tims, *Parents Plead Not Guilty in Deaths*, WASH. POST (Apr. 5, 2008), www.washingtonpost.com/wp-dyn/content/article/2008/04/04/AR2008040403314.html.

¹⁶⁵ Dan Tilkin, *Oregon Woman Fights Idaho Faith Healing Laws*, KOIN 6 (Jan. 21, 2016), <http://koin.com/2016/01/21/oregon-woman-fights-idaho-faith-healing-laws/>.

¹⁶⁶ Karen Lehr, *Canyon County Sheriff Urging Lawmakers to Make Change to Faith Healing Laws in Idaho*, KIVI 6 (Feb. 3, 2017), www.kivitv.com/news/canyon-county-sheriff-urging-lawmakers-to-make-change-to-faith-healing-laws-in-idaho.

¹⁶⁷ *Religious Defenses In State Penal Codes*, CHILDREN'S HEALTHCARE IS A LEGAL DUTY, INC., <http://childrenshealthcare.org/wp-content/uploads/2014/07/State-exemptions-criminal2.pdf>.

As Section II showed, not all deaths from childhood illness are preventable. But something seems terribly amiss in Idaho. A task force established by the Governor of Idaho to examine faith healing deaths tallied child graves in the Followers of Christ's cemetery in Canyon County. By its estimate, between 2002 and 2011, the number of child deaths in that community was ten times the rate of child deaths in the rest of Idaho.¹⁶⁸

A granular review shows many deaths were, in fact, preventable. The Idaho Child Fatality Review Team reported in 2013 that "five deaths of infants less than a month old were preventable had they received medical treatment."¹⁶⁹ Three years later, a task force reported two more child deaths occurred "under circumstances where medical care would have prevented death."¹⁷⁰

Accounts from individuals who have since left the Followers of Christ reinforce this view. Linda Martin, a former Follower of Christ who has family still active in the church, grew up in Idaho.¹⁷¹ Throughout Martin's life, many of the children in her family died from treatable illnesses and diseases, ranging from untreated diabetes to bronchial pneumonia; the "prayer and anointing with oil" she now "believe[s] is medical neglect."¹⁷²

Because of the shield of immunity around faith healing, prosecutors simply do not file charges after a child dies. At least one coroner will not do autopsies on deceased children because the law requires autopsies only when a crime is suspected.¹⁷³ Like the affirmative steps to deceive authorities during Philadelphia's measles outbreak chronicled by Offit, Donahue says that in Canyon County evidence sometimes has been altered by the time law enforcement arrives.¹⁷⁴ For example, a child's clothing may be changed or the child's body swaddled in a blanket or some other type of fabric.¹⁷⁵ Donahue became a major proponent of change after he realized the difficulty of investigating child deaths in the Followers of Christ community.¹⁷⁶

¹⁶⁸ Lehr, *supra* note 166. ¹⁶⁹ *Id.* ¹⁷⁰ *Id.*

¹⁷¹ Betsy Russell, *Former Church Member: "The Way These Kids Die is Inhumane,"* SPOKESMAN REVIEW (Aug. 4, 2016), www.spokesman.com/blogs/boise/2016/aug/04/former-church-member-way-these-kids-die-inhumane/. See also Linda Martin, *Idaho Faith Healing Testimony*, IDAHO LEGISLATIVE INTERIM COMMITTEE MEETING, YOUTUBE (Aug. 4, 2016), www.youtube.com/watch?v=PqN9GyTzb8o.

¹⁷² Russell, *supra* note 172.

¹⁷³ *A Repeal Bill*, IDAHO CHILDREN, idahochildren.org/a-bill-to-repeal/.

¹⁷⁴ Lehr, *supra* note 166.

¹⁷⁵ *Id.* See also Nigel Duara, *An Idaho Sheriff's Daunting Battle to Investigate When Children of a Faith-Healing Sect Die*, L.A. TIMES (Apr. 18, 2017), www.latimes.com/nation/la-na-idaho-children-20170418-story.html.

¹⁷⁶ *Id.*

Exemptions can have a far-reaching impact on the steps taken by state actors charged with protecting children. Child caseworkers and other officials often believe they cannot intervene to protect a child even when they suspect physical or psychological illness. As Asser and Swan reported in their seminal study of child deaths across the U.S., “[b]elieving they were powerless in the face of the parents’ wishes, some teachers ignored obvious symptoms and sent lessons home to bedridden children. Some social workers and law enforcement officers allowed parents to decline examinations of children reported to be ill.”¹⁷⁷ Although *Prince* limits itself to its facts,¹⁷⁸ there can be no doubt that Idaho’s cascading religious accommodations frustrate the overall goal of protecting children.

B Better Protecting Idaho’s Children

Tolerance is a hard value to credit when children are dying in droves. Yet reforming Idaho law to be more protective has proven challenging. To prevent child deaths “whenever possible,” Donahue urged Idaho lawmakers to repeal the “by faith alone” exemption from abuse and neglect, collapsing the shield around faith healing.¹⁷⁹ Canyon County’s Coroner Vicki DeGues-Morris urged caution, however. A repeal, she believes, will not lead to a “change of lifestyle.” Quite the contrary, the Followers of Christ and other fundamentalist groups could “go underground,” masking even more child deaths.¹⁸⁰ The rugged remoteness of the Idaho’s landscape and the privacy such an environment affords lend credence to this concern. If communities close in on themselves further, it will become increasingly difficult to learn whether or when a child is in need of medical attention from the State. The State must have eyes and ears in the community in order to spot children who need State intervention.

On February 21, 2017, recently retired Idaho Supreme Court Chief Justice Jim Jones urged the repeal of Idaho’s faith healing exemption. Jones implored “the Legislature to stand up for our children” by requiring that they receive basic healthcare.¹⁸¹ Idaho has “numerous protections for children without religious exemptions – marital age, child labor, ability to contract, and the like,” he noted.¹⁸² While adults can “decide to forgo medical intervention for themselves for religious reasons, that is their prerogative . . . the state has an

¹⁷⁷ Asser and Swan, *supra* note 90, at 628. ¹⁷⁸ *Prince*, 321 U.S. at 171.

¹⁷⁹ Lehr, *supra* note 166. ¹⁸⁰ *Id.*

¹⁸¹ Jim Jones, *Does the Right to Life End at Birth for Some Kids?*, SPOKESMAN REVIEW (Feb. 21, 2017), <http://media.spokesman.com/documents/2017/02/Jones-faith-healing-oped.pdf>.

¹⁸² *Id.*

interest in safeguarding the health and safety of minors who cannot speak for themselves.”¹⁸³ “Unshackled,” Jones felt compelled to “speak up” about this “injustice.”¹⁸⁴ For Jones, “the right to have basic life-saving healthcare trumps [parental and religious] protections.”¹⁸⁵

In the 2017 term, Idaho Senator Dan Johnson introduced Senate Bill 1182, which would have allowed judges to intervene in faith healing cases and stripped out the limitation to members of a “bona fide religious denomination.”¹⁸⁶ Senate Bill 1182 would have replaced the “by faith alone” concept with a test similar to Idaho’s state RFRA, permitting the state to override religious beliefs when a compelling state interest requires intervention, although it must do so by the least restrictive means. The sponsor sought “a balance between protecting children and honoring parents’ free exercise of religion under the First Amendment.”¹⁸⁷

The floor debate on Senate Bill 1182 crystalized the difficulty in finding a line between respecting the religious freedom of parents and fulfilling the state’s duty to protect children. For then-Senate Majority Leader Bart Davis, who supported the bill, a core weakness of Idaho’s religious exemption is the following:

God expects people to “use all the tools available to us. And until those children can make that decision for themselves, the government in my opinion has a compelling government purpose, in its least restrictive means possible, a duty to protect the lives of children.”¹⁸⁸

Still, Senator Davis expressed disbelief at the notion of repealing the religious exemptions for parents without replacing it with *some* accommodation:

I heard a lot of opposition to the bill because it doesn’t go far enough, that we need to repeal the shield protection I can’t get that bill passed, I don’t believe I can I’ve been here for a while and I know kinda how to count votes; that bill will not pass.¹⁸⁹

Senator Michelle Stennett, who opposed the bill, summarized her opposition succinctly: Senate Bill 1182 “muddies parental rights This doesn’t solve any of that, this just makes more conflict.”¹⁹⁰

¹⁸³ *Id.* ¹⁸⁴ Ehlert, *supra* note 163. ¹⁸⁵ *Id.* ¹⁸⁶ *Id.*

¹⁸⁷ Betsy Russell, *Johnson on Faith Healing Bill: “Not Sure if it Changes a Whole Lot,”* SPOKESMAN REVIEW (Mar. 20, 2017), www.spokesman.com/blogs/boise/2017/mar/20/johnson-his-faith-healing-bill-not-sure-it-really-changes-whole-lot/.

¹⁸⁸ Betsy Russell, *Senate Panel Narrowly Backs Controversial Faith-Healing Bill*, SPOKESMAN REVIEW (Mar. 20, 2017), www.spokesman.com/blogs/boise/2017/mar/20/senate-panel-narrowly-backs-controversial-faith-healing-bill/.

¹⁸⁹ *Id.* ¹⁹⁰ *Id.*

The Idaho Senate voted to kill the faith healing amendment on the Senate floor.¹⁹¹ Despite the fact that senators voted more than two-to-one against it, Senate Bill 1182 signaled an important and credible attempt by the Idaho legislature to carve back the shield around faith healing in Idaho.¹⁹² To the extent that Senate Bill 1182 would have allowed Idaho judges to intervene in faith healing cases, its passage would have alleviated the human costs to children animating decisions such as *Prince*.

Senate Bill 1182 would also have stripped the protection for faith healing parents from civil and criminal charges. This is facially appealing. But a hard question remains whether criminal penalties would sufficiently protect children in communities like the Followers of Christ. Alexandru's case gives reason to doubt whether removing the exemption from prosecution will alone keep children safe. Families can always leave a particular location. After Alexandru was removed by social workers and later returned to his parents, Alexandru's family moved from one province in Canada to another; Alexandru fell off the state's radar.¹⁹³

Neighboring Oregon's legislature was more successful than Idaho's when it removed its faith healing exemption in 1999.¹⁹⁴ After Oregon changed its law in 1998, not a single death occurred among the Followers of Christ for a three-year period, some believe out of fear of prosecution.¹⁹⁵ But that interruption turned out to be a hiatus, not a change in practice or beliefs. Instead, child deaths in Oregon's faith healing communities have come back in full force. At this writing, Oregon officials brought murder charges against the parents of a twin girl, Ginnifer, who died hours after birth in the couple's home as "dozens of people from the faith-healing Followers of Christ Church gathered at the

¹⁹¹ Betsy Russell, *Canyon Sheriff: "In My County Alone I've Had 3 Deaths in the Last 4 months, One Yesterday,"* SPOKESMAN REVIEW (Mar. 20, 2017), www.spokesman.com/blogs/boise/2017/mar/20/canyon-sheriff-my-county-alone-ive-had-3-deaths-last-4-months-one-yesterday/ (reporting that Senate Bill 1182 passed the State Affairs Committee by a 5–4 vote but failed on the Senate floor by 11 to 24).

¹⁹² Betsy Russell, *Senate Kills Faith Healing Bill on 11–24 Vote*, SPOKESMAN REVIEW (Mar. 21, 2017), www.spokesman.com/blogs/boise/2017/mar/21/senate-kills-faith-healing-bill-11-24-vote/.

¹⁹³ *Calgary 1st-Degree Murder Trial Delayed for Parents in Diabetic Teen's Death*, CBC NEWS (Sep. 12, 2016), www.cbc.ca/news/canada/calgary/alex-radita-murder-trial-parents-resume-1.3758122.

¹⁹⁴ Isolde Raferty, *Changes in Oregon Law Put Faith-Healing Parents on Trial*, N.Y. TIMES (May 29, 2011), www.nytimes.com/2011/05/30/us/30followers.html?mcubz=0; see also Everton Bailey Jr., *Followers of Christ Parents Charged With Murder in Death of Premature Twin Baby*, OREGON LIVE (June 5, 2017), www.oregonlive.com/oregon-city/index.ssf/2017/06/followers_of_christ_parents_of.html.

¹⁹⁵ See Hughes, *supra* note 92, and accompanying text.

house.”¹⁹⁶ Ginnifer “died from complications of prematurity . . . her lungs hadn’t developed enough to work on their own,” Oregon’s State Medical Examiner said in an affidavit; “the death was preventable if Baby Ginnifer had been given the medical care available in a hospital neonatal intensive care unit.”¹⁹⁷

At one point, one of the two authors of this chapter believed that prosecuting parents for faith healing would save children from avoidable deaths.¹⁹⁸ But the ability to escape legal regulation by moving, as Alexandru’s parents did, drives home the limits of the law. Indeed, some believe Oregon’s decision to eliminate the faith healing exemption led members of the Followers of Christ to move to Idaho, where they have resumed faith healing.¹⁹⁹ True, if Idaho removed its religious exemption, there may be few places left in the U.S. where faith healing communities could go, as Figures 13.5 and 13.6 show. But the fact that faith healing practices continue in Oregon after the state has jailed Followers, including the sister and brother-in-law of Ginnifer’s mother for the death of the couple’s infant, shows how entrenched faith healing is in these communities.

Despite Senate Bill 1182s failure, it represents an important step in the right direction for Idaho. Removing the specific protection for treatment “by faith alone” would permit Idaho’s RFRA to kick in. RFRA’s balancing framework would acknowledge the importance of the parents’ religious liberty, without dismissing the child’s right to life. Like the federal and state RFRA’s discussed extensively in this volume, Idaho’s RFRA requires the state to defer to religious practices unless a compelling state interest requires intervention.²⁰⁰ It declares the “[f]ree exercise of religion is a fundamental right.”²⁰¹ Idaho’s RFRA allows the state to substantially burden religious practices only when “[e]ssential to further a compelling governmental interest” and accomplished by the “[l]east restrictive means of furthering that compelling governmental interest.”²⁰² Once a burden is shown, Idaho, not individual believers, has the burden to show that Idaho’s “means” are sufficiently related to its “ends.”²⁰³ The challenged state action would enjoy no presumption; instead, the presumption would weigh against the application of state law.

¹⁹⁶ See Bailey, *supra* note 194. ¹⁹⁷ *Id.*

¹⁹⁸ See Robin Fretwell Wilson, *The Perils of Privatized Marriage*, in MARRIAGE AND DIVORCE IN A MULTI-CULTURAL CONTEXT: RECONSIDERING THE BOUNDARIES OF CIVIL LAW AND RELIGION 253, 260 (Joel A. Nichols, ed., 2011).

¹⁹⁹ Bill Dentzer, *Religious Freedom or Medical Neglect? Idaho Lawmakers Take Up Faith-Healing Exemption*, IDAHO STATESMAN (Jul. 29, 2016), www.idahostatesman.com/news/politics-government/state-politics/article92784987.html (“Some say that more members have moved to Idaho from neighboring Oregon in the years since Idaho’s neighbor to the west eliminated faith-healing exemptions from its criminal statutes.”).

²⁰⁰ *Id.* ²⁰¹ See generally IDAHO CODE § 73-402 (2016). ²⁰² *Id.* ²⁰³ *Id.*

What would that mean for faith healing practices? Removing the “by faith alone” provision would not mean the State could override every decision regarding a child’s illness. On at least one dimension, whether a child’s death could be prevented with timely medical intervention, the State would bear the burden of showing that stepping into the parents’ shoes was warranted. Honoring parental preferences, including those based on faith, harms no one if the outcome would not change.

If Idaho removed the “by faith alone” provision, state authorities would have more opportunities to be at the bedside of a child in need of protection. This, of course, requires that mandatory reporters – who, in Idaho, include everyone – actually report. Once alerted, state officials would be equipped to seek judicial overrides when a child’s life could be saved. Capitalizing on that opportunity may require greater efforts to encourage reporting, however.

In sum, faith healing practices and corporal punishment both reveal the limits of the law to reach into communities that are insular and remote. The failure to regulate fosters tangible and heart-wrenching harm for children. While it is hard to know whether any given child’s illness is treatable or whether that child’s death could be prevented, this fact places a premium on evaluating children. This means that the State must gain the trust of isolated and insular communities in order to know a child is in need.

V CONCLUSION

At the intersection of parental rights and child protection lie the issues of faith healing in response to treatable and nontreatable illnesses and the use of corporal punishment as a means to “save a child’s soul” and to “teach him right from wrong.” States may wield their police power against a “parent’s claim to control of the child” when harm to children is likely to result, even if parents claim religious or cultural reasons for placing their children at risk. Despite the authority to protect children, states prize – and protect – to different degrees a family’s autonomy to make decisions about how to discipline children or heal them “by faith alone.” Although parents’ choices to physically discipline children have become a focus of national debate after Adrian Peterson’s prosecution for disciplining his child, evidence is mixed that corporal punishment leaves significant lasting impacts on children.

The insulation for faith healing or treatment by spiritual means is a different matter. Tragic cases of children dying at the hands of their parents flout the no-harm principle that bounds both religious liberty and parental rights. What empirical evidence there is suggests that had states intervened, hundreds of children’s deaths could have been averted. Patently, an adult who does not

want to receive treatment for religious reasons, or no reason at all, should be able to do so.²⁰⁴ But when a child would benefit from treatment, states should rethink their reflexive respect for parental autonomy, religion, and cultural practices.

Even as child graves continue to pile up in Idaho, however, lawmakers struggle with how to reach into insular communities and better protect children. Erasing the virtual immunity from prosecution for parents in Idaho after a child dies for a common, treatable ailment seems unlikely, without more, to save children's lives. More bridges must be built to reach into communities that treat "by faith alone."

²⁰⁴ *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990) (assuming a right to refuse medical treatment, but holding the state has authority to enact procedural safeguards to protect persons lacking capacity to make their wishes known personally).

