

Institute of Judicial Administration

American Bar Association

Juvenile Justice Standards

STANDARDS RELATING TO

Rights of Minors

Recommended by the
IJA-ABA JOINT COMMISSION ON JUVENILE JUSTICE STANDARDS

Hon. Irving R. Kaufman, *Chairman*

Approved by the
HOUSE OF DELEGATES, AMERICAN BAR ASSOCIATION, 1979

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Preface

The standards and commentary in this volume are part of a series designed to cover the spectrum of problems pertaining to the laws affecting children. They examine the juvenile justice system and its relationship to the rights and responsibilities of juveniles. The series was prepared under the supervision of a Joint Commission on Juvenile Justice Standards appointed by the Institute of Judicial Administration and the American Bar Association. Seventeen volumes in the series were approved by the House of Delegates of the American Bar Association on February 12, 1979.

The standards are intended to serve as guidelines for action by legislators, judges, administrators, public and private agencies, local civic groups, and others responsible for or concerned with the treatment of youths at local, state, and federal levels. The twenty-three volumes issued by the joint commission cover the entire field of juvenile justice administration, including the jurisdiction and organization of trial and appellate courts hearing matters concerning juveniles; the transfer of jurisdiction to adult criminal courts; and the functions performed by law enforcement officers and court intake, probation, and corrections personnel. Standards for attorneys representing the state, for juveniles and their families, and for the procedures to be followed at the preadjudication, adjudication, disposition, and postdisposition stages are included. One volume in this series sets forth standards for the statutory classification of delinquent acts and the rules governing the sanctions to be imposed. Other volumes deal with problems affecting nondelinquent youth, including recommendations concerning the permissible range of intervention by the state in cases of abuse or neglect, status offenses (such as truancy and running away), and contractual, medical, educational, and employment rights of minors.

The history of the Juvenile Justice Standards Project illustrates the breadth and scope of its task. In 1971, the Institute of Judicial Administration, a private, nonprofit research and educational organi-

zation located at New York University School of Law, began planning the Juvenile Justice Standards Project. At that time, the Project on Standards for Criminal Justice of the ABA, initiated by IJA seven years earlier, was completing the last of twelve volumes of recommendations for the adult criminal justice system. However, those standards were not designed to address the issues confronted by the separate courts handling juvenile matters. The Juvenile Justice Standards Project was created to consider those issues.

A planning committee chaired by then Judge and now Chief Judge Irving R. Kaufman of the United States Court of Appeals for the Second Circuit met in October 1971. That winter, reporters who would be responsible for drafting the volumes met with six planning subcommittees to identify and analyze the important issues in the juvenile justice field. Based on material developed by them, the planning committee charted the areas to be covered.

In February 1973, the ABA became a co-sponsor of the project. IJA continued to serve as the secretariat of the project. The IJA-ABA Joint Commission on Juvenile Justice Standards was then created to serve as the project's governing body. The joint commission, chaired by Chief Judge Kaufman, consists of twenty-nine members, approximately half of whom are lawyers and judges, the balance representing nonlegal disciplines such as psychology and sociology. The chairpersons of the four drafting committees also serve on the joint commission. The perspective of minority groups was introduced by a Minority Group Advisory Committee established in 1973, members of which subsequently joined the commission and the drafting committees. David Gilman has been the director of the project since July 1976.

The task of writing standards and accompanying commentary was undertaken by more than thirty scholars, each of whom was assigned a topic within the jurisdiction of one of the four advisory drafting committees: Committee I, Intervention in the Lives of Children; Committee II, Court Roles and Procedures; Committee III, Treatment and Correction; and Committee IV, Administration. The committees were composed of more than 100 members chosen for their background and experience not only in legal issues affecting youth, but also in related fields such as psychiatry, psychology, sociology, social work, education, corrections, and police work. The standards and commentary produced by the reporters and drafting committees were presented to the IJA-ABA Joint Commission on Juvenile Justice Standards for consideration. The deliberations of the joint commission led to revisions in the standards and commentary presented to them, culminating in the published tentative drafts.

The published tentative drafts were distributed widely to members of the legal community, juvenile justice specialists, and organizations directly concerned with the juvenile justice system for study and comment. The ABA assigned the task of reviewing individual volumes to ABA sections whose members are expert in the specific areas covered by those volumes. Especially helpful during this review period were the comments, observations, and guidance provided by Professor Livingston Hall, Chairperson, Committee on Juvenile Justice of the Section of Criminal Justice, and Marjorie M. Childs, Chairperson of the Juvenile Justice Standards Review Committee of the Section of Family Law of the ABA. The recommendations submitted to the project by the professional groups, attorneys, judges, and ABA sections were presented to an executive committee of the joint commission, to whom the responsibility of responding had been delegated by the full commission. The executive committee consisted of the following members of the joint commission:

Chief Judge Irving R. Kaufman, *Chairman*
Hon. William S. Fort, *Vice Chairman*
Prof. Charles Z. Smith, *Vice Chairman*
Dr. Eli Bower
Allen Breed
William T. Gossett, Esq.
Robert W. Meserve, Esq.
Milton G. Rector
Daniel L. Skoler, Esq.
Hon. William S. White
Hon. Patricia M. Wald, *Special Consultant*

The executive committee met in 1977 and 1978 to discuss the proposed changes in the published standards and commentary. Minutes issued after the meetings reflecting the decisions by the executive committee were circulated to the members of the joint commission and the ABA House of Delegates, as well as to those who had transmitted comments to the project.

On February 12, 1979, the ABA House of Delegates approved seventeen of the twenty-three published volumes. It was understood that the approved volumes would be revised to conform to the changes described in the minutes of the 1977 and 1978 executive committee meetings. The *Schools and Education* volume was not presented to the House and the five remaining volumes—*Abuse and Neglect*, *Court Organization and Administration*, *Juvenile Delinquency and Sanctions*, *Juvenile Probation Function*, and *Noncriminal*

Misbehavior—were held over for final consideration at the 1980 mid-winter meeting of the House.

Among the agreed-upon changes in the standards was the decision to bracket all numbers limiting time periods and sizes of facilities in order to distinguish precatory from mandatory standards and thereby allow for variations imposed by differences among jurisdictions. In some cases, numerical limitations concerning a juvenile's age also are bracketed.

The tentative drafts of the seventeen volumes approved by the ABA House of Delegates in February 1979, revised as agreed, are now ready for consideration and implementation by the components of the juvenile justice system in the various states and localities.

Much time has elapsed from the start of the project to the present date and significant changes have taken place both in the law and the social climate affecting juvenile justice in this country. Some of the changes are directly traceable to these standards and the intense national interest surrounding their promulgation. Other major changes are the indirect result of the standards; still others derive from independent local influences, such as increases in reported crime rates.

The volumes could not be revised to reflect legal and social developments subsequent to the drafting and release of the tentative drafts in 1975 and 1976 without distorting the context in which they were written and adopted. Therefore, changes in the standards or commentary dictated by the decisions of the executive committee subsequent to the publication of the tentative drafts are indicated in a special notation at the front of each volume.

In addition, the series will be brought up to date in the revised version of the summary volume, *Standards for Juvenile Justice: A Summary and Analysis*, which will describe current history, major trends, and the observable impact of the proposed standards on the juvenile justice system from their earliest dissemination. Far from being outdated, the published standards have become guideposts to the future of juvenile law.

The planning phase of the project was supported by a grant from the National Institute of Law Enforcement and Criminal Justice of the Law Enforcement Assistance Administration. The National Institute also supported the drafting phase of the project, with additional support from grants from the American Bar Endowment, and the Andrew Mellon, Vincent Astor, and Herman Goldman foundations. Both the National Institute and the American Bar Endowment funded the final revision phase of the project.

An account of the history and accomplishments of the project

would not be complete without acknowledging the work of some of the people who, although no longer with the project, contributed immeasurably to its achievements. Orison Marden, a former president of the ABA, was co-chairman of the commission from 1974 until his death in August 1975. Paul Nejelski was director of the project during its planning phase from 1971 to 1973. Lawrence Schultz, who was research director from the inception of the project, was director from 1973 until 1974. From 1974 to 1975, Delmar Karlen served as vice-chairman of the commission and as chairman of its executive committee, and Wayne Mucci was director of the project. Barbara Flicker was director of the project from 1975 to 1976. Justice Tom C. Clark was chairman for ABA liaison from 1975 to 1977.

Legal editors included Jo Rena Adams, Paula Ryan, and Ken Taymor. Other valued staff members were Fred Cohen, Pat Pickrell, Peter Garlock, and Oscar Garcia-Rivera. Mary Anne O'Dea and Susan J. Sandler also served as editors. Amy Berlin and Kathy Kolar were research associates. Jennifer K. Schweickart and Ramelle Cochrane Pulitzer were editorial assistants.

It should be noted that the positions adopted by the joint commission and stated in these volumes do not represent the official policies or views of the organizations with which the members of the joint commission and the drafting committees are associated.

This volume is part of a series of standards and commentary prepared under the supervision of Drafting Committee I, which also includes the following volumes:

ABUSE AND NEGLECT
NONCRIMINAL MISBEHAVIOR
JUVENILE DELINQUENCY AND SANCTIONS
YOUTH SERVICE AGENCIES
SCHOOLS AND EDUCATION
POLICE HANDLING OF JUVENILE PROBLEMS

Addendum of Revisions in the 1977 Tentative Draft

As discussed in the Preface, the published tentative drafts were distributed to the appropriate ABA sections and other interested individuals and organizations. Comments and suggestions concerning the volumes were solicited by the executive committee of the IJA-ABA Joint Commission. The executive committee then reviewed the standards and commentary within the context of the recommendations received and adopted certain modifications. The specific changes affecting this volume are set forth below. Corrections in form, spelling, or punctuation are not included in this enumeration.

1. The Introduction was revised by deleting the last paragraph describing the contents of Part VII and substituting a new paragraph explaining the rationale for eliminating the subject of first amendment rights from the coverage of the volume.

2. Standard 3.2 was amended by deleting the phrase pertaining to the style of life which the child had been accorded as a factor in determining the scope of support.

Commentary to Standard 3.2 was revised to delete discussion of perpetuating life style and other patterns of family life as relevant to determining the scope of the support obligation.

3. Standard 3.3 E. was amended by expanding the provision for criminal prosecution for parental failure to support: protection of children under twelve was expanded to include children under sixteen. Sixteen was then bracketed to allow some discretion in states' adoption of an age ceiling.

4. Standard 3.4 B. 1. was amended to add an exception that would continue the support obligation for children living separately after a finding of endangerment.

Commentary was revised to discuss the addition.

5. Standard 4.4 was amended to add “emancipated” to describe minors living separate and apart and managing their own affairs.

6. Standard 4.6 A. was amended to bracket age sixteen in the description of mature minors.

Commentary was revised to explain that the amendment is designed to emphasize the minor’s capacity to understand, rather than his or her mere chronological age, for informed consent to treatment.

7. Standard 4.6 B. was amended to make the provision on notifying a mature minor’s parents of medical treatment expressly subject to Standard 4.2 B., in which the physician must seek the minor’s consent to notify parents of specified medical treatments.

8. Standards 4.7 B. and 4.8 B. were amended to change “physician” to “person or agency” providing treatment.

9. Standard 7.1 (Part VII) was deleted in its entirety, as discussed in Item 1 above.

10. Commentary to Standard 2.1 on emancipation was revised to add a reference to the ABA Young Lawyers Division and Family Law Section’s support of Commissioner Wald’s dissent to family function as an exception to tort liability.

It was also revised to describe the Family Law Section’s position on specific grounds for emancipation.

11. Commentary to Standard 3.3 was revised to define “suitable” in a vendor’s right to recover for goods or services “suitable” to the child’s or family’s economic situation.

12. Commentary to Standard 3.4 A. was revised to endorse the position of the ABA Family Law Section on extending the parental support obligation beyond the age of majority when the child is enrolled in high school or an equivalent degree program.

13. Commentary to Standard 4.1 was revised to insert a discussion of the minor’s right to refuse treatment.

14. Commentary to Standard 4.2 was revised to add a cross-reference to *Abuse and Neglect* Standard 6.6 B. on continued parental right to consent to medical treatment when the child is removed temporarily from the home.

Further revision added that any disclosures made by a minor to a physician during medical counseling be protected as privileged communications.

15. Commentary to Standard 4.9 was revised to add a recommendation that states adopt uniform licensing requirements for psychotherapists.

Contents

PREFACE	v
ADDENDUM	xi
INTRODUCTION	1
STANDARDS	7
STANDARDS WITH COMMENTARY	17
PART I: AGE OF MAJORITY	17
1.1 Age of majority.	17
PART II: EMANCIPATION	20
2.1 A new approach to emancipation.	20
PART III: SUPPORT	33
3.1 Who is obligated to support.	33
3.2 Scope of support.	36
3.3 Enforcement of support obligations.	38
3.4 Duration of the obligation to support.	44
PART IV: MEDICAL CARE	50
4.1 Prior parental consent.	50
4.2 Notification of treatment.	54
4.3 Financial liability.	60
4.4 Emancipated minor.	64
4.5 Emergency treatment.	66
4.6 Mature minor.	68
4.7 Chemical dependency.	70
4.8 Venereal disease, contraception, and pregnancy.	72
4.9 Mental or emotional disorder.	85

PART V: YOUTH EMPLOYMENT	87
5.1 Employment during school.	87
5.2 Minimum age of employment.	87
5.3 Employment in hazardous activities.	87
5.4 Work permit as proof of eligibility for employment.	88
5.5 Enforcement of child labor laws.	102
5.6 Restrictions on hours of employment.	103
5.7 Compensation and minimum wage.	106
5.8 Workmen's compensation.	110
PART VI: MINORS' CONTRACTS	111
6.1 Minors' contracts.	111
DISSENTING VIEW	121
BIBLIOGRAPHY	125

Introduction

This volume concerns minors' rights. Yet one need only ask the question, "What are the rights of minors?" to realize that the question has no answer. That is true not because the question should not be asked—but rather because it is a host of questions which in turn involves a multitude of social policy concerns and influences. A child's right to medical care, to cite only one illustration to which we turn in Part IV, may vary with his or her age, with the type of medical procedure which is at issue, or with the parties to the particular dispute about the right involved. Suppose that the question is whether a sixteen-year-old girl has a right to an abortion. But the *problem* cannot be captured in so simplistic a statement. Among the questions to be asked are: if a doctor performs an abortion at the request of the child, will he or she be liable in tort to the child's parents? If the juvenile court wants the abortion performed, may it be ordered—over the child's objection? or despite her parents' objection? If the doctor is willing to perform the abortion, can the parents obtain an injunction to stop him or her? If the doctor is unwilling to perform the abortion without the parents' permission, may the child obtain the aid of court process to have the abortion performed? If the doctor performs the abortion, who is obligated to pay for it—the child alone? the parents alone? the child, but only when she reaches majority? The answer to any one of these questions may not indicate the answer to any one of the others, because the interests the questions express may be balanced differently in each situation. It is obvious that the answer to any of the questions must take into account four, perhaps contradictory but in any event separable, sets of values—the interests of the child, the interests of the family (which have traditionally been expressed as the "rights of parents"), the interests of the third parties who deal with the child, and the more generalized interests of the state in the welfare of children. To complicate the matter, there is no inherent reason why the answers to these questions must determine the answers to the same questions asked about a different medical procedure, under different factual circumstances, for a child of another age.

For all of the questions that are worth asking, moreover, there are few hard law answers. The traditional lawyer's method of arriving at conclusions for a new problem—by reasoning from analogous doctrinal premises—is a dangerous technique in the area of minors' rights. With the exception of a few recent statutes on medical care problems—see Part IV—the primary source of judicial doctrine has related to suits between parents and nonmembers of the family and has been concerned with whether the minor is emancipated for a variety of purposes. See Part II. The concerns of this volume are of necessity both broader and more specific.

These standards focus on relationships between the child and the parents and between the child and third parties, against a background of the interests of the family. Our concern is with legally enforceable rights and obligations; the question we ask in each context is whether and to what extent a minor should be treated as an adult. Thus, situations in which the state seeks to interfere in an authoritarian fashion with both parents and child (*e.g.*, the issue of compulsory medical care against the family's wishes) are not addressed here but in the *Abuse and Neglect* volume. Moreover, this focus is not intended to explicate a "Bill of Rights for Children." *Cf.* Foster and Freed, "A Bill of Rights for Children," 6 *Fam. L.Q.* 343 (1972). Whatever the utility of articulating a host of unenforced and unenforceable hopes for minor citizens, we believe it is more useful to focus narrowly on legally imposed disabilities and legally enforceable obligations. The "right to life," the "right to a balanced diet," the "right to loving custodians," and other imponderables we leave to philosophers.

The search for legally enforceable rights and obligations proceeds against a legal background which includes a notion, expressed by a variety of courts in a variety of contexts, of "family privacy" or "family autonomy." The notion is that to the maximum extent possible courts should not interfere with family decisionmaking unless the parents' behavior falls below a legislatively mandated minimum standard of parental care as established in the juvenile court's neglect jurisdiction. The notion implies that when the family is an ongoing unit parents are able to impose their decisions on their children; children do not have a legal forum in which to assert directly rights they have against their parents, so long as the minimum standard of parental care is maintained. What rights independent of their parents' wishes children should be accorded must, therefore, be established by specific legislative value judgments.

The intrafamily disputes about issues of child support, care, and upbringing which have led to the expression of the family privacy

notion (at least as represented in appellate court opinions) have been of two kinds: parent versus parent disagreements about care of the child; child versus parent disagreements about parental decisionmaking.

In *Kilgrow v. Kilgrow*, 268 Ala. 475, 107 So. 2d 885 (1959), for example, the child's father wanted the child enrolled in a parochial school and the mother was determined to prevent the enrollment. The father sought and obtained an injunction from a trial judge preventing the mother from interfering with the enrollment because it would be for the "best welfare" of the child to attend the parochial school. The Supreme Court of Alabama held, however, that the trial court had no jurisdiction over the controversy:

It seems to us, if we should hold that equity has jurisdiction in this case such holding will open wide the gates for settlement in equity of all sorts and varieties of intimate family disputes concerning the upbringing of children. The absence of cases dealing with the question indicates a reluctance of courts to assume jurisdiction in disputes arising out of the intimate family circle. It does not take much imagination to envision the extent to which explosive differences of opinion between parents as to the proper upbringing of their children could be brought into court for attempted solution.

In none of our cases has the court intervened to settle a controversy between unseparated parents as to some matter incident to the well-being of the child, where there was no question presented as to which parent should have custody. . . . Never has the court put itself in the place of the parents and interposed its judgment as to the course which otherwise amicable parents should pursue in discharging their parental duty. . . .

The inherent jurisdiction of courts of equity over infants is a matter of necessity, coming into exercise only where there has been a failure of that natural power and obligation which is the province of parenthood. It is a jurisdiction assumed by the courts only when it is forfeited by a natural custodian incident to a broken home or neglect, or as a result of a natural custodian's incapacity, unfitness or death. . . .

See also *People ex rel. Sisson v. Sisson*, 271 N.Y. 285, 2 N.E.2d 660 (1936) (parents could not agree to religious training for the child; trial court has no jurisdiction to determine issues concerning internal affairs of the home while the family is an ongoing unit).

The nonintervention principle assumes that judges are no wiser in making decisions about the family than are parents. Moreover, if judges make these decisions family decisionmaking processes may be disabled: the parent who "lost" the argument in court will probably

be more bitter than the parent whose original wish was modified through the complex negotiation and compromise process in which families indulge; and the parent who “won” will be emboldened to “go to the law” the next time a family issue arises. To some extent, at least, the knowledge that the courts are available to settle family controversies may encourage more families to seek solution of family problems through legal process rather than to use the collective resources of the family. The nonintervention principle also protects the courts by discouraging judges from intervening upon family prerogatives as readily where there is no parental dispute and where the parents do not fall below minimal community standards.

The family privacy principle has also been asserted in the other major context of intrafamily controversy—litigation between child and parents to resolve disputes about the child’s upbringing, maintenance, or care. The precedents are limited here as well because only atypical families seek judicial aid. Thus, in *Roe v. Doe*, 29 N.Y.2d 188, 272 N.E.2d 567, 324 N.Y.S.2d 71 (1971), without eschewing trial court jurisdiction completely, the court of appeals affirmed the intermediate appellate court’s dismissal of a support decree against a father who had refused to give his daughter, a student at a private university, any additional money for tuition or living expenses because she was unwilling to abide by his “reasonable” decisions about her residence and educational plans. See also Standard 3.3 A., Commentary.

But cases which involve parent-child disagreement can arise judicially in a variety of contexts—some of them requiring judicial disposition. For example, a child may obtain a medical procedure to which his or her parents object without informing them, and the doctor may then sue the parents for the cost of the procedure or the parents may sue the doctor for assault and battery (a “touching” without consent). Or the child may enroll in college and the college may sue the parents for the child’s tuition. The traditional rules governing controversies of this kind are: the third party will be permitted to recover from the parents if the items or services provided the child were “necessaries” (Standard 3.3 D. *infra*); the child’s consent to the services or agreement to the purchase is binding on the child and not a violation of the parents’ rights if the child is emancipated (Standards 2.1, 4.4 *infra*). When legislative rules, such as these standards recommend, are prescribed to govern indirect litigation of the underlying parent-child disagreement, the purposes of the judicial notion of “family privacy” have not been compromised. When judges decide after the fact whom the legislature has made financially liable, family decisionmaking processes are not directly contravened. More-

over, judges who decide these issues after the fact are typically not the juvenile court judges whose responsibilities in other areas produce interventionist tendencies. Even *post hoc* judicial decisions can be minimized if parents and nonmembers of the family are given clear legislative guidance as to their rights and obligations. Thus, if the legislature speaks authoritatively and with clarity as to whether a child can obtain a particular medical procedure and, if so, whether the parents are liable for its cost, there will likely be less litigation. None of the actors will need judges' advice before the fact; a clear legal rule will doubtless discourage litigation after the fact. For all of these reasons, then, the standards in this volume address themselves directly to, and provide clarifying legal rules to govern, the multifarious contexts in which the decisions and behavior of children, their parents, and nonmembers of the family interface.

Part I explores the age of majority. Consistent with the national trend, we recommend that the age of eighteen be chosen as the age of majority for all purposes. Despite the fact that in some states legislators have opted to "protect" persons between the ages of eighteen and twenty-one for some limited purposes, we argue that the responsibilities imposed by our society on such persons make it essential that they be treated as adults for all purposes.

Part II examines the traditional doctrine of emancipation; while exploring the many purposes it has served as a handmaiden of substantive law doctrines, the standard recommends that for most purposes the issues treated under the rubric should be reexamined overtly as aspects of substantive doctrines. The standard also recommends that a judicial emancipation doctrine should not be available. See Standard 2.1 C. 1. *infra*. The standard concludes by articulating emancipation criteria, geared to the minor's separate residence and financial independence, to be used only where the legislature has not addressed the issue as an aspect of substantive doctrine in a given context.

Part III deals with the multifarious issues of child support. It articulates policies concerning what adults should be obligated to support obligations (Standard 3.3 E.), and when the support obligation (Standard 3.2), how support obligations can be enforced (Standard 3.3)—including a policy to govern criminal enforcement of support obligations (Standard 3.3 E.), and when the support obligation should terminate (Standard 3.4). The last includes, of course, the traditional notion of emancipation.

Part IV deals with minors' access to medical treatment and describes the circumstances under which a minor may obtain medical services without parental consent. The framework for addressing

these issues involves the interrelated questions of prior parental consent, subsequent disclosure of treatment to the parent, and financial liability. The various standards propose that in the absence of overriding societal interests, parental involvement in the child's medical care should be encouraged by prior consent or subsequent notification. However, where the medical treatments sought by the minor pertain to chemical dependency (Standard 4.7), venereal disease, contraception, or pregnancy (Standard 4.8), or mental or emotional disorders (Standard 4.9), the standards authorize minors to consent without parental notification.

Part V provides a schema regulating youth employment. The underlying policy of the standards is to minimize restrictions on minors' employability by reducing or eliminating many of the present legislative encumbrances contained in child labor laws. Youth unemployment and underemployment, and minors' lack of integration into meaningful economic roles is currently a more serious problem than the dangers of economic exploitation. Standards 5.1-5.3 provide a framework for reconciling restrictions on employability with the policies of compulsory education adopted in the *Schools and Education* volume. Once minors are beyond the age of compulsory school attendance, however, the standards eliminate any additional restrictions on minors' access to the marketplace. In order to facilitate competitive equality with adults, Standards 5.5-5.7 eliminate other employment disabilities imposed on minors.

Part VI deals with the contract obligations of minors. The commentary indicates that present doctrines are chaotic and may be unwise; the standards attempt to remedy that. They recommend that contracts of minors between the ages of twelve and eighteen be enforceable if one of three additional criteria is met (Standard 6.1 A.).

The tentative draft as originally published contained Part VII, dealing with first amendment rights. In response to objections from several groups that such emphasis on first amendment rights might lead to an inference that other constitutional provisions do not apply to minors, Part VII was deleted. Therefore, this volume does not cover the constitutional rights of minors.

Standards

PART I: AGE OF MAJORITY

1.1 Age of majority.

All persons who have attained the age of eighteen years should be regarded as adults for all legal purposes.

PART II: EMANCIPATION

2.1 A new approach to emancipation.

A. The legal issues traditionally resolved by reference to the emancipation doctrine should be resolved legislatively as aspects of the substantive doctrines which govern legal relationships between child and parent, between parent and parent, between child and nonmembers of the family, and between parents and nonmembers of the family.

B. Legislatively created, narrowly drawn doctrines which obviate the need for relying upon the vague criteria of the traditional emancipation doctrine should include the following principles:

1. a parent should not be permitted to recover from the child's employer wages due or paid by the employer to the child;
2. a child should be permitted to sue his or her parent and the parent should be permitted to sue the child for damages arising from intentional or negligent tortious behavior so long as the behavior is not related to the exercise of family functions.

C. Because legal disputes concerning the activities and needs of children will inevitably arise—between child and parent, between parent and parent, between child and nonmembers of the family, and between parents and nonmembers of the family—and the disputes will arise in contexts and present legal issues which cannot be forecast legislatively, the legislature should also enact an emancipation doctrine of general applicability.

1. The doctrine should not permit emancipation by judicial decree.

2. The doctrine should be explicitly limited to issues not addressed by other standards of this volume and should authorize a finding of emancipation when a child, prior to the age of majority, has established a residence separate from that of his or her family, whether or not with parental consent or consent of a person responsible for his or her care, and is managing his or her own financial affairs.

PART III: SUPPORT

3.1 Who is obligated to support.

A child entitled to support is entitled to support from each of his or her parents, natural or adopted, whether or not they are married.

3.2 Scope of support.

A child is entitled to such support from a person obligated to support as will permit the child to live in a manner commensurate with that person's means.

3.3 Enforcement of support obligations.

The obligation to support a child may be enforced:

- A. by a suit brought by the child or on behalf of the child;
- B. by a parent who has custody of the child;
- C. by a nonparent who has custody of the child pursuant to an order of a court with guardianship, neglect, or delinquency jurisdiction;
- D. by a nonmember of the family, in a proceeding brought against either parent of the child to recover the price or the fair market value of any goods or services provided to the child, if the goods or services so provided are either essential to preserve the life of the child or reasonably appear to the provider to be suitable to the child's or the family's economic situation;

1. a parent obligated to support the child is not liable to a nonmember of the family who has provided the child with goods or services if the parent obligated to support does not have custody of the child and, if subject to a court decree ordering payments in the child's behalf, has fully complied with the financial terms of the decree;

E. by criminal prosecution, if a proceeding could be maintained under subsection A. and if the parent obligated to support a child under the age of [sixteen] persistently fails to provide support which the parent can provide and which the parent knows he or she is legally obligated to provide to the child.

3.4 Duration of the obligation to support.

A. The obligation to support a child should terminate when the child reaches the age of majority.

B. The obligation to support a child should terminate prior to his or her reaching the age of majority:

1. if and for so long as the child is married or if the child is managing his or her own financial affairs and is living separate and apart from a custodial parent or a nonparent who has custody of the child pursuant to an order of a court with guardianship, neglect, or delinquency jurisdiction, except when the child is living in a separate residence in connection with a judicial finding of endangerment;

2. when the parental rights of a parent obligated to support are terminated by a juvenile court pursuant to the *Abuse and Neglect* volume.

C. The obligation to support a child should not terminate when the person obligated to support dies.

PART IV: MEDICAL CARE

4.1 Prior parental consent.

A. No medical procedures, services, or treatment should be provided to a minor without prior parental consent, except as specified in Standards 4.4–4.9.

B. Circumstances where parents refuse to consent to treatment are governed by the *Abuse and Neglect* volume.

4.2 Notification of treatment.

A. Where prior parental consent is not required to provide medical services or treatment to a minor, the provider should promptly notify the parent or responsible custodian of such treatment and obtain his or her consent to further treatment, except as hereinafter specified.

B. Where the medical services provided are for the treatment of chemical dependency, Standard 4.7, or venereal disease, contraception, and pregnancy, Standard 4.8, the physician should first seek and obtain the minor's permission to notify the parent of such treatments.

1. If the minor-patient objects to notification of the parent, the physician should not notify the parent that treatment was or is being provided unless he or she concludes that failing to inform the parent could seriously jeopardize the health of the minor, tak-

ing into consideration:

- a. the impact that such notification could have on the course of treatment;
 - b. the medical considerations which require such notification;
 - c. the nature, basis, and strength of the minor's objections;
 - d. the extent to which parental involvement in the course of treatment is required or desirable.
2. A physician who concludes that notification of the parent is medically required should:

- a. indicate the medical justifications in the minor-patient's file; and
- b. inform the parent only after making all reasonable efforts to persuade the minor to consent to notification of the parent.

C. Where the medical services provided are for the treatment of a mental or emotional disorder pursuant to Standard 4.9, after three sessions the provider should notify the parent of such treatment and obtain his or her consent to further treatment.

4.3 Financial liability.

A. A parent should be financially liable to persons providing medical treatment to his or her-minor child if the parent consents to such services, or if the services are provided under emergency circumstances pursuant to Standard 4.5.

B. A minor who consents to his or her own medical treatment under Standards 4.6-4.9 should be financially liable for payment for such services, and should not disaffirm the financial obligation on account of minority.

C. A public or private health insurance policy or plan under which a minor is a beneficiary should allow a minor who consents to medical services or treatment to file claims and receive benefits, regardless of whether the parent has consented to the treatment.

D. A public or private health insurer should not inform a parent or policy holder that a minor has filed a claim or received a benefit under a health insurance policy or plan of which the minor is a beneficiary, unless the physician has previously notified the parent of the treatment for which the claim is submitted.

4.4 Emancipated minor.

A. An emancipated minor who is living separate and apart from his or her parent and who is managing his or her own financial affairs may consent to medical treatment on the same terms and conditions as an adult. Accordingly, parental consent should not be required,

nor should there be subsequent notification of the parent, or financial liability.

1. If a physician treats a minor who is not actually emancipated, it should be a defense to a suit basing liability on lack of parental consent, that he or she relied in good faith on the minor's representations of emancipation.

4.5 Emergency treatment.

A. Under emergency circumstances, a minor may receive medical services or treatment without prior parental consent.

1. Emergency circumstances exist when delaying treatment to first secure parental consent would endanger the life or health of the minor.

2. It should be a defense to an action basing liability on lack of parental consent, that the medical services were provided under emergency circumstances.

B. Where medical services or treatment are provided under emergency circumstances, the parent should be notified as promptly as possible, and his or her consent should be obtained for further treatment.

C. A parent should be financially liable to persons providing emergency medical treatment.

D. Where the emergency medical services are for treatment of chemical dependency (Standard 4.7); venereal disease, contraception, or pregnancy (Standard 4.8); or mental or emotional disorder (Standard 4.9), questions of notification of the parent and financial liability are governed by those provisions and Standards 4.2 B., 4.2 C., and 4.3.

4.6 Mature minor.

A. A minor of [sixteen] or older who has sufficient capacity to understand the nature and consequences of a proposed medical treatment for his or her benefit may consent to that treatment on the same terms and conditions as an adult.

B. The treating physician should notify the minor's parent of any medical treatment provided under this standard, subject to the provisions of Standard 4.2 B.

4.7 Chemical dependency.

A. A minor of any age may consent to medical services, treatment, or therapy for problems or conditions related to alcohol or drug abuse or addiction.

B. If the minor objects to notification of the parent, the person or agency providing treatment under this standard should notify the parent of such treatment only if he or she concludes that failing to inform the parent would seriously jeopardize the health of the minor, and complies with the provisions of Standard 4.2.

4.8 Venereal disease, contraception, and pregnancy.

A. A minor of any age may consent to medical services, therapy, or counseling for:

1. treatment of venereal disease;
2. family planning, contraception, or birth control other than a procedure which results in sterilization; or
3. treatment related to pregnancy, including abortion.

B. If the minor objects to notification of the parent, the person or agency providing treatment under this standard should notify the parent of such treatment only if he or she concludes that failing to inform the parent would seriously jeopardize the health of the minor, and complies with the provisions of Standard 4.2.

4.9 Mental or emotional disorder.

A. A minor of fourteen or older who has or professes to suffer from a mental or emotional disorder may consent to three sessions with a psychotherapist or counselor for diagnosis and consultation.

B. Following three sessions for crisis intervention and/or diagnosis, the provider should notify the parent of such sessions and obtain his or her consent to further treatment.

PART V: YOUTH EMPLOYMENT

5.1 Employment during school.

A. No minor below the age of sixteen who is required to attend school should be employed during the hours in which he or she is required to be in school, as indicated on the work permit. See Standard 5.4.

1. This prohibition should not apply to a minor employed during school hours in a school sanctioned work-study, vocational training, or apprenticeship program.

5.2 Minimum age of employment.

A. No minor below twelve years of age should be employed in any occupation, trade, service, or business:

1. except that, with the consent of the minor's parent, no minimum age limitations or restrictions should apply to a minor employed:

a. by his or her parent in nonhazardous occupations, as defined in Standard 5.3; or

b. by third parties in domestic service, casual labor, or as a youthful performer, provided that such exempt services should not be performed by a minor required to attend school during hours in which the school is in session. See Standard 5.1.

5.3 Employment in hazardous activities.

A. No minor below sixteen years of age should be employed in any occupation determined to be hazardous.

B. The secretary of labor [or state labor commissioner] should promulgate specific standards and regulations defining what occupations are hazardous.

1. The secretary should regularly review and investigate to determine if a particular occupation or employment should be added to or deleted from the list of those which are hazardous.

C. The prohibition on employing minors in hazardous activities does not apply to a minor fourteen or older who is employed in or supervised under a state or federal apprentice training or work-study program in which the minor receives training and supervision.

5.4 Work permit as proof of eligibility of employment.

A. No minor below sixteen years of age should be employed without presenting to an employer or prospective employer a permit to work, which is the sole basis by which eligibility to work should be established.

B. A work permit should be issued by or under the authority of the school superintendent of the district or county in which the minor resides, upon request by a minor, and upon a showing that the minor is at least twelve years of age, as established by a birth certificate or other reliable proof of age including the oath or affirmation of a parent.

C. The work permit should contain the following information:

1. the name, address, and description or picture of the minor;
 2. the date of birth of the minor;
 3. the name, address, and position of the issuing officer;
 4. the date of issuance of the permit;
 5. the hours during which the minor is required to attend school, and when his or her employment is thereby prohibited;
- and

6. a statement that no minor under sixteen years of age may work during school hours, or in hazardous activities, except as part of a recognized work-study or apprentice program.

D. Every employer should require a minor employee or prospective employee to furnish a work permit as proof of age and authorization to be employed.

1. Every employer should obtain a copy of the work permit from the issuing officer and retain it in his or her possession. An employer of a minor is entitled to rely upon such permit as evidence of age and legal hours of employment.

5.5 Enforcement of child labor laws.

Enforcement of the provisions of Standards 5.1-5.4 should be by civil fines.

5.6 Restrictions on hours of employment.

Adult and minor employees should be subject to the same restrictions on the total number of hours per day, or per week, or the actual hours during which they may be employed.

5.7 Compensation and minimum wage.

A. State and federal minimum wage laws should apply equally to minors and adults, without wage variations or differentials on the basis of age.

B. Persons performing similar work should receive similar compensation without regard to the age of the worker.

5.8 Workmen's compensation.

All minors, whether or not lawfully employed under the provisions of these standards, should be subject to the same rights and remedies as adults under applicable workmen's compensation laws.

PART VI: MINORS' CONTRACTS

6.1 Minors' contracts.

The validity of contracts of minors, other than those governed by other standards of this volume, should be governed by the following principles:

A. The contract of a minor who is at least twelve years of age should be valid and enforceable by and against the minor, as long as such a contract of an adult would be valid and enforceable, if:

1. the minor's parent or duly constituted guardian consented in writing to the contract; or

2. the minor represented to the other party that he or she was at least eighteen years of age and a reasonable person under the circumstances would have believed the representation; or

3. the minor was a purchaser and is unable to return the goods to the seller in substantially the condition they were in when purchased because the minor lost or caused them to be damaged, the minor consumed them, or the minor gave them away.

B. The contract of a minor who has not reached the age of twelve should be void.

C. Release of a tort claim by a minor should be valid, if an adult's release would be valid under the same circumstances:

1. if the minor is at least twelve years of age, if the release is approved by the minor, the minor's parent, and, if suit is pending, by the court; or

2. if the minor has not reached the age of twelve, if the release is approved by the minor's parent, and, if suit is pending, by the court.

Standards with Commentary

PART I: AGE OF MAJORITY

1.1 Age of majority.

All persons who have attained the age of eighteen years should be regarded as adults for all legal purposes.

Commentary

In 1971, the twenty-sixth amendment to the Constitution was adopted; it provides that “the right of citizens of the United States who are eighteen years of age or older, to vote, shall not be denied or abridged by the United States or by any State on account of age.” In the congressional hearings considering the proposed amendment, a variety of rationales was suggested in support of extending adult voting rights to persons aged eighteen to twenty-one. *S. Rep. No. 92-26, Senate Comm. on the Judiciary, 92d Cong., 2d Sess. (1971)*. Many of the supporting arguments centered on the favorable impact that integrating this sector of the populace into the political process would have. Sen. Jennings Randolph argued that participation by younger voters could have the beneficial effect of “forcing us all to take a ‘fresh look’ at our political system.” Former Presidential Assistant Theodore Sorenson urged passage as a matter of political morality, “[f]or the very essence of democracy requires that its electoral base be as broad as the standards of fairness and logic permit.” Dr. W. Walter Menninger, a member of the National Commission on the Causes and Prevention of Violence, was concerned about the lack of participation of younger voters under the present system. He hoped that extending the franchise might encourage younger voters to take a more active part in the political process “when they are still subject to the stimulation of courses in citizenship and American history.” Others suggested that integration into the political process might help defuse youthful alienation and unrest. There was a concern that “student unrest reflects the concern

of youth over the important issues of our day” and that democratic participation was a preferable alternative to disorder and protest. “We must channel these energies into our political system to give young people the opportunity to influence society in a constructive and peaceful manner.”

In addition to the political benefits from younger voters participating in the decisionmaking process, a number of affirmative arguments about the qualifications of young people were also advanced. As a group, those persons aged eighteen to twenty-one constitute the best educated segment of the entire population. A corollary to this is that they are as mentally and emotionally capable of participating responsibly as are older adults. Considerations of fairness also dictated legal equality since many persons in the eighteen to twenty-one age group already had assumed a number of adult responsibilities. A large proportion were married and raising families. More than one million were serving in the armed forces. It was believed that being able to vote would add legitimacy to this obligation. Several million other young people were full-time employees and taxpayers. In short, to a considerable degree, this age cohort had assumed a number of adult responsibilities. Extending the vote to encompass this group was simply a recognition of this fact.

Although formally, the twenty-sixth amendment only established the minimum age for voter qualification, many states used the opportunity to reconsider age of majority as it affected other legal rights and disabilities as well. Under the twenty-sixth amendment, it is still permissible for states to maintain higher ages for all privileges of adulthood and citizenship, except voting, and a few jurisdictions still maintain higher age limits. See, *e.g.*, Miss. Code Ann. § 1-3-27 (1972) (“The term ‘minor,’ when used in any statute, shall include any person, male or female, under twenty-one years of age”); Alaska Stat. § 25.20.010 (1965) (“A person is considered to have arrived at majority at the age of 19 years”). About two-thirds of the states, however, reduced the age of majority to age eighteen for most, if not all, legal purposes. See, *e.g.*, Vt. Stat. Ann. tit. 1, § 173 (1972) (“Persons of the age of eighteen years shall be considered of age and until they attain that age, shall be minors”); Ga. Code Ann. § 74-104 (1973) (“The age of legal majority in this State is 18 years; until that age, all persons are minors”). The states used a variety of statutory mechanisms to reduce the age of majority to eighteen. Some jurisdictions have explicit “age of majority” provisions. See, *e.g.*, Hawaii Rev. Stat. § 577-1 (Supp. 1975) (“All persons, whether male or female, residing in the State, who have attained the age of eighteen years, shall be regarded as of legal age

and their period of minority to have ceased”); Cal. Civ. Code § 25.1 (West 1973). Others accomplish the same result by redefining adult and minor in their statutory definition provisions. See, *e.g.*, Ariz. Rev. Stat. Ann. § 1-215(2), (4) (1974) (“‘Adult’ means a person who has attained the age of eighteen years. ‘Child’ or ‘children’ as used in reference to age of persons means persons under the age of eighteen years”). Minn. Stat. Ann. § 645.451(2)-(6) (Supp. 1975); Mass. Ann. Laws ch. 4, § 7 (1974). Other states include the definition of minority in the family law or domestic relations provisions. See, *e.g.*, N.Y. Dom. Rel. Law § 2 (McKinney Supp. 1975). Regardless of the mechanism employed, however, the majority of states have reduced the age of majority to eighteen for virtually all legal purposes.

It is the intention of the age of majority law to reduce the age of legal majority in this state from 21 years of age to 18 years of age for all purposes so that all persons who have reached the age of 18 shall have all the rights, privileges, powers, duties, responsibilities and liabilities heretofore applicable to persons who were 21 years of age or over. Ga. Code Ann. § 74-104.1 (1973).

The effect of such provisions is thus to eliminate all age-related legal disabilities for the eighteen to twenty-one age cohort.

A number of states, while reducing the age of majority to eighteen, left certain peripheral legal disabilities. The most prominent of these is eligibility to purchase alcoholic beverages. See, *e.g.*, Cal. Bus. and Prof. Code § 25658(a) (West 1964) (“Every person who sells . . . any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor”); Ariz. Rev. Stat. Ann. § 4-244(9) (Supp. 1975) (nineteen years of age). Other continuing legal limitations include eligibility to hold public office, ability to convey lands, and the like. Such restrictions are inconsistent with the general determination that persons eighteen to twenty-one years of age are capable of assuming adult responsibilities. The selective withholding of legal equality is demeaning, and based on the experience of states with full legal equality, probably unnecessary. Standard 1.1 rejects a position of selective or partial equality in favor of an across-the-board age of majority for all legal purposes.

In states where the age of majority was reduced to eighteen, some confusion was introduced with respect to preexisting legal obligations. What effect does such legislation have on preexisting support obligations which continue until “majority”? Some jurisdictions, anticipating the difficulties, included specific provisions in their

legislation which continued in force preexisting obligations. Only those entered into after enactment of the new age of majority statute reflected the lower ages. See, *e.g.*, Cal. Civ. Code § 25.1 (West 1973); Hawaii Rev. Stat. § 577-1 (Supp. 1975). Courts asked to give retroactive effect to the age of majority provisions have generally declined to do so, following a similar policy of continuing in force prior obligations. See, *e.g.*, *Daugherty v. Daugherty*, 308 So. 2d 24 (Fla. 1975), 1 Fam. L. Rep. 2217 (1975) (order for support payments until “majority” implies support until age twenty-one if agreement entered into prior to passage of new law); *Yaeger v. Yaeger*, 303 Minn. 497, 229 N.W.2d 137, 1 Fam. L. Rep. 2428 (1975) (same). As a general policy, Standard 1.1 would anticipate only prospective application. Once the legal transition is accomplished, much of the current legal confusion should dissipate.

Thus, Standard 1.1 follows the lead of a number of jurisdictions which establish the age of majority for all legal purposes at age eighteen. It eschews any selective withholding of legal equality as inconsistent and unnecessary. In doing so, it takes into account and gives legal recognition to the social reality that persons aged eighteen and over already engage in a vast range of adult responsibilities.

PART II: EMANCIPATION

2.1 A new approach to emancipation.

A. The legal issues traditionally resolved by reference to the emancipation doctrine should be resolved legislatively as aspects of the substantive doctrines which govern legal relationships between child and parent, between parent and parent, between child and nonmembers of the family, and between parents and nonmembers of the family.

B. Legislatively created, narrowly drawn doctrines which obviate the need for relying upon the vague criteria of the traditional emancipation doctrine should include the following principles:

1. a parent should not be permitted to recover from the child's employer wages due or paid by the employer to the child;
2. a child should be permitted to sue his or her parent and the parent should be permitted to sue the child for damages arising from intentional or negligent tortious behavior so long as the behavior is not related to the exercise of family functions.

C. Because legal disputes concerning the activities and needs of children will inevitably arise—between child and parent, between parent and parent, between child and nonmembers of the family,

and between parents and nonmembers of the family—and the disputes will arise in contexts and present legal issues which cannot be forecast legislatively, the legislature should also enact an emancipation doctrine of general applicability.

1. The doctrine should not permit emancipation by judicial decree.

2. The doctrine should be explicitly limited to issues not addressed by other standards of this volume and should authorize a finding of emancipation when a child, prior to the age of majority, has established a residence separate from that of his or her family, whether or not with parental consent or consent of a person responsible for his or her care, and is managing his or her own financial affairs.

Commentary

A. History and scope of the emancipation doctrine.

The “emancipation” doctrine was originally developed as a method to determine an employer’s right to pay wages to a child without having to account to the parent for the same wages. H. Clark, *Domestic Relations* § 8.3 (1968). The doctrine is now applied in a variety of contexts in which a court, in order to reach a just conclusion regarding, for example, the child’s right to support from a divorced parent or the child’s right to sue his or her parent for a tort, first makes a determination concerning the degree of control the parent has over the child and the amount of responsibility the parent bears, under all the circumstances, for the care and support of the child, and designates the result as “emancipation” or “nonemancipation.” 67 *C.J.S.* “Parent and Child” §§ 86, 88 (1950). See *Nohas v. Noble*, 77 N.M. 139, 420 P.2d 127 (1966) (parent may not sue child in tort when tort was committed prior to emancipation of child); *Koon v. Koon*, 50 Wash. 2d 577, 313 P.2d 369 (1957) (suit by divorced mother to enforce decree entitling child to support from father); *Allen v. Arthur*, 139 Ind. App. 460, 220 N.E.2d 658 (1966) (parent sues child’s employer in tort, claiming loss of unemancipated child’s wages).

In most instances, emancipation will be found only where the parent has consented, either expressly or implicitly, to the “emancipating” activities of the child. 67 *C.J.S.* “Parent and Child” §§ 86, 88 (1950): 59 *Am. Jur. 2d* “Parent and Child” § § 93, 95 (1971). In some situations the child may also become emancipated by his or her own act but the courts have not reached uniform results where the child’s acts alone are relied upon. See section C. in this com-

mentary. A child may also become either partially or generally emancipated, under certain legislatively prescribed circumstances, by judicial decree.

As a common law doctrine applied according to the circumstances of each case, emancipation is not coextensive with removal of the disabilities of minority defined by statute. Minors, through their own and their parents' actions, may be completely emancipated as regards reciprocal obligations of support and service, but if they are under age according to the relevant statute, they still will not be authorized to vote, drink, obtain a driver's license, or contract for goods or services without a cosigner. Even in those states that provide for a judicial decree of "complete" emancipation, the decree may only endow a minor with the rights of an adult as to management of property, making enforceable contracts, and entering professions; there remain certain privileges reserved for chronological adulthood only. See Tex. Fam. Code § 31.07 (1973) ("except for specific constitutional and statutory age requirements"); Okla. Stat. Ann. tit. 10, § 91 (1973) (emancipation allows the minor only "to transact business in general, or any business specified"). The conclusion that a minor is "emancipated," whether by case holding or by decree, eliminates only those disabilities of minority to which the facts of the case refer the court.

This self-limiting element of the emancipation doctrine has resulted occasionally in reference to the notions of "partial" and "temporary" emancipation. 67 *C.J.S.* "Parent and Child" § 86 (1950); 59 *Am. Jur. 2d* "Parent and Child" § 93 (1971). A child may be deemed "emancipated" for some purposes and not for others, and some courts term this status "partial" emancipation; such cases usually involve continuing parental obligations toward children who have established a certain degree of independence. See *Porter v. Powell*, 79 Iowa 151, 44 N.W. 295 (1890) (a child may have the right to keep her own wages and still call on her parent to pay her medical expenses); *P. J. Hunycutt & Co. v. Thompson*, 159 N.C. 29, 74 S.E. 628 (1912) (where a father barred his son from the family home and permitted him to earn wages, the son is emancipated as to keeping his wages and owing services to his father, but is not emancipated as to the father's obligation to provide necessities and care when the son takes sick and dies). Similarly, if the economic and living arrangements that would constitute grounds for a conclusion of emancipation are eliminated, restoring the relationship that pertains between an unemancipated minor and his or her parent, the minor may be said to have been only temporarily emancipated. See *Vaupel v. Bellach*, 261 Iowa 376, 154 N.W.2d

149 (1967), in which a nineteen-year-old unmarried son who had lived away from home and supported himself but had returned home to be supported once again by his mother, was held unemancipated and therefore not liable for contribution when he was driving a car in which his mother was injured due to the negligence of a third party. Essentially, a finding of "temporary" emancipation may be tantamount to a finding of nonemancipation for the purposes of the case at hand.

Both "partial" and "temporary" emancipation are illustrations of that element of the emancipation doctrine which makes its definition and application so elusive: the doctrine is used to determine that a minor is emancipated for some purposes and not for others. A conclusion regarding emancipation may be made in the course of determining a variety of very diverse legal issues: notice to parents that a minor is involved in criminal proceedings; the child's or a third party's liability for a contract; intrafamily tort immunity; the scope of parental support obligations; establishment of residence for purposes of federal diversity jurisdiction, voting, or state benefits such as welfare or state college admission. Because the courts are looking not to the meaning of the family's actions in terms of continuing interdependence but to a desirable result on the merits of the litigation, determinations of emancipation have been inconsistent and unpredictable. Where intrafamily relationships are similar but the legal issues differ, the conclusions concerning emancipation may also differ. This "for-what-purpose" element makes emancipation less a clarifying doctrine than an obfuscating collection of inconsistent conclusions.

B. Emancipation as a substantive law "facilitator."

In deciding whether a child is emancipated, the courts have actually weighed factors related to the substantive doctrines governing the legal dispute while purporting simply to apply traditional indicia of emancipation relating to the child's circumstances vis-à-vis the parents. Thus, if a minor is residing apart from his or her parents and has supported himself or herself for several months, with parental consent either expressed or implicit, the minor will be deemed emancipated or unemancipated in accordance with the court's view of the right involved. The inconsistencies in the doctrine produced by this substantive law focus make it practically useless as a predictive or regulatory device.

Protection of the minor's interests and expansive interpretation of parental obligations, regardless of emancipating circumstances, seems to be a paramount value in support cases; *e.g.*, a daughter living away from home and earning her own living is entitled to

parental support in payment of medical expenses. *Wallace v. Cox*, 136 Tenn. 69, 188 S.W. 611 (1916). See also *Cooper v. McNamara*, 92 Iowa 243, 60 N.W. 522 (1894) (presumption of parental liability for board and room not rebutted by son's living away from home, earning and keeping wages; court implied parental consent to the living arrangement from mother's failure to state clearly that she would refuse further support). A child who is supporting himself is still entitled to judicially decreed support from his divorced father, until the decree is modified. *Keve v. Steinberg*, 64 Misc. 2d 141, 314 N.Y.S.2d 273 (1970). And a minor son who has repeatedly defied his father's wishes, taken money for tuition and living expenses at a series of colleges from each of which he has withdrawn, and forged his father's name to a retail installment sale contract for a Corvette, may be entitled to continued support from the father because the father's failure to disavow responsibility for the child is an implied retention of control over the child's actions. *Bates v. Bates*, 62 Misc. 2d 498, 310 N.Y.S.2d 26 (1970).

On the other hand, where the interests of the minor seem to be served, the courts have found the minor emancipated in cases with very similar factual patterns. In *Lev v. College of Marin*, 22 Cal. App. 3d 493, 99 Cal. Rptr. 476 (1971), a nineteen-year-old unmarried minor, financially independent and living away from home with parental consent, was found to be emancipated for the purpose of establishing residence for public college admission. Another nineteen-year-old who moved to a different state from that of her parents, got a job, lived with her brother for three months, and then moved into her own apartment, was found to be emancipated for purposes of welfare settlement and was entitled to relief from the second state. *In re Fiihr*, 289 Minn. 322, 184 N.W.2d 22 (1971). Consent of parents was not discussed.

1. Right to wages cases.

Many of the older cases held an employer liable to the parents of a minor employee for wages earned by the minor, releasing the employer from such liability only upon a finding of either an explicit or implicit agreement on the part of the parent to let the child retain his or her earnings, or parental acquiescence over such a long period that it appeared equitable to allow the child to retain the wages. Annot., "What Amounts to Implied Emancipation of Minor Child," 165 *A.L.R.* 723 (1947).

Where the only issue is the child's right to keep his or her wages and the employer's right to avoid double payment, the courts may refer to the child as emancipated. *Surface v. Dorrell*, 115 Ind. App.

244, 57 N.E.2d 66 (1944) (daughter who lives away from home and spends her earned wages with no parental control, entitled to wages promised by her deceased grandmother, as against father's claim to earnings). Where right to the child's earnings is not the sole issue, however, and is only one element of a case involving other substantive issues, the question of emancipation may be treated differently. See, e.g., *Lufkin v. Harvey*, 131 Minn. 238, 154 N.W. 1097 (1915) (although parent condones child's hiring out for wages and spending wages as child sees fit, the child may not be emancipated so as to relieve parent of obligation to pay necessary medical expenses which the child cannot afford).

2. Intrafamily tort cases.

In dealing with questions concerning intrafamily torts, the courts have often intertwined application of the emancipation doctrine with their attitude toward the intrafamily immunity doctrine, arriving at emancipation results that can be explained only in relation to the particular court's leanings regarding the immunity doctrine. The rationales given for the immunity doctrine are that to allow intrafamily suits would destroy family harmony or, alternatively, would encourage collusive litigation in which nonmembers of the family (insurance companies) would bear the loss by fraud. The former rationale necessarily implies a rule that no actions can be allowed between a parent and an unemancipated child. Clark, *supra* at § 9.2. If the minor is emancipated, however, close family ties are already severed and the danger of collusion is considerably lessened. In an immunity rule jurisdiction, then, the child must be emancipated either to sue a parent or for contribution by either parent or child to be permissible if both are involved in a single accident. Where a court is uncomfortable with the immunity doctrine but does not want to abandon it altogether, the emancipation doctrine can be stretched to permit recovery. The flexibility of the concept, and the discretion it gives to courts in application, makes the emancipation doctrine admirably suitable for such uses.

Where the emancipation doctrine has been applied in a relatively straightforward way according to the traditional rationales of the intrafamily tort immunity doctrine, the results have been predictable. In *Warren v. Long*, 264 N.C. 137, 141 S.E.2d 9 (1965), a thirty-year-old mentally incompetent woman, physically and economically dependent on her family all her life except during a stay in an institution, unable to support herself and probably not marriageable, was found to be unemancipated and therefore unable to sue her mother for damages arising from an accident in which both were involved. See

also *Gilliken v. Burbage*, 263 N.C. 317, 139 S.E.2d 753 (1965) (tort action against parent permitted by child who had lived away from home, worked and kept own wages, and was not listed as dependent on father's tax return). But the emancipation question has also been addressed in a manner suggesting that it was manipulated to achieve a desired result. Thus, in *Perkins v. Robertson*, 140 Cal. App. 2d 536, 4 Cal. Rptr. 297, 295 P.2d 972 (1960), a son who earned his own wages and kept them and a blind daughter who managed her own affairs but could not earn a living, were deemed "partially" emancipated—that is, not emancipated—and could not sue their parent for negligence. *Carricato v. Carricato*, 384 S.W.2d 85 (Ky. 1964) (twenty-two-year-old daughter employed, but only occasionally contributing to family upkeep though living at home; court insisted on significance of an implied agreement with parents that she could manage her life as she wished). Some courts have simply avoided the emancipation issue by abolishing intrafamily tort immunity. See, e.g., *Falco v. Pados*, 444 Pa. 372, 282 A.2d 351 (1971) (unemancipated daughter may collect from her mother's insurance carrier for accidental personal injuries).

3. Diversity jurisdiction cases.

A minor who is unquestionably emancipated, as by the death of both parents and arrival at "an age of discretion," can acquire a domicile of his or her own choice which would be considered the minor's residence for the purpose of diversity jurisdiction. *Bjornquist v. Boston and Albany R. Co.*, 250 F. 929 (1st Cir. 1918). In less clear-cut circumstances, however, the federal courts have been swayed by policy considerations other than those relating to intra-family relationships when considering the question of a minor's ability to make use of the diversity jurisdiction of federal courts. Thus, in *Spurgeon v. Mission State Bank*, 151 F.2d 702 (8th Cir. 1945), cert. denied, 327 U.S. 782 (1945), the court found that an eighteen-year-old male who, with parental consent, had left home to "make his way in the world," moved to another state and worked there for three months until drafted, was emancipated for the purpose of establishing a domicile separate from that of his parents; since this domicile was the same as that of the bank he sued for false imprisonment, the case was remanded to state court for lack of diversity of citizenship federal jurisdiction. In *Curry v. Maxson*, 318 F. Supp. 842 (D. Mo. 1970), however, a twenty-year-old who had moved to Kansas and supported himself, and then returned to his grandmother's home in Missouri rather than his parental home upon learning that he was to be drafted, was held not to have es-

tablished a domicile in Kansas for purposes of diversity in a medical malpractice suit against a Missouri citizen, when the applicable statute of limitations would have barred suit in the state court. The result in *Curry* is attributable not to the application of emancipation standards but to a federal judicial policy to limit expansion of diversity jurisdiction when the result might be to interfere unduly with state policies.

C. Evidentiary indicia of emancipation.

Traditional indicia of emancipation, although not uniformly applied even in cases of identical substantive import, include: a judicial decree of emancipation in states whose legislatures have enacted such special legislation; marriage of the child; induction of the child into the armed services; establishment by the child of a domicile other than the parents'; establishment by the child of economic independence from his or her parents.

1. Statutory cause of action to remove disabilities of minority.

Statutory provisions for emancipation of minors may authorize either complete or partial emancipation. Where complete emancipation is provided for, the decree will have the effect of removing all disabilities of minority having to do with the transaction of business—"the right to sue and be sued, contract, to buy, sell and convey real estate, and generally to do and perform all acts which such minor could lawfully do if twenty-one years of age." Ala. Code tit. 27, § 17 (1973). See also Kan. Stat. Ann. § 38-108 (1973); Miss. Code Ann. § 93-19-9 (1972). The decree is granted upon petition to the appropriate court. In some cases the minor may petition the court in his or her own right. See Ala. Code tit. 27, § 13 (1973) (if parents dead or incompetent); Tenn. Code Ann. § 23-1201 (1973); Tex. Fam. Code § 31.01 (Vernon 1973). In several states only the parent or "next friend" has such standing under the statute. See Kan. Stat. Ann. § 38-109 (1973); Miss. Code Ann. § 93-19-3 (1972); Okla. Stat. Ann. tit. 10, § 92 (1973). The court usually has great discretion in deciding whether to grant such petitions; the statutory standard is usually simply "the best interest of the minor." Ala. Code tit. 27, § 13 (1973); Kan. Stat. Ann. § 38-109 (1973); Tex. Fam. Code § 31.02 (1973). Arkansas provides for a decree of emancipation with no substantive standard at all. Ark. Stat. Ann. § 34-2001, 34-2002 (1973). Emancipation by statutory provision may be only partial—a legislative recognition that the common law principle of emancipation may be applied in a deliberately limited manner so as to affect only certain rights or obligations. A judicial decree of emancipation may be limited by the terms of the order to specific

purposes. See Ala. Code tit. 27, § 18 (1973) (restrictions as to contracts with guardians, trustees, executors, other debtors of minor); Miss. Code Ann. § 93-19-9 (1973); Tenn. Code Ann. § 23-1205 (1973). Once entered, the decree may not be collaterally attacked. See *May v. Spivey Chevrolet Co., Inc.*, 241 Ark. 1098, 411 S.W.2d 528 (1967) (parent who obtained judicial decree of emancipation for her child, cannot maintain suit to modify decree).

2. Marriage.

Marriage of a minor, with or without parental consent, is usually deemed sufficient by itself to emancipate the child. Unless and until annulled, the marriage effects the minor's emancipation from his or her parent, *Kirby v. Gilliam*, 182 Va. 111, 28 S.E.2d 40 (1943), upon the theory that the child, by marrying, undertakes a status inconsistent with parental control and liability. A subsequent divorce obtained while the child was still a minor has been held not to obviate the emancipation so as to restore a father's support obligation. *Meyer v. Meyer*, 493 S.W.2d 42 (Kan. 1973). A number of early cases indicated that marriage may not in all cases emancipate the child so as to absolve parental authority and control. *People v. Todd*, 61 Mich. 234, 28 N.W. 79 (1886) (criminal prosecution of minor for nonsupport of wife dismissed for lack of testimony showing that minor was emancipated); *Austin v. Austin*, 167 Mich. 164, 132 N.W. 495 (1911) (in action by wife for temporary alimony, minor husband can defend on ground that he is not emancipated); *Guillebert v. Grenier*, 107 La. 614, 32 So. 238 (1902) (minor who left state to marry without parental permission held unemancipated for purpose of forcing mother to give accounting of tutorship). Nonetheless, the overwhelming majority of recent cases seems to conclude that, for all purposes during the marriage, a minor child is completely emancipated from his or her parents.

3. Military service.

Again on the theory that the minor has assumed a status inconsistent with parental authority and control, the general rule is that the minor's entrance into military service will effect emancipation from the parents. *LaVoice v. LaVoice*, 125 Vt. 236, 214 A.2d 53 (1965) (divorced father need not continue to provide support under temporary decree; duty ceases even without modification of decree). In some cases, the general rule has not been applied. In *Koon v. Koon*, 50 Wash. 2d 577, 313 P.2d 369 (1957), the minor did not move out of his mother's home while in the service; the court determined that the minor's status had not changed sufficiently to warrant relieving his divorced father of his duty to support. See also

Peacock v. Peacock, 212 Ga. 401, 93 S.E.2d 575 (1956), holding that a son who enters military service is still entitled to the father's support under a divorce decree. Despite a few such exceptions, courts generally conclude that a minor in military service is emancipated for all purposes and litigation centers on whether the emancipation is temporary or permanent. See *Dean v. Oregon, R. and Nav. Co.*, 44 Wash. 564, 87 Pac. 824 (1906) (parents may bring action for the death of their son, alleging loss of service, where there is evidence to show his intent to return home after discharge); *Fausser v. Fausser*, 50 Misc. 2d 601, 271 N.Y.S.2d 59 (1966) (status of child following discharge from military, for purposes of support payments from divorced father, depends on whether he returns to parental home and control).

4. Living apart.

A child's establishment of a residence separate and apart from that of the parents is a significant, though seldom solely determinative, factor in deciding questions of emancipation. See, for example, *Lev v. College of Marin*, 22 Cal. App. 3d 493, 99 Cal. Rptr. 476 (1971) (nineteen-year-old minor residing away from home emancipated for the purpose of establishing local residence to fulfill college admission requirements); *Buxton v. Bishop*, 185 Va. 1, 37 S.E.2d 755, 165 A.L.R. 719 (1946) (father not liable for medical expenses incurred by a twenty-year-old son who had lived away from home for three years). In such cases, separate residence has usually been only one factor among several considered by the court. Separate residence has rarely been sufficient alone to support a conclusion of total emancipation. Indeed, where the court deems it desirable to extend the protections of minority to the child, the fact of separate residence may be ignored. See the cases, *supra*, involving parental support obligations.

5. Economic indicia.

In many cases it is the minor's financial situation rather than whether he or she lives with the parents which determines emancipation. Control of wages, without more, has not been considered indicative of emancipation, since under present social conditions the child's right to keep his or her own wages is more often than not assumed. Therefore, that a child works and keeps his or her earnings is usually not advanced as a dispositive factor. A combination of various economic indicia, however, has often been deemed persuasive. If the minor is employed and living away from home, with control over his or her own financial affairs, the minor is often found to be emancipated. Even if the child is living at home, a large number

of economic indicia often leads to a similar conclusion. See *Carricato v. Carricato*, 384 S.W.2d 85 (Ky. 1964) (tort action by mother permitted against twenty-year-old daughter who was employed but living at home; daughter received meals without paying for board but contributed to the family upkeep when needed). See also *Gilliken v. Burbage*, 263 N.C. 317, 139 S.E.2d 753 (1965) (intrafamily tort action permitted); *Burton v. Burton*, 472 S.W.2d 620 (Mo. 1971) (support action against divorced father).

D. Need for reform of the emancipation doctrine.

The preceding description proves beyond doubt that the emancipation doctrine is extraordinarily well suited to manipulation by judges trying to shape a variety of substantive doctrines to which emancipation is pertinent. Yet whether those substantive doctrines are legislative or common law, judges should be required to expand or contract them in direct response to the policies they pursue. The standards in this volume, and Standard 2.1 specifically, seek to accomplish that goal. Standard 2.1 A. calls for legislative and judicial lawmaking which resolves a variety of parent-child issues—such as the age at which and the circumstances under which a father's support obligation ceases, when a merchant can look to a parent to take responsibility for a minor's purchase, when a child can obtain medical care without parental consent—in accordance with the policies which those problems imply. The remaining standards in this volume grapple with those issues in some detail.

It might be argued that the emancipation doctrine provides judges with just the flexibility they need—to temper unwise legislative policies and to soften ancient judicial doctrines without overruling them, as well as to expand and reinforce sound legislative and judicial policies. Flexibility in the judicial process is undeniably of value, even if to obtain it we must also have less predictability. Yet this volume of standards is designed to address the substantive issues anew—to devise rules which will not require amelioration by common law methods because they are encrusted with age and the idiosyncrasies of their historical roots. If there were no opportunity to reform the substantive doctrines, emancipation would continue to be a useful antidote; but this volume offers an opportunity both to reform the substantive doctrines and to direct the courts' attention to those factual considerations which should govern decision making about emancipation issues once the doctrine is freed of its role as a facilitator of substantive law. Should the substantive law reforms recommended in this volume subsequently become inadequate because of changes in behavior and lifestyles, legislative modi-

fication will be encouraged if an ameliorative doctrine such as the traditional emancipation doctrine is unavailable. In short, it is clear that the emancipation doctrine cannot be used to resolve the important current issues of child-parent controversy because its context is too narrow, because its precedents are too encumbered with historical accretions pertinent to a quite different society, and because—to put the matter bluntly—its use might lead to decisions which are not consistent with the freedom and discretion for teenage children which is the American norm in the 1970's.

E. Reform of emancipation doctrine.

Most of the questions which the traditional emancipation doctrine was used to answer are addressed in the standards which follow. Standard 2.1 B. is a diverse collection of legal rules which do not fit comfortably under the organization of this volume but must nonetheless be articulated because of the extensive attention they have received via judicial manipulations of the emancipation doctrine.

1. Standard 2.1 B. 1. deals with the factual situation through which the emancipation doctrine developed. It states a legal rule about minors' rights to wages. The standard reflects a legislative policy toward parent-child relationships (*e.g.*, that parents should not be permitted to control their children's earnings) rather than seeking to provide a method, as does the emancipation doctrine, for determining under what circumstances within the family should a conclusion that the child may control his or her own earnings be reached. There is likely to be little debate that the standard captures the typical practice in American families.

Needless to say, this standard does not preclude assertion of judicial jurisdiction over a child's earnings or assets in such settings as guardianship proceedings. For some analysis of this method of preserving a child's estate, see I. Weissman, *Guardianship, A Way of Fulfilling Public Responsibility for Children* (U.S. Children's Bureau Pub. No. 330, 1949). See also Standards 5.2 A. 1. b. and 6.1 *infra*.

2. Standard 2.1 B. 2. addresses itself to one of the major substantive areas in which the traditional emancipation doctrine has flourished—intrafamily tort suits. The standard makes all the subtle and conceptual distinctions irrelevant by making a policy choice that the intrafamily tort immunity should be abolished—a policy choice which is clearly the trend of the law. See W. Prosser, *Torts* § 122 (1971). Apparently, most appellate judges are rapidly becoming convinced that no harm is done to family values if a child can sue his or her parent for negligent driving so long as the parent is insured. See

Prosser, *supra* at 122. It is quite another matter to permit the child to sue the parent for a battery after an objectionable spanking, for invasion of privacy if the parent goes through the child's private possessions, etc. See Cooperrider, "Child and Parent in Tort: A Case for the Jury?" 43 *Minn. L. Rev.* 73 (1958). The exception carved out in the standard for intrafamily tort actions where the behavior is "related to the exercise of family functions" tries to limit the impact of the standard to suits where the real defendant is an insurance carrier. The phrase "exercise of family functions" is designed to confer immunity from suit for all behaviors that concern care, custody, control, discipline, and supervision of children by their parents. The exception is designed to capture the implications of the "family privacy" principle described at page 2 *supra*. The "family privacy" principle suggests that doubts with respect to interpretation of what is a "family function" should be resolved by an expansive reading of the exception—and the generality of its language will permit just that. However, there is substantial support for a contrary view of the family function exception. The ABA Family Law Section would delete the exception. A minority of the members of the committees reviewing these standards on behalf of both the Family Law Section and the Young Lawyers Division of the ABA endorsed the position espoused by Commissioner Patricia M. Wald in the Dissenting View appearing at page 121.

F. Legislative emancipation doctrine.

Although emancipation issues should always be determined as aspects of the substantive legal problem of concern, it is not possible for this volume to explore the myriad legal doctrines which make it relevant to ask whether a minor should be treated as an adult. Thus, these standards do not determine under what circumstances a minor should be permitted to obtain a federal forum. Nor does this volume examine a host of other issues: intrastate residence for purposes of college tuition costs; whether and under what circumstances a minor can transfer to a new school without parental consent; whether a parent must sign a minor's report card; and so on ad infinitum. See section A. in this commentary, *supra*. In any event, however assiduously legislatures address these issues, it is inevitable that some legal controversy will arise that could not have been (or was not) predicted when the legislature spoke on the substantive problems. There is a need, then, in these standards and in statute, for a general emancipation doctrine which will guide judges to the extent that the substantive doctrines do not. Standard 2.1 C. is designed to fill that need. The standard specifies that it will control decisions only if the legislature has not addressed the substantive problem directly. The standard seeks to eliminate much of the ar-

cane portion of the emancipation doctrine's common law tradition and to focus the courts' attention on a few relatively simple and factually appropriate evidentiary indicia. Thus, evidence would be introduced as to where the minor is living, whether he or she earns a living, pays his or her own bills, is listed separately in the telephone book, has his or her own charge accounts, etc. Parental consent is eliminated as a factor because evidence on such a question is difficult to assess, because in the past courts have commonly used parental consent or its absence as a post hoc justification for decisions based on other criteria, and because, in any event, the legal questions left unresolved by these standards should be resolved by reference to objective indicia of the minor's situation rather than by reference to the minor's relationship with his or her parents. The standard contains a negative recommendation as well: emancipation decisions should not be made by reference to a legislatively authorized, judicial decree of emancipation (Standard 2.1 C. 1.). Indeed, such statutes should be repealed. Their presence permits the legislatures to ignore the often difficult issues of substantive law which the emancipation doctrine supposedly resolves; most minors who establish and maintain economic and other relationships outside their immediate families are not likely to know about or be advised to seek judicial emancipation; the cost of such a legal proceeding, however minimal in some cases, should not be imposed as a matter of course on minors who want (or whose parents want for them) some measure of autonomy; and the inevitable generality and vagueness of the substantive standard for judicial emancipation (either by statutory language or judicial interpretation, the standard will become "the best interests of the minor") will provide judges with a degree of discretion in influencing family behavior which is inconsistent with the "family privacy" principle (see page 2 *supra*).

Some authorities, such as the ABA Family Law Section, would prefer the expansion of Standard 2.1 C. 2. to make explicit both the grounds and legal effect of emancipation. Thus, the Family Laws Section recommends amendment of the standard to provide that marriage results in emancipation, that additional grounds for emancipation also may be adopted by the states, and that the legal consequences of emancipation be stipulated by statute.

PART III: SUPPORT

3.1 Who is obligated to support.

A child entitled to support is entitled to support from each of his or her parents, natural or adopted, whether or not they are married.

Commentary

A. Although the early common law position was that parental support was a moral but not a legally enforceable obligation, child support is now required by statute in all states. Most often, the statutory obligation is imposed directly in divorce statutes and inferred from criminal nonsupport provisions and dependency and neglect statutes. See *Kelley v. Kelley*, 317 Ill. 104, 147 N.E. 659 (1925); *Dee v. Dee*, 9 Misc. 2d 964, 169 N.Y.S.2d 789 (1957). A variety of rationales have been given for requiring parental support: by bringing the helpless child into the world the parents incur a (natural) obligation to support it; the duty to support is correlative to the parents' right to the child's custody, control, services, and earnings; the burden for limiting public responsibility for persons unable to care for themselves falls logically on parents. 67 *C.J.S.* "Parent and Child" § 15 (1950); 59 *Am. Jur. 2d* "Parent and Child" § 51 (1971). Whatever the detail of the explanation, in historical or policy terms, it is clear that our society expects and demands that parents provide primary and (whenever possible) exclusive financial care for young children. There can hardly be any objection to this principle. It expresses a notion with which most parents would agree; it asserts one of the important bastions for the "family privacy" principle—a state which looks to parents to provide care and nurture for children has less justification for supervising parents' methods and the details of their care.

B. Traditionally and currently, the parental support obligation extends to a parent whether married or unmarried. Standard 3.1 reflects that tradition. The matter has become one of Constitutional compulsion. See *Gomez v. Perez*, 409 U.S. 535 (1973); *R. v. R.*, 431 S.W.2d 152 (Mo. 1968). Typically, of course, if the child is illegitimate a support obligation is enforced, if at all, against the unmarried father in a quasi-criminal paternity action. See Clark, *Domestic Relations* § 5.3 (1968); Standard 3.3 *infra*. But this standard imposes joint and several obligations upon *both* parents of a child. Because most paternity action statutes seem superficially to concentrate only on the unmarried father, they will have to be revised to take account of the mother's ongoing responsibility for half of the support burden. It is possible, to be sure, that judges in paternity actions do take account, informally, of the mother's responsibility in fashioning decrees, but no adequate empirical data exist to evaluate that possibility; adding the appropriate language to the statutes should ensure formal consideration of the mother's joint responsibility.

The support obligation of married parents should also be equal—

joint and several. The traditional focus on the father, initially and for some purposes and in some contexts exclusively, can probably be attributed to the economic disabilities of the wife which were part and parcel of the "husband and wife are one" (the unity) fiction in which the common law indulged, as well as the obvious fact that in most situations the father has been the parent in a better situation to discharge a support obligation. The mother's obligation to support was deemed to arise only if the father died or became incapable of support. See 67 *C.J.S.* "Parent and Child" § 16 (1950). This traditional allocation has been in the process of gradual change for several decades—at least when the rights of creditors intervene. Thus, a host of states have enacted "family responsibility" statutes which make both parents jointly liable to creditors. See, e.g., *Poydras v. Poydras*, 115 So. 2d 221 (La. App. 1963); *State v. Langford*, 90 Ore. 251, 176 P. 197 (1918). These statutes have not been consistently construed, however, and in some cases primary responsibility has been left with the father. See Annot., "Construction and Application of Statute Charging Father and Mother Jointly with Child's Care and Support," 131 *A.L.R.* 862 (1941). More recent legislative patterns, often described as "family expense" statutes, provide that expenditures of the family may be charged to either the husband or wife, and that the parents may be sued jointly or separately. 69 *A.L.R.2d* 203, 231 (1960). Standard 3.1 would require adoption of the "family expense" model.

This standard would also require that divorce support statutory provisions take specific account of both parents' assets and earnings as well as earning ability. A number of more recent court decisions do seem to reflect an increased interest in the mother's role in child support. Thus, there have been cases requiring a noncustodial mother to support her minor children. See, e.g., *Levy v. Levy*, 245 Cal. App. 2d 341, 53 Cal. Rptr. 790 (1966); *Barnhard v. Barnhard*, 252 Ark. 157, 477 S.W.2d 845 (1972) (financially able mother required to contribute to her child's support through college); *Beasley v. Beasley*, 159 N.W.2d 449 (Iowa Sup. Ct. 1968). Nor is the father automatically required to reimburse the mother for necessities supplied by her to their children. See, e.g., *Wills v. Baker*, 240 Mo. App. 705, 214 S.W.2d 748 (1948). See generally Note, "Domestic Relations: The Expanding Role of the Mother in Child Support," 27 *Ark. L. Rev.* 157 (1973). But see *Saltzman v. Saltzman*, 189 F. Supp. 36 (D.C. Pa. 1960) (husband must reimburse wife for expenses incurred thirty years previously for "necessaries" because husband is primarily responsible for children's support).

The Connecticut legislature has provided a rational framework

for allocating support responsibilities in the context of divorce that could well be emulated in pursuing the objectives of this standard. See Conn. Gen. Stats. Ann. § 46-57 (1973):

The parents of a minor child of the marriage, which child is in need of maintenance, shall maintain such child according to their respective abilities. In determining whether a child is in need of maintenance and, if in need, the respective abilities of the parents to provide such maintenance and the amount thereof, the court shall consider the age, health, station, occupation, earning capacity, amount and sources of income, estate, vocational skills and employability of each of the parents. . . .

C. This standard concerns itself solely with the parental duty to support. In recent years a number of jurisdictions have imposed some form of support obligation on some persons, such as a step-parent, standing in loco parentis to a child. See, e.g., N.Y. Dom. Rel. Law § 415 (McKinney 1964); Eng. Matrimonial Proceedings & Property Act 1970, ch. 45, § 27(1). See generally C. Foote, R. Levy, and F. Sander, *Cases and Materials on Family Law* 822-869 (2d ed. 1976). These new concerns obviously reflect legislative awareness of increases both in the divorce rate and in the extent to which individuals are forming stable but nonmarital families. *Id.* at 669-748. Because the issues are complex and in flux, and because of the impact of any rule on governmental welfare benefits (see *Lewis v. Martin*, 397 U.S. 552 [1970]), the IJA-ABA Joint Commission on Juvenile Justice Standards takes no position on what relationship to a child other than biological or adoptive parenthood justifies imposition of a support obligation.

3.2 Scope of support.

A child is entitled to such support from a person obligated to support as will permit the child to live in a manner commensurate with that person's means.

Commentary

A. Since support obligations are not commonly enforced directly while the family is an ongoing unit (see Standard 3.3, commentary A. *infra*, the scope of the support obligation often becomes relevant only in the context of a divorce or separate maintenance action or when a merchant sues a parent for goods or services provided the child. Note that Standard 3.3 D. establishes a requirement for

parental liability in a suit by a merchant which is narrower than this standard would impose in divorce actions. This dichotomy recognizes what the courts have in any case usually accomplished. The standard also establishes a sensible policy: when parents divorce, provision for the child should be as ample as the parents' means permit; but when the question is whether a nonmember of the family can hold the parents liable for extensions of credit to the child, a narrower scope for liability encourages caution on the part of the person who extends credit. See also Standard 6.1 A. 1. *infra*.

B. Early cases defined the support obligation as requiring that the child be provided with "necessaries"—usually construed to give the child a claim only for those items deemed essentials of living. The frugality of the standard was obviously affected by the extent to which the scope of the support obligation was articulated in suits by nonmembers of the family against parents for reimbursement. Most recent cases have expanded the scope of the obligation, measuring the child's need against the parents' ability to pay. Thus the rule is commonly phrased to require parents to maintain the child in a manner commensurate with the parents' means and station in life. See, *e.g.*, *Libby v. Arnold*, 161 N.Y.S.2d 798 (N.Y. Dom. Rel. Ct. 1957). Similarly, it is common for courts to claim authority to take into account the character and situation of the parties and all other circumstances. See, *e.g.*, *Holmes v. Holmes*, 255 Minn. 270, 96 N.W.2d 547 (1959). See also Conn. Gen. Stat. Ann. § 46-57 (1973).

It is clear that every child would be entitled to claim some level of support (above a juvenile court jurisdictional minimum), no matter how shabbily the child had been treated by his or her parent while the family was viable, so long as the parent could afford it.

Note that the standard does not include as an item for consideration the child's separate estate. In excluding that factor, the standard is not consistent with the law and practice in a number of states. See, *e.g.*, Conn. Gen. Stat. Ann. § 46-57 (1973), requiring the court to consider, *inter alia*, "the age, health, station, occupation, educational status and expectation, amount and sources of income, vocational skills, employability, estate and needs of the child." See also Mass. Laws Ann. ch. 201, § 41 (1974), a probate provision which requires use of the child's assets if the father's means are insufficient to support the child in his or her accustomed manner. See also Annot., "Child's Ownership of or Right to Income or Property as Affecting Parent's Duty to Support, or as Ground for Reimbursing Parent for Expenditures in that Regard," 121 *A.L.R.* 176 (1939).

The Uniform Marriage and Divorce Act § 309 (1970) also favors inclusion of the child's financial resources in determining the size of the support award. In most situations, of course, the issue will be of no importance because the child will have no separate estate worth considering; when the child has an estate, it is likely that the parents will be able to support the child so that the child's estate can be conserved for his or her adult years. Beyond these likelihoods, however, there is an important policy: if parents can afford to support a child they should do so. By looking to parents alone as the primary sources of support, we will indirectly encourage the parental responsibility which notions of governmental nonintervention presuppose.

D. These standards make no effort to establish principles to govern the myriad and complex procedural and substantive doctrines of divorce-child support law. Those doctrines vary considerably from state to state. We have focused here on what seem to be the most central issues in devising a conceptual scheme for child support.

3.3 Enforcement of support obligations.

The obligation to support a child may be enforced:

- A. by a suit brought by the child or on behalf of the child;
- B. by a parent who has custody of the child;
- C. by a nonparent who has custody of the child pursuant to an order of a court with guardianship, neglect, or delinquency jurisdiction;
- D. by a nonmember of the family, in a proceeding brought against either parent of the child to recover the price or the fair market value of any goods or services provided to the child, if the goods or services so provided are either essential to preserve the life of the child or reasonably appear to the provider to be suitable to the child's or the family's economic situation;
 - 1. a parent obligated to support the child is not liable to a nonmember of the family who has provided the child with goods or services if the parent obligated to support does not have custody of the child and, if subject to a court decree ordering payments in the child's behalf, has fully complied with the financial terms of the decree;
- E. by criminal prosecution, if a proceeding could be maintained under subsection A. *supra* and if the parent obligated to support a child under the age of [sixteen] persistently fails to provide support which the parent can provide and which the parent knows he or she is legally obligated to provide to the child.

Commentary

A. This standard is designed to explicate the various types of judicial enforcement of support techniques. Although 3.3 A. appears to allow child support actions by or on behalf of the child even in the context of the "ongoing family" in contravention of the family privacy notion which has infused this area of the law, see Introduction *supra*, the predominant trend of judicial decisions suggests that the power this standard authorizes will be used seldom and with restraint. *Cf. Roe v. Doe*, 29 N.Y.2d 188, 272 N.E.2d 567 (1971), in which a twenty-year-old college student obtained in the trial court a support award from her father, despite his disapproval of her living arrangements and her failure to abide by his demands. The court of appeals ordered the support award dismissed because the father's demands were reasonable. A concurring judge contended that courts should not "decide in every instance whether a father's conduct was unreasonable, arbitrary or capricious. It seems to me that this judicial intervention could lead to a perilous adventure upon which the courts of this State have been loath to embark." 29 N.Y.2d at 191, 272 N.E.2d at 571 (concurring opinion). The standard thus incorporates the view expressed by those statutes which appears to permit a child in an ongoing family unit to sue a parent for support. See N.Y. Family Ct. Act § 212 (1975); Tex. Fam. Code § 11.01 (1973). There have been a few cases which permit a child or a representative of the child to sue the parent for support when there is no independent basis, such as a divorce or separate maintenance action, for judicial jurisdiction. The cases are collected in Annot., "Maintenance of Suit by Child, Independently of Statute, Against Parent for Support," 13 *A.L.R.2d* 1142 (1950). Many of the cases in which courts have accepted jurisdiction have involved families strained to the point of disruption. See *Simms v. Simms*, 49 Hawaii 200, 412 P.2d 638 (1966) (mother had refused to obtain a divorce or to sue for separate maintenance); *McQuade v. McQuade*, 145 Colo. 218, 358 P.2d 470 (1961).

Authorizing judicial jurisdiction for such suits, even if the jurisdiction will seldom be exercised, reflects a value preference. See, *e.g.*, Wald, "Making Sense Out of the Rights of Youth," 4 *Human Rights* 13, 17 (1974):

Thus, in situations where the interests of the child (no matter his age) and the parents are apt to conflict or a serious adverse impact on the child is likely to be the consequence of unilateral parental

actions, it is now argued that the child's interests deserve representation by an independent advocate before a neutral decisionmaker.

Moreover, that value preference obviously rests on a series of psychological and social premises about family life:

. . . [A] fundamental reason why children's rights has emerged as a serious topic at all is the erosion in confidence in the family [reliably] to meet all the needs of the child. . . Intact families whose members love and respect each other would not be likely to disintegrate if there were to be a different allocation of rights and privileges within the family. I would wager that most strong family units already allow their children the freedom we are talking about. It is the borderline, shaky or unstable family structures that might split open when the lines of authority become more blurred. These are also the high risk families in which abuse and exploitation of children are most likely to occur, and where children most need an affirmation of their basic rights. Subconsciously, we may worry that parents will say "why should I feed, house and educate you if you won't do what I say; if, in short, I can't control you?". . . I do not think we have any evidence that the viability of the family will be jeopardized by more freedom for the children or, indeed, that the continuation of its present rigid power structure is essential to preservation at all. . . Wald, *supra* at 23-24.

But see Levy, "The Rights of Parents," 1976 *B.Y.U.L. Rev.* 693.

Although Standard 3.3 A. authorizes judicial jurisdiction to enforce support at the behest of a child in an ongoing family, as the New York Court of Appeals majority indicated in *Roe v. Doe*, 29 N.Y.2d 188, 272 N.E.2d 567 (1971), a "rule of reason" is obviously intended. It is unlikely, for example, that a teen-age daughter, deprived of her weekly allowance because her grades have fallen below parental expectations, would sue her parents for "support." But if such a suit were brought, this standard should not be construed to authorize judicial supervision of family life in such essentially petty cases. Indeed, the jurisdiction recommended here would be utilized, in all probability, only in cases involving intrafamily disputes about the level of parental support where the parents have in fact breached, or have come close to breaching, societally acceptable minima as expressed in juvenile court neglect statutes. See also Standard 3.3 C.

B. Standard 3.3 B. includes the most obvious and usual source of judicial jurisdiction—when the parents separate and one or both of them want a judicial decree either to terminate the marriage or to regularize their separate lives. The standard makes no effort to

articulate the vast body of law relating to support issues, *e.g.*, matters relating to jurisdiction in interstate contexts, criteria for decree modifiability, reduction of accrued awards to judgment. The detail of such matters is better left to development by individual states in light of their traditional practices. For some of the idiosyncrasies which have affected decisions akin to those addressed in Standard 3.3 B., see Annot., "Right of Child to Enforce Provisions for His Benefit in Parents' Separation or Property Settlement Agreement," 34 *A.L.R.3d* 1357 (1970).

Standard 3.3 articulates several policies which merit special attention. A legal custodian of the child can enforce the support obligation whether or not he or she has physical custody of the child (Standard 3.3 B.). A nonparent can enforce the support award of a juvenile court if that person has been given legal custody of the child (Standard 3.3 C.). But no independent action for support is permitted to a nonparent who does not have legal custody; where a juvenile court has taken jurisdiction, it is sufficient that the foster parent may petition the juvenile court for relief if the parents are not providing required support.

C. Standard 3.3 D. is an effort to give new expression as well as new content to the traditional "necessaries" doctrine. That doctrine has in the past been used to determine whether a merchant who sold on credit to a child could hold the parents liable for the child's purchase. See also Standard 6.1 *infra*. "Necessaries" have been defined as those goods and services appropriate to the support of the child, bearing in mind the obligor's means and the child's needs. The category has been construed to include not only food, clothing, and shelter, but also, on occasion, medical, legal, and educational services, and the use of credit. But the doctrine has hardly been successful. The tradesman must decide, when extending credit to the child, whether a court will subsequently agree that the goods and services were in fact "necessary." The result has been that, on some occasions, merchants' reasonable expectations as to parental liability have been defeated and, on other occasions, minors have been unable to make purchases from cautious merchants. See generally H. Clark, *Domestic Relations* § 6.3 (1968). In addition, a number of states have required the merchant to prove in such actions that the parent obligated to support has himself or herself failed to provide sufficient "necessaries" to the child. See, *e.g.*, Tex. Fam. Code § 4.02 (1973); Cal. Civ. Code § 207 (1973). Such a requirement obviously compounds creditors' difficulties. The problems are made more complex by the intricacies of spousal support doctrines in many states. Thus, if the state law provides that the father is pri-

marily liable for child support and the mother liable only secondarily, a suit by a merchant against the custodial mother might fail; or a court might permit the merchant to recover because the mother can sue the father for reimbursement of costs expended in support of the children. *Cf. Dilger v. Dilger*, 271 S.W.2d 169 (Tex. Civ. App. 1951). If, on the other hand, the parents are considered jointly liable for support, an independent action brought by the divorced mother as a "third party supplier of necessaries" would probably fail. Finally, in a number of states if the obligor has already given the child money for a particular "necessary," the merchant cannot hold the obligor liable for the child's purchase on credit. See Clark, *supra* at 191. In addition to relying upon the "necessaries" doctrine, a merchant may be able to look to agency principles—if the obligor had expressly or apparently authorized the purchase. See W. Seavey, *Agency* § 14C (1964); *Saks & Co. v. Bennett*, 12 N.J. Super. 316, 79 A.2d 479 (1951). But the support obligation does not per se create such an agency and merchants do not obtain much security from the existence of the doctrine.

Standard 3.3 D. is designed to obviate most of the arcane learning of the "necessaries" tradition. Although still of necessity both general and to some extent subjective (*e.g.*, the merchant must decide whether the goods or services are essential to preserve the life of the child, or, in the alternative, whether they are suitable for the family's economic situation), the test looks to the reasonableness of the merchant's behavior and eliminates a variety of those traditional defenses which have made the merchant's extension of credit to the child most precarious. Note that the rule permitting suit by a merchant against a support obligor deliberately imposes on the parents a less onerous financial responsibility than does the support doctrine articulated in Standard 3.1 and enforceable directly against a parent under Standard 3.3 A. and B. Since the merchant can protect himself or herself by inquiry of the parents, and under some circumstances by demanding cash (see Standard 6.1 *infra*), it seems appropriate to limit parental liability in some fashion. Parents are given some protection, therefore, by contracting the scope of the items for which they can be held liable to third party merchants and providers of services. The standard would apply to, and therefore protect the interests of, any "nonmember of the family." The phrase is vague, of course, but designed to include all merchants and suppliers (even if related) who have a commercial rather than familial interest when they serve the child. In suits authorized by this standard, the merchant or supplier will normally be able to recover the price of an item or service provided the child if a price

was set or bargained for. It is possible, of course, in the case of overreaching by the merchant or collusion by the merchant with the child, that other common law contract doctrines might permit the parents to limit recovery to some lesser amount. See also Standard 4.3 *infra*.

Although the term "suitable to the child's or the family's economic situation" may appear ambiguous, it should be construed as restricting reimbursement to those goods and services which reasonably appear to the provider to be of a kind that the parent would have approved if consulted at the time the goods or services were provided.

The exception articulated in Standard 3.3 D. 1. is designed to give some protection to the noncustodial spouse, typically the divorced father, who is appropriately fulfilling his obligations under a judicial decree. The noncustodial parent typically has much less control of the behavior of the child than does the custodial parent and should not be required to "pay twice" if the child makes independent purchases. Moreover, the merchant can still look to the custodial parent to make good on the purchase. Implicitly, this exception would eliminate the traditional defense of either parent that the child received money directly for the purchase—a risk that the merchant should not be required to take. Where there is no court decree of support, the merchant may sue either parent; since liability is joint and several under Standard 3.1, the parent sued should be able to obtain indemnification from the other parent for half the liability.

D. Standard 3.3 E. is taken from Model Penal Code § 230.5 (Proposed Official Draft 1962), which provides that violation of the support obligation is a misdemeanor. Although at common law nonsupport was not criminal, every state currently imposes a criminal penalty on a parent who willfully deserts or fails to support his or her child. According to most of the cases the obligor cannot be found guilty if he or she is in compliance with a judicial support order, even if the child is nonetheless not receiving adequate support. Good cause for failing to support is also considered exculpatory under most state statutes; moreover, misbehavior by a custodial parent has often been held to preclude criminal conviction of the other spouse. The current statutes often limit the criminal sanction to failure to support a child below some age, usually between sixteen and eighteen—less than the age to which the support obligation extends—reflecting both a policy of limiting criminal penalties and the notion that older children should contribute in some measure to their own support.

There has been considerable academic dispute as to the wisdom of the criminal sanction. Compare Willging and Ellsmore, "The 'Dual

System' in Action: Jail for Nonsupport," 1 *Toledo L. Rev.* 348 (1969) with Jones, "The Problem of Family Support: Criminal Sanctions for the Enforcement of Support," 38 *N.C.L. Rev.* 1 (1959). The argument against the sanction is that jailing the obligor parent, or compelling his or her extradition from another state, in fact reduces the likelihood of obtaining support for the child. The criminal penalty is self-defeating. A criminal record often makes it difficult or impossible for the parent to retain a job or to obtain a new job, and prosecution ignores the interests of the obligor's second family. On the other hand, it is clear that the criminal sanction may have a coercive effect and sometimes produces financial aid for a child which the child would not otherwise obtain. Whether or not the resentment produced by prosecution will do more to undermine the obligor's willingness to support in the future than it does to produce cash for the child at the moment of prosecution cannot be ascertained from the data presently available.

Although the objections to use of the criminal sanction are well known, no state has repealed its provisions. It is likely, however, that they are used sparingly and only after all efforts at support enforcement through civil process have failed. Moreover, since most of the statutes provide for suspension of sentence if the obligor gives assurance of future payment of a specific amount, the criminal sanction in operation closely resembles civil enforcement of support via the contempt sanction. Procedures in the criminal action are geared to traditional criminal law standards. See generally Clark, *supra* at § 6.5.

3.4 Duration of the obligation to support.

A. The obligation to support a child should terminate when the child reaches the age of majority.

B. The obligation to support a child should terminate prior to his or her reaching the age of majority:

1. if and for so long as the child is married or if the child is managing his or her own financial affairs and is living separate and apart from a custodial parent or a nonparent who has custody of the child pursuant to an order of a court with guardianship, neglect, or delinquency jurisdiction, except when the child is living in a separate residence in connection with a judicial finding of endangerment;

2. when the parental rights of a parent obligated to support are terminated by a juvenile court pursuant to the *Abuse and Neglect* volume.

C. The obligation to support a child should not terminate when the person obligated to support dies.

Commentary

A. The right to support from parents has not traditionally been, nor should it be, lifelong. Almost uniformly (with an exception considered below), courts have limited the parents' obligation to the period prior to the age of majority. See *Gaidos v. Gaidos*, 48 Wash. 2d 276, 293 P.2d 388 (1956). Standard 1.1 *supra* recommends that the age of majority be uniformly reduced to eighteen for all purposes. Thus, it is clear that Standard 3.4 A. will produce less support for many "children." That result is inescapable without permitting the obligation to extend beyond the age of majority; more important, it is the correct result. If it is appropriate to consider persons who have reached the age of eighteen as adults for all purposes (and, as Standard 1.1 indicates, there seems to be near consensus on that issue), it would be wrong to consider those persons dependent solely to impose additional financial obligations on their parents. Indeed, prolonging even the symbolic period of dependence to demand continuing financial support from parents would interfere with just those responsibilities of adulthood which it is the purpose of the new age of majority to recognize. Compare Annot., "Parents' Obligation to Support the Adult Child," 1 *A.L.R.2d* 910 (1948).

The recent statutes lowering the age of majority have produced a spate of litigation concerning the obligation of parents to support under extant divorce decrees which refer, variously, to "age of majority" or to "21 years of age." Important in the decisions in these cases were such factors as the age of majority when the decree was entered, whether or not the decree incorporated a separation agreement of the parties, and the specific language of the decree. In general, where the court has been able to construe a separation agreement as evidencing the parents' intention that support was to continue to age twenty-one, that intention has been given effect. See, e.g., *Kirchner v. Kirchner*, 465 S.W.2d 299 (Ky. 1971); *Waldron v. Waldron*, 13 Ill. App. 3d 964, 301 N.E.2d 167 (1973). Compare *Griffith v. Griffith*, 286 So. 2d 671 (La. App. 1973), *Ruhsam v. Ruhsam*, 21 Ariz. 101, 515 P.2d 1199 (1973).

One traditional legal problem which the lowered age of majority will help to solve, albeit not perhaps to the satisfaction of either children or those who favor "the rights of children," is the extent of a parent's responsibility for his or her child's college expenses. With a few exceptions (see Ill. Ann. Stat. ch. 40, § 19 [Smith-Hurd

1953], Ind. Ann. Stat. § 31-1-12-15 [Burns, Supp. 1974]), the state statutes have not been very helpful. Although many courts have held that they have no jurisdiction to enforce support for a child beyond the age of twenty-one, a number of recent decisions have simply looked at the parent's ability to pay and the child's capacity for college education and ordered the parent to continue support. See, e.g., *Schumm v. Schumm*, 122 N.J. Super. 146, 299 A.2d 423 (1973), holding that support may be ordered for the adult child. This result has often found favor in academic explorations of the problem. See Note, "The College Support Doctrine: Expanded Protection for the Offspring of Broken Homes," 1969 *Wash. U.L.Q.* 425; Note, "Family Law—Divorced Father May Be Compelled to Aid His Minor Child in the Custody of the Mother to Obtain a College Education," 109 *U. Pa. L. Rev.* 130 (1960); Note, "The Duty of a Father Under Pennsylvania Law to Support His Child in College," 18 *Vill. L. Rev.* 243 (1972). Standard 3.4 A. would deny courts authority to order a parent to finance his or her child's college education. There is no way to know, of course, how many fewer parents will in fact provide support during their children's educational years because they have no legal obligation to do so. It is only fair to assume that children of divorced parents are likely to be worse off in this regard than the children of intact families. Yet the symbolic and practical advantages of a reduced age of majority (and a uniform age of majority) are substantial. Although some college-age "children" may suffer, the advantage—to children and their parents—of lowering the age of dependence and decreasing the amount of judicial control of broken families through continuing litigation seems worth the price.

B. Standard 3.4 A. does not incorporate an exception to majority as the support-terminating device for children who are incapable of supporting themselves due to a mental, emotional, or physical disability. Such an exception is common but not universal. See H. Clark, *Domestic Relations* 505; Annot., "Parents' Obligation to Support Adult Child," 1 *A.L.R.2d* 910 (1948). See also *Hutton v. Hutton*, 284 Ala. 91, 222 So. 2d 348 (1969) (support payments for epileptic son terminate at age twenty-one); *Pocialik v. Federal Cement Tile Co.*, 122 Ind. 11, 97 N.E.2d 360 (1951) (child who acquired disability prior to majority but after emancipation from parents not entitled to support as adult). These standards concern the care to which children are entitled and do not explore what classes of adults should be given the same protection. Notwithstanding this general principle, the executive committee of the ABA-IJA Joint Commission has endorsed the recommendation of the ABA

Family Law Section to extend the obligation of support beyond the age of majority when the child is enrolled in high school or an equivalent degree program. In the absence of specific guidelines modifying this general proposal (e.g., a maximum age cut-off for the support obligation), the executive committee's action should be construed as a policy recommendation rather than as an amendment to the standards. This interpretation, moreover, accords with this volume's general eschewal of commentary on the rights of dependent adults.

C. Standard 3.4 B. is an effort to formulate, for the purposes of support termination only, rules which determine when, short of majority, a child should no longer be permitted to look to his or her parents for support. For some indication of the need for clear and administrable criteria to replace traditional notions of emancipation, see Standard 2.1 *supra*. Yet there can be no doubt that there should be a doctrine which terminates support prior to majority if the child is in fact independent; the difficulty has been in determining how much independence makes the child independent.

It is not difficult to establish the inconsistencies and inadequacies of the traditional judicial doctrines. Marriage of the minor child, whether or not with parental consent, has usually been held to terminate parental support—at least as long as the marriage is not annulled. See Standard 2.1, commentary C. 2. *supra*. A minor's entry into the military service also terminates the support obligation, again on the theory that the minor has assumed a status inconsistent with parental authority and control, although a few cases reinstate the support obligation when the minor is discharged. See Standard 2.1, commentary C. 3. *supra*. Other factors relevant to, though not always conclusive proof of, emancipation for purposes of support, include assumption by the minor of a name other than that of the obligated parent, and the establishment by the minor of a residence separate from his or her parents, with or without their consent. See, e.g., *Niesen v. Niesen*, 38 Wis. 2d 599, 157 N.W.2d 660 (1968) (obligation of natural parent to support not terminated by son's assumption of stepfather's name); but see *Warshaw v. Ginsburg*, 245 Cal. App. 2d 413, 53 Cal. Rptr. 911 (1966) (son's assumption of stepfather's name—together with evidence of stepfather's ability to support—enough to terminate father's obligation, at least until child needs financial help). Similarly, if the child establishes a home separate from that of his or her parents, especially if the child is self-sufficient, many courts would terminate the parent's support obligation. See Annot., "What Voluntary Acts of Child, Other than Marriage or Entry into Military Service, Terminate Parent's Obligation to Support," 32 *A.L.R.3d* 1055 (1970); Note, "After *Roe v.*

Doe: A Reconsideration of Parent's Responsibility for the Insubordinate Minor Child Public Assistance Recipient," 38 *Albany L. Rev.* 125 (1973). See also *Wills v. Baker*, 240 Mo. App. 705, 214 S.W.2d 748 (1948) (father granted custody of children and made his home available to them; father not required to recompense his former wife for costs incurred by her to support children when without his consent they went to live with her); but see *Bates v. Bates*, 62 Misc. 2d 498, 310 N.Y.S.2d 26 (1970) (father liable to support twenty-year-old son despite his extremely disrespectful and disobedient attitude).

Standard 3.4 B. 1. would replace all of this arcane learning with a relatively simple and easy to administer test which looks to easily ascertainable criteria: if the child is married he or she is not entitled to support; if the child is managing his or her own financial affairs *and* is living separate from the parents he or she is not entitled to support. The decision with respect to marriage reflects a belief that, whether or not children need or will obtain parental financial help after marriage, they should consider themselves and be considered independent of their parents. The living apart rule also reflects a policy judgment—that children who are financially and residentially independent should also be independent of their parents' resources. It might be appropriate to emancipate a child who is financially independent even if the child continues to reside with his or her parents. But a great many of the children who now work for the extra money thought to be essential in an inflationary economy cannot realistically be considered independent; and the separate residence criterion offers a tidy and simple evidentiary rule which will at once minimize judicial discretion in emancipation decisions and give nonmembers of the family (*e.g.*, merchants) a much better benchmark for their decisions than would be available without the rule. The standard eliminates most of the oddities of traditional emancipation law. It is intended that the two most important traditional criteria, marriage and entry into the armed services, would continue to be automatic. If the child subsequently divorced and returned to the parental home (thus providing at least some objective evidence of return to a dependent relationship), the support obligation would be recreated. The nice distinctions between divorce and annulment would be abolished. Notice also that a change of the child's name would not affect the support obligation; if the child's name is important to the supporting parent, the parent can always seek judicial review of that decision as an aspect of the divorce decree—but the child should continue to receive support.

However, the obligation to support a child would not terminate automatically if the child establishes a separate residence because his or her parents have been guilty of neglect or abuse and there has been a judicial determination of child endangerment. Parents would not be relieved of their support obligations by conduct which forced their children to leave the family home in such cases.

D. Standard 3.4 B. 2. articulates what is the law in most jurisdictions. See *Weaver v. Garrett*, 13 Md. App. 283, 282 A.2d 509 (1971); Annot., "Adoption as Affecting Duty of Support or Assistance Otherwise Owed by Natural Parent to Child, or by Child to Natural Parent," 114 *A.L.R.* 494 (1938). But see N.J. Stat. Ann. § 9:2-20 (1973) (parental support obligation does not cease with termination of parental rights unless decree specifically so provides). If the state is willing to end the familial relationship (even at the voluntary petition of the parents), there should be no reason to tap the parents' financial resources for the benefit of the child. It seems likely that efforts to obtain continuing support for a child following a decree terminating parental rights can be explained either as a tax on middle class parents who want to be rid of a child, or as a punishment for lower class parents whose child is forcibly and permanently taken away.

E. The death of a parent has traditionally been considered an event which terminates the obligation to support prior to a child's majority, unless the parent had made an express or implied contract to support the child after the parent's death. *Layton v. Layton*, 263 N.C. 453, 139 S.E.2d 732 (1965); Annot., "Death of Parent as Affecting Decree for Support of Child," 18 *A.L.R.* 2d 1126 (1951). Although there has been general agreement that freedom of testation is entitled to greater weight than the continuing need of the child for financial support in the ongoing family, there has been considerable litigation concerning the divorce court's authority to modify a decree to continue support after a divorced parent's death. See H. Clark, *Domestic Relations* 505-507 (1968); *Guggenheimer v. Guggenheimer*, 99 N.H. 399, 112 A.2d 61 (1955) (under broadly-worded statute giving divorce court general authority to make reasonable provision for support of children, court can issue support order against decedent's estate where the child needs support). Since it has seemed likely that the child whose parents have divorced will be less well taken care of by the will of his or her non-custodial parent (commonly the father, who will commonly have larger earnings), it has been deemed fair to give divorce courts power to continue the child's support from the deceased parent's estate.

See, *e.g.*, Uniform Marriage and Divorce Act § 316 (c) (1970):

Unless otherwise agreed in writing or expressly provided in the decree, provisions for the support of a child are terminated by emancipation of the child but not by the death of a parent obligated to support the child. When a parent obligated to pay support dies, the amount of support may be modified, revoked, or commuted to a lump sum payment to the extent just and appropriate in the circumstances.

Standard 3.4 C. goes beyond the Uniform Act to recommend legislation emulating European models of protection for dependent children even at the expense of the testamentary freedom of their deceased parents. For an analysis of the problem and some indication that American jurisdictions may soon begin to prefer the interests of children to the estate planning interests of their parents, see Foster, Freed, and Midonick, "Child Support: The Quick and the Dead," 26 *Syracuse L. Rev.* 1157 (1976). See also C. Foote, R. Levy, and F. Sander, *Cases and Materials on Family Law* 749-792 (2d ed. 1976). Although the IJA-ABA Joint Commission approved Standard 3.4 C. in principle, it decided that ramifications of the principle involved changes in the law too complicated and far reaching to be considered in the limited amount of time available to the commission. Thus, the commission left to individual state determination such questions as whether the support obligation should have priority over claims by creditors against an estate and whether the estate's obligation should continue for the balance of the child's minority or only for a limited time after the death of the obligor.

PART IV: MEDICAL CARE

4.1 Prior parental consent.

A. No medical procedures, services, or treatment should be provided to a minor without prior parental consent, except as specified in Standards 4.4-4.9.

B. Circumstances where parents refuse to consent to treatment are governed by the *Abuse and Neglect* volume.

Commentary

Establishing the conditions under which a minor may have access to medical services involves the interrelated questions of: the extent to which prior parental consent to such procedures is required; whether

subsequent notification or disclosure will be made to parents if treatments have been provided without obtaining prior approval; and who will be financially liable for medical services provided to a minor with or without parental consent or subsequent disclosure. These standards on medical care alter a number of statutory and common law doctrines which limit a minor's access to medical treatment and services. Under common law rules, minors lacked the legal capacity to validly consent to medical treatment or services on their own. Consequently, any medical procedures or treatments performed on them without first obtaining parental consent was tortious, a technical battery, and the treating physician was liable. See, e.g., Pilpel, "Minors' Rights to Medical Care," 36 *Albany L. Rev.* 462 (1972); Wadlington, "Minors and Health Care: The Age of Consent," 11 *Osgoode Hall L.J.* 115 (1973). Several common law exceptions to this restrictive rule evolved, permitting medical treatments in the absence of parental consent in the event of emergencies, or if the minor was emancipated, or "mature." Note, "Treatment of a Minor Without Consent and in the Absence of Statute," 8 *Wake Forest L. Rev.* 148 (1971). Recent statutes typically codify and elaborate these common law principles and exceptions. See, e.g., Ill. Ann. Stat. ch. 91, § 18.3 (Smith-Hurd 1972); Ala. Code tit. 22, § 104 (15)-(22) (Cum. Supp. 1972).

The minor's right to medical services provided in these standards, whether with or without parental consent, includes the right to refuse such care. This concept is consistent with a major principle underlying the standards—that services should be provided on a voluntary basis, subject to the juvenile's informed consent. See *Noncriminal Misbehavior* Standards 4.2 and 6.3, *Dispositions* Standard 4.2, *Youth Service Agencies* Standard 5.1, *Corrections Administration* Standard 4.10 E. However, where medical or mental health services are necessary to prevent clear harm to the juvenile's health, limited exception to the requirement of consent is provided.

These standards on medical care broaden minors' access to medical treatment by specifying for minors, parents, and medical professionals the treatments and services that minors may obtain on their own initiative without prior parental consent, subsequent disclosure to parents, or parental financial liability by assuring physicians that they may provide certain categories of treatments on the basis of the consent of the child alone. Treatments provided under this authority will not result in liability of the physician for failing to obtain parental consent.

Standard 4.1 states the operative norm, which is that in the absence of countervailing considerations, a minor may not obtain

medical treatments or services without prior parental consent. The requirement of parental consent for most types of medical treatment is limited to persons below the age of eighteen; see Standard 1.1 *supra*, which reduces the age of majority to eighteen for all purposes, including consent to medical treatment. A substantial number of states have either reduced the age of majority to eighteen for all purposes or enacted more limited statutes allowing persons eighteen or older to consent to medical treatment. See, e.g., Colo. Rev. Stat. Ann. § 41-2-13 (1971 Supp.); Del. Code Ann. tit. 6, § 2705 (1972); Ga. Code Ann. § 88-2904 (1971); N.C. Gen. Stat. § 90-21.5 (1971); N.M. Stat. Ann. § 13-13-1 (1971).

Requiring parental consent is consistent with the policies underlying the notion of family autonomy; limiting the circumstances for external intervention should strengthen family cohesiveness and internal decision making. The parental consent requirement would foster cohesiveness by contributing to the general knowledge of the welfare of family members, as well as enhancing parental responsibility for the protection of the minor's interests. The consent requirement assumes a certain deference to the family decision-making process unless some other consideration justifies overriding this value. Where countervailing policies dictate medical treatment, legislative authorization for the minor to seek treatment without regard to parental consent seems the most appropriate resolution. For most types of medical services, the interests of the parent and the minor in securing treatment will coincide and the problem of a parent refusing to consent will seldom arise. Where the treatments are related to chemical dependency, sexual activity, or emotional disorders—circumstances where the parent might refuse to consent or which could generate divisive intrafamily conflict—the social utility in providing medical treatment outweighs the potential negative impact that treatment without parental consent might occasion. These standards provide specific categories of exceptions; see, e.g., Standards 4.7–4.9 *infra*, which allow the minor to consent to medical services without reference to parental approval.

Apart from authorizing minors to consent to treatments and services for categories of medical problems that frequently generate intrafamily controversy, the general requirement of parental consent assumes the availability of juvenile court proceedings when a parent's refusal to consent to more routine types of treatment constitutes neglect, as defined in the *Abuse and Neglect* volume. See, e.g., *State v. Perricone*, 37 N.J. 463, 181 A.2d 751 (1962); Note, "Court-Ordered, Non-emergency Medical Care for Infants," 18 *Clev.-Mar. L. Rev.* 297 (1969). Parents may refuse to consent to

medical treatments if such treatments violate their religious beliefs or if they simply determine that the treatment is unnecessary. See, e.g., Note, "Judicial Power to Order Medical Treatment for Minors Over Objections of Their Guardians," 14 *Syracuse L. Rev.* 84 (1962); Annot., "Power of Public Authorities to Order Medical Care for a Child Over Objection of Parent or Custodian," 39 *A.L.R.2d* 1138 (1953). In the event that a parent refuses to consent, the child, a medical professional, social worker, or other interested party may initiate a neglect proceeding to determine whether the failure to consent constitutes neglect. See the *Abuse and Neglect* volume. Other than in cases of neglect, these standards on medical care provide no basis for juvenile court jurisdiction or intervention.

A number of cases illustrate the way in which courts balance the parents' normally broad authority over the child's welfare with the necessity to intervene "when failure to provide treatment has dire implications such as a threat to the life of the minor involved." Wadlington, "Minors and Health Care: The Age of Consent," 11 *Osgoode Hall L. Rev.* 115 (1973).

If the preservation of the child's life plainly requires an operation and negligible risk is involved, the courts will require the operation to be done. The best example of this is the case in which a blood transfusion was required to save the life of a new-born child, the parent refusing to allow it for religious reasons based on certain Biblical language. The Illinois Supreme Court ordered the operation to be performed, holding such an order to be within the State's power to protect its children from neglect as set forth in the dependency statute. . . . On the other hand, the courts are more reluctant to order operations upon children against the wishes of the parents when the child's life is not at stake, and when the operation is serious, painful, or dangerous. The leading case on this is *In re Hudson* [13 Wash. 2d 673, 126 P.2d 765 (1942)], refusing to order the amputation of a child's deformed arm where the medical testimony was that such an operation was dangerous but necessary to improve the child's health and enable her to lead a more normal life.

On the borderline between the operation involving minimal risk and the serious dangerous operation lies *In re Seiferth* [309 N.Y. 80, 127 N.E.2d 820 (1955)], which arose because the father of a fourteen year old boy refused to permit him to be operated upon for removal of a harelip and cleft palate. The refusal was for religious reasons. The operation would have involved little risk and would become more difficult with the passage of time. The boy's life was not at stake, but his chance for a normal life was. The court held that the trial court properly left the matter to the boy's choice, largely on the ground that his cooperation in speech therapy would be required after the operation and that

this would only be given if he consented to the operation. The trial judge indicated that if the boy had been younger, the operation would probably have been ordered. The disposition of this case is an excellent illustration of the way in which the courts attempt to reconcile the interests in preserving the family from state control with the interest in protecting children from avoidable physical harm. H. Clark, *Domestic Relations* § 17.2 (1968).

The results in these and similar cases reflect efforts by courts to strike a balance between the preservation of family autonomy and integrity—as manifest in the requirement of parental consent—and the state's interest in preventing avoidable physical harm to children. These standards on medical care will strike such a balance by providing an independent right of access to medical services by a minor regardless of parental approval where countervailing social policies dictate. Apart from these exceptional treatments, Standard 4.1 A. provides that parental consent should be obtained or the refusal of such consent litigated in a neglect proceeding.

4.2 Notification of treatment.

A. Where prior parental consent is not required to provide medical services or treatment to a minor, the provider should promptly notify the parent or responsible custodian of such treatment and obtain his or her consent to further treatment, except as hereinafter specified.

B. Where the medical services provided are for the treatment of chemical dependency, Standard 4.7, or venereal disease, contraception, and pregnancy, Standard 4.8, the physician should first seek and obtain the minor's permission to notify the parent of such treatments.

1. If the minor-patient objects to notification of the parent, the physician should not notify the parent that treatment was or is being provided unless he or she concludes that failing to inform the parent could seriously jeopardize the health of the minor, taking into consideration:

- a. the impact that such notification could have on the course of treatment;
- b. the medical considerations which require such notification;
- c. the nature, basis, and strength of the minor's objections;
- d. the extent to which parental involvement in the course of treatment is required or desirable.

2. A physician who concludes that notification of the parent is medically required should:

a. indicate the medical justifications in the minor-patient's file; and

b. inform the parent only after making all reasonable efforts to persuade the minor to consent to notification of the parent.

C. Where the medical services provided are for the treatment of mental or emotional disorder pursuant to Standard 4.9, after three sessions the provider should notify the parent of such treatment and obtain his or her consent to further treatment.

Commentary

In a number of situations, these standards permit minors to receive medical treatment without the physician first obtaining parental consent. The medical treatment may be necessitated by an emergency (Standard 4.5), or the minor may be of sufficient maturity to consent to the treatment himself or herself (Standard 4.6). In addition, the standards also authorize minors to seek medical treatment in connection with chemical dependency (Standard 4.7); in connection with sexual activity, contraception, pregnancy, and the like (Standard 4.8); or in connection with a mental or emotional disorder (Standard 4.9). All of these treatments without prior parental consent will raise the issue of subsequent notification of the parent that treatment or services were or are being provided. The question of subsequent disclosure to the parent that the minor has received a particular form of treatment raises the question of the applicability of the physician-patient privilege to the range of treatments to which these standards permit minors to consent. At present, physicians may be legally obligated or feel a moral responsibility to advise parents that they have treated or are treating the minor in an emergency situation, for chemical dependency, venereal disease, pregnancy, emotional problems, or the like. Since one assumption underlying these standards is that for certain types of treatments the minor may object to parental notification or may even be deterred from seeking medical assistance if his or her parent will be informed, it is necessary to specify the circumstances under which a physician should inform the parents of the treatments sought or provided and those in which they should not be notified.

One of the principles of medical ethics is that "a physician may not reveal the confidences entrusted to him in the course of medical attendance . . . unless he is required to do so by law or unless it becomes necessary in order to protect the welfare of the individual or of the community." American Medical Association, *Principles of Medical Ethics* § 9 (1971) (emphasis supplied). Support for the

privilege is based on the belief that the physician is "the confidant of many intimate details of the patient's past . . . [and] it is generally felt among physicians that without some guarantee of secrecy the patient will be unable completely to trust his physician and, consequently, may bring harm to himself by being unable to reveal all the facts necessary to proper treatment." Note, "Legal Protection of the Confidential Nature of the Physician-Patient Relationship," 52 *Colum. L. Rev.* 383, 384 (1952). The primary requisite for the invocation of the privilege is that the "patient must have consulted the doctor for treatment or for diagnosis preparatory to treatment." J. Waltz and F. Inbau, *Medical Jurisprudence* 239 (1971). The confidentiality of communications between doctor and patient is recognized by state law. See, e.g. Cal. Evid. Code §§ 990-1007 (Supp. 1967); Minn. Stat. Ann. § 595.02 (Supp. 1967); Ill. Stat. Ann. ch. 51, § 5.1 (Supp. 1967). Physicians divulging confidential communications have been held liable for breach of contract or invasion of privacy. See, e.g., *Clark v. Geraci*, 29 Misc. 2d 791, 208 N.Y.S.2d 564 (1960); *Hague v. Williams*, 37 N.J. 328, 181 A.2d 345 (1962); Note, *supra*; Annot., "Doctors—Disclosure of Confidential Information," 20 *A.L.R.*3d 1109.

Despite the recognition of the privilege, there are a number of situations in which physicians may disclose information obtained from patients, for example, where there is a compelling public need, such as reporting incidences of venereal disease to public health boards, see, e.g. Cal. Health & Safety Code § 3051 (Supp. 1970); *Simonsen v. Swenson*, 104 Neb. 224, 177 N.W. 831 (1920). Courts have also held that "disclosure may, under compelling circumstances, be made to a person with a legitimate interest in the patient's health," *Hague v. Williams*, 37 N.J. 328, 181 A.2d 345 (1962) (disclosure to insurer of infant's pathological condition when parents applied for insurance on child's life). Clearly, parents have such a legitimate interest in their child's physical or mental health. However, few courts have had occasion to decide the question of what information a physician may reveal to the parents of a minor patient over the minor's objections; in part, this is because of the traditional common law framework requiring prior parental consent to treatment. But see *Alpin v. Morton*, 21 Ohio St. 536 (Ohio Sup. Ct. 1871) (physician liable for slander for telling mother that unmarried daughter was pregnant); *Kenny v. Gurley*, 208 Ala. 623, 95 So. 34 (1923) (physician not liable for telling parent that girl had venereal disease).

In jurisdictions where minors are permitted to consent to certain medical treatments on their own behalf, such as for treatment of

venereal disease, pregnancy, and contraception, legislatures have adopted several "disclosure" strategies to resolve the problem of physician-patient confidentiality when the patient is a minor. Some legislation provides that the physician *is not required* to notify the parent of the treatment, leaving it to the doctor's discretion. See, e.g., Colo. Rev. Stat. Ann. § 13-22-102 (1973); Maine Rev. Stat. Ann. tit. 32, § 3154 (Cum. Supp. 1972). Many jurisdictions reach a similar result by providing that the physician *may advise* the parent that the child is seeking treatment, but without specifying the circumstances or considerations that should govern this decision. See, e.g., Cal. Civ. Code § 34.6 (1971); Kan. Stat. Ann. § 65-2892 (Supp. 1970). Other jurisdictions permit disclosure when, in the physician's discretion, such notification would be beneficial to the minor's health, Ky. Rev. Stat. § 214.185 (1972), or in the alternative, failing to advise the parent would be detrimental to the minor's health, Minn. Stat. Ann. § 144.346 (1971). Several jurisdictions *require* physicians to notify the parent of positive diagnoses of venereal disease or pregnancy when the minor child has sought treatment at his or her own behest. See, e.g., Hawaii Rev. Stat. § 577A-3 (Supp. 1971); Iowa Code Ann. § 140.9 (1972).

The complexity of the issues and the variability in individual situations preclude adopting an absolute rule either barring disclosure or requiring notification under all circumstances where a minor has received medical treatment without prior parental consent. Nothing in this standard prevents the minor from informing the parent himself or herself, nor the physician, on the basis of sound medical judgment, from attempting to persuade the minor of the desirability of parental involvement. Rather, the standard attempts to resolve the physician's dilemma in those instances when the minor either expresses no position or voices opposition to parental disclosure.

In dealing with this issue of notification of parents, this standard distinguishes between those types of treatment in which the interests of the parent and the minor will normally coincide and where notification of parents is appropriate and mandatory, and those circumstances where the interests of parent and child may conflict and the minor may or does object and notification is discretionary. In the latter instances, the overriding social interests in enabling the minor to obtain the particular treatment dictate that unless the minor's health will be seriously jeopardized by failing to notify the parents, the minor's objection to disclosure should be honored by the treating physician.

Abuse and Neglect Standard 6.6 B. provides in part that when

children are removed from home, parents should retain the right to consent to major medical decisions unless parental consent is not normally required or the court finds that parental refusal of consent would be seriously detrimental to the child. This standard applies to temporary removal and not to permanent termination of parental rights.

Standard 4.2 A. states the general policy in favor of notifying the parents and seeking their consent to further treatment in situations where parental consent is not required. Standard 4.2 B. then provides an exception, permitting notification over a minor's objection only when medically justified and required.

The general policy favoring notification typically will apply where medical treatment is sought in an emergency situation or where a mature minor seeks more routine types of medical treatment. In most such instances, we assume that the minor-patient will not object to the physician notifying the parents of the circumstances and treatment. Where the minor is unable to consent, or objects, in the absence of some overriding consideration which normally will not be present, there is a strong parental interest in knowing about the medical condition of their child.

Standard 4.2 B. authorizes deviation from the norms of notification and consent of parents when compliance with these policies would inhibit the provision of needed medical treatment in certain identifiable medical problem areas where minors will be likely to require medical treatment; they are likely to object to parental notification; and the social desirability of providing services outweighs the potential negative impact of nondisclosure on family autonomy. In such instances, Standard 4.2 B. 1. permits parental notification when exceptional circumstances require, but suggests several factors and considerations that may weigh against parental notification. The importance of minors obtaining treatment for chemical dependency, or for venereal disease, birth control, and pregnancy; the potential deterrent effect that disclosure may have in a particular instance; and respect for the autonomy and independence of the minor in such circumstances, requires substantial respect for the minor-patient's objections to parental notification. Illustrative of this position is Minn. Stat. Ann. § 144.346 (1971) which accomplishes this result by providing that "The professional *may inform* the parent or legal guardian of the minor patient of any treatment given or needed *where*, in the judgment of the professional, *failure to inform* the parent or guardian *would seriously jeopardize the health* of the minor patient." (Emphasis supplied.) In these specific, excepted areas, Standard 4.2 B. 1. requires that,

in the first instance, the physician make an affirmative medical finding that parental notification is necessary for successful treatment, and that the failure to notify could have serious detrimental consequences for the minor's health. Such conclusions and the medical reasons supporting them should be included in the minor-patient's medical records and files. Even when such determination is made, Standard 4.2 B. 1. suggests that the physician should also consider the potential adverse consequences for treatment of parental notification over the patient's objections, including the possibility that the minor may terminate treatment rather than continue after parental disclosure. Similarly, the physician should also take into account the nature, basis, and strength of the minor-patient's objections. The physician should also consider the degree to which parental involvement in the course of treatment is necessary or desirable. This will reflect the nature and seriousness of the medical difficulty presented. The age of the minor is relevant to these determinations since disclosure for the wellbeing of the minor may be more appropriate for younger minors than older minors.

Even when the physician concludes, on the basis of sound medical judgment, that failing to notify the parents could have serious health consequences, Standard 4.2 B. 2. provides that the physician must first make all reasonable efforts to persuade the minor to consent to parental notification. See Fla. Stat. Ann. § 384.061 (1971). Only after finding that failure to notify the parents will have serious health consequences for the minor, and after making all reasonable efforts to persuade the minor to consent to notification, may the physician notify the parents "without the consent of the minor-patient and over the express refusal of the minor-patient providing the information." Md. Stat. Ann. art 43, § 135(c) (1973 Supp.). The physician should not incur liability to the parents if, in the exercise of medical discretion, he or she concludes that failing to notify the parents will not seriously jeopardize the health of the minor-patient. On the other hand, a physician may be liable for an unconsented disclosure as an invasion of privacy or a breach of contract if he or she notifies the parents under circumstances which do not medically require parental disclosure. See, *e.g.*, *Alpin v. Morton*, 21 Ohio St. 536 (1871).

Standard 4.2 C. governs the physician's obligation to notify the parents when the treatments provided are for a mental or emotional disorder, pursuant to Standard 4.9 which authorizes a minor of fourteen or older to consent to three initial therapy or counseling sessions without parental notification to allow for crisis intervention and the short-term treatment of mental or emotional difficulties.

In the absence of other associated problems, such as those accompanying chemical dependency (Standard 4.7) or sexual activity (Standard 4.8), Standard 4.9 does not allow for unlimited psychotherapeutic intervention without parental involvement. This reflects a concern about the nature of psychological treatment and the potential risks that such intervention may pose for the parent-child relationship and family autonomy. To highlight these differences, the notification provision of Standard 4.2 C. differs from the disclosure provisions of Standard 4.2 B. governing chemical dependency and sexual activity. Under Standard 4.2 C., the person providing treatment or counseling must make disclosure to the parent that treatment was provided, whereas for the treatments governed by Standard 4.2 B., the provider normally should not make disclosure to the parents unless he or she concludes that failing to do so would be detrimental to the minor's health. This difference in disclosure requirements reflects the judgment that, in the absence of countervailing considerations, parental involvement and participation in the course of therapy should be secured as expeditiously as possible, consistent with the interests of the minor. "One of the first goals of counseling [a minor seeking counseling without parental consent] would be planning with him how to involve his parents, who are a significant portion of reality." Note, "Counseling the Counselors: Legal Implications of Counseling Minors without Parental Consent," 31 *Md. L. Rev.* 332, 333 at note 3 (1971). Despite the potential deterrent effect that such disclosure may have on minors seeking counseling assistance, in most instances the long-term effectiveness of counseling will require parental involvement and participation. Accordingly, unless the therapy or counseling is also provided in connection with treatments associated with chemical dependency or sexual activity, disclosure must be made and parental consent sought. Counseling of a minor by a physician concerning health-related problems, treatment, or other medical services may involve confidential disclosures protected as part of the doctor-patient privileged communication.

The applicability of these notification provisions to particular forms of treatment will be amplified in the commentary to Standards 4.7-4.9, *infra*. Where the parents are notified, their consent to further treatment should be obtained, as provided in Standard 4.1.

4.3 Financial liability.

A. A parent should be financially liable to persons providing medical treatment to his or her minor child if the parent consents to such

services, or if the services are provided under emergency circumstances pursuant to Standard 4.5.

B. A minor who consents to his or her own medical treatment under Standards 4.6–4.9 should be financially liable for payment for such services and should not disaffirm the financial obligation on account of minority.

C. A public or private health insurance policy or plan under which a minor is a beneficiary should allow a minor who consents to medical services or treatment to file claims and receive benefits, regardless of whether the parent has consented to the treatment.

D. A public or private health insurer should not inform a parent or policy holder that a minor has filed a claim or received a benefit under a health insurance policy or plan of which the minor is a beneficiary, unless the physician has previously notified the parent of the treatment for which the claim is submitted.

Commentary

Financial responsibility for the medical care of minors is typically placed upon the minor's parents unless the child is emancipated. See, e.g., *Wallace v. Cox*, 136 Tenn. 69, 188 S.W. 611 (1916). For most medical services and in most family relationships, parents consent to treatment and assume financial liability for their children as a matter of course. Their financial liability follows either from contract obligations or their duty to provide the "necessaries" of life to their children. H. Clark, *Domestic Relations* § 6.3 (1968); *Greenspan v. Slate*, 12 N.J. 426, 97 A.2d 390 (1953). In the latter instance, parents will be liable if "there is an omission of duty on their part to furnish necessaries, as where the need exists and the parents refuse or neglect to act; or in the case of some special emergency rendering the interference of the third person reasonable and proper." *Lufkin v. Harvey*, 131 Minn. 238, 239, 154 N.W. 1097 (1915). At common law, apart from "necessaries," if the parent did not consent and there was no reason to infer consent, then the person providing treatment could collect only from the minor, an unrewarding task in light of the minor's freedom to disaffirm contracts. To the extent that these standards require parental consent, Standard 4.3 A. also imposes parental financial liability for services provided pursuant to that authorization.

These standards also allow minors to consent to a variety of medical services without parental consent or subsequent disclosure and therefore without parental financial liability. In order to assure that minors will have an opportunity to obtain these services, Standard

4.3 B. imposes financial liability on the minor consenting to such services. This follows the policies enunciated in Standard 6.1, which eliminates many of the disabilities imposed on minors' freedom of contract. Standard 4.3 C. provides that if the minor is the beneficiary of any public or private health insurance policy, he or she must be permitted to file claims and receive benefits regardless of parental consent. Standard 4.3 D. governs the circumstances under which the insurer may notify the parents of treatments or payments. The objective is to make financial liability consistent with Standards 4.1 and 4.2 governing parental consent and notification. Where parents consent to treatment or are notified of treatment, they will be liable. Where consent and disclosure are not appropriate, the minor will be liable. Insurer's disclosures should parallel physicians' disclosures; see Standard 4.2.

Of those jurisdictions which have liberalized their minor medical consent statutes in recent years, surprisingly few have considered how such treatments will be financed. One approach is to make the minor personally liable for any services to which he or she consents. For example, the Minnesota medical consent statute provides that "a minor so consenting for such health services shall thereby assume financial responsibility for the cost of said services." Minn. Stat. Ann. § 144.347 (1971). See also Standard 6.1 on contractual liability of minors. Standard 4.3 B. adopts this position, imposing financial liability on a minor for services to which the minor consents.

Imposing liability on the consenting minor does not preclude similar liability on the part of public or private health insurers of the minor. Most statutes regulating insurance policies are silent as to whether policies which provide benefits for insured minors will pay for treatments rendered without parental consent—the parent being the nominal holder of the policy. If a minor files a claim for payment for medical care to which his or her parent did not consent, no apparent legal impediment exists to prevent payment of the claim. State insurance statutes generally provide that the "insured" may file a claim and payment may be made either to the insured or to the provider of services. See, *e.g.*, N.Y. Ins. Law § 164-3 (5) (McKinney 1966); Ill. Ann. Stat. ch. 73, Ins. Code § 767.60(b) (Smith-Hurd 1965). Under the typical family health insurance policy, each member of the family is an insured, and as an insured, a party to the contract and a real party in interest who can sue on the contract. "Only those between whom the agreement was made are entitled to the rights of parties; except of course, that the beneficiary may be the real party in interest and may, as such, enforce the contract." Vance, *Law of Insurance*, § 19 at 120. Accordingly,

a minor who is a beneficiary of a health policy may file a claim against the insurance company for expenses incurred while receiving medical treatment. The typical claim form for medical and hospital expenses is filed either with the hospital or doctor, or the insurer and requires only the signature of the patient. A valid claim for medical expenses will be paid as long as the identification number is on the form and the minor is recorded as a dependent beneficiary of the parents. The policy holder—in the case of dependent children, their parent—is not required to sign the claim form. Standard 4.3 C. authorizing minors to file claims under the policy regardless of parental consent simply makes this explicit.

Standard 4.3 D. governs the insurer's notification and disclosure policies in an effort to make them consistent with the disclosure policies of Standard 4.2. It is the practice of most medical insurance companies, once the claim is paid, to send a "benefit explanation" to the main subscriber who, in the case of an insured minor, is typically the parent. Effectively, the insurance company informs the parents of the medical services which the minor has received and for which he or she has filed claims, even if the services were originally rendered without parental consent, as permitted by statute. If the minor does not want his or her parent notified of the treatments, the insurance company's practice of informing policy-holding parents of the benefits paid may discourage the minor from filing claims for services covered by the insurance contract. Where the minor is authorized to consent to treatments under Standards 4.7 or 4.8, he or she may be faced with the alternatives of foregoing the treatment itself, which is socially undesirable; relinquishing claims to insurance benefits and paying for the treatments himself or herself, which the minor can rarely afford; or filing the claim and having the parent notified, which may be unacceptable to the minor.

One resolution of this dilemma would be to require insurance companies to fulfill their obligations to minor-beneficiaries under the terms of their contracts without notifying the parents of the payment of such benefits where the payments are for medical services for which the minor alone is authorized to consent. Standard 4.3 D. accomplishes this result by providing that the insurer may notify the parent of payments only in instances where the treating physician has notified the parents of treatment. See Standard 4.2. Accordingly, insurance forms should be modified to allow the minor-beneficiary or physician to indicate that the treatment is one for which parental consent or disclosure is not required and that the insurance company should not notify the policy holder of payment. Another alternative would be for the treating physician to

sign a form indicating that parental notification is not required pursuant to Standard 4.2, and therefore the insurance company should not disclose to the policy holder the fact of payment. Similarly, the proposed national health insurance legislation (H.R. 12684 & S.2970; S.2513, 93d Cong., 2d Sess. (1974); S.3 & H.R. 22, 93d Cong., 1st Sess. (1973)), which would alter the traditional role of the states as regulators of the insurance industry, should include provisions authorizing payments for the types of medical services approved by these standards, and a mechanism of payment which does not include parental notification when the minor consented to treatment.

4.4 Emancipated minor.

A. An emancipated minor who is living separate and apart from his or her parent and who is managing his or her own financial affairs may consent to medical treatment on the same terms and conditions as an adult. Accordingly, parental consent should not be required, nor should there be subsequent notification of the parent, or financial liability.

1. If a physician treats a minor who is not actually emancipated, it should be a defense to a suit basing liability on lack of parental consent, that he or she relied in good faith on the minor's representations of emancipation.

Commentary

The common law exempted emancipated minors from the requirement of parental consent to medical treatment. *State ex. rel. Scott v. Lowell*, 78 Minn. 166, 80 N.W. 877 (1899); *Smith v. Seibly* 72 Wash. 2d 66, 431 P.2d 719 (1967). Accordingly, an emancipated minor who understood the nature and consequences of the treatment could give effective consent. Comment, "Medical Care and the Independent Minor," 10 *Santa Clara Lawyer* 335 (1970). At common law, emancipation occurred by marriage, judicial decree, consent of the parents, and the like. 59 *Am. Jur. 2d* § 93; Annot., "Minor: Implied Emancipation," 165 *ALR* 723; Annot., "What Voluntary Acts of a Child, Other than Marriage or Entry into Military Service, Terminate Parent's Obligation to Support," 32 *ALR* 3d 1055. In addition, by statute, a minor living apart from his or her parents who is self-supporting, and exercising general control over his or her own life may be emancipated. See, e.g., Cal. Civ. Code Ann. § 34.6 (Supp. 1973). A substantial number of states allow emancipated minors to obtain medical and surgical care without

parental consent. A typical statute provides that "any minor who is living separate and apart from his parents or legal guardian . . . and who is managing his own financial affairs . . . may consent to treatment." Minn. Stat. Ann. § 144.341 (1971). In addition, some courts indicate that a minor living in the parental home may be "partially" emancipated for certain purposes, such as consenting to medical treatment, if paying living expenses to the parents and using the remainder of his or her earnings as he or she sees fit. *E.g.*, *Gillikin v. Burbage*, 263 N.C. 317, 139 S.E.2d 753 (1965); *Bach v. Long Island Jewish Hospital*, 49 Misc. 2d 207, 267 N.Y.S.2d 289 (1966).

Ultimately, the amorphous nature of emancipation doctrine, see standard on Emancipation, 2.1, *supra*, requires an identification of the nature of the problem to be resolved, in order to articulate the criteria to define "emancipation." The test used in Standard 4.4 A., "living separate and apart . . . and managing his or her own affairs" defines a situation in which there is no effective, responsible adult present to consent. In the absence of even a minimally functioning family, or some other adult exercising legal control over the minor, there is no one in a better position than the minor to look out for his or her own welfare. In such a situation, common sense dictates authorizing minors to consent to any medical treatment or service without prior parental consent, subsequent disclosure, or financial liability. Effectively, the minor is entitled to medical services on the same terms and conditions as an adult. As provided in Standard 4.4 A., one consequence of a minor's emancipation and right to consent on his or her own behalf, is the concomitant financial liability for such services. See, *e.g.*, *Buxton v. Bishop*, 185 Va. 1, 37 S.E.2d 755 (1946); Annot., "Minors Implied Emancipation," 165 A.L.R. 723; Cal. Civ. Code § 34.6 (Cum. Supp. 1972); Colo. Rev. Stat. § 41-2-13 (Cum. Supp. 1971).

In order to encourage physicians to treat emancipated minors, several jurisdictions have adopted provisions protecting them from liability when they treat minors in "good faith" who purport to be emancipated but are not in fact. For example, "The consent of a minor who professes to be, but is not a minor whose consent alone is effective to medical, dental, and health services shall be deemed effective without the consent of the minor's parent or legal guardian if the physician or other person relied in good faith upon the representation of the minor." 35 Pa. Stat. § 10105 (1970); Accord, Ala. Code tit. 22, § 104(21)(1) (Cum. Supp. 1973). Such provisions attempt to insure that minors who are truly emancipated will have access to treatment by relieving the treating physicians from lia-

bility. Standard 4.4 A. 1. implements this policy by allowing a “good faith” defense to suits based on a failure to obtain parental consent, although it would not be a defense to other causes of action. See, e.g., Ala. Code tit. 22 § 104(21) (3). Accordingly, a treating physician who relies in good faith on a minor’s representation of emancipation may provide treatment until he or she subsequently discovers that this is not the case. Should a physician discover that a minor is not authorized to consent under this provision, the physician must comply with the notification provisions of Standard 4.2. Financial liability on the part of the minor and/or the parent, will be determined according to the provisions of Standard 4.3.

4.5 Emergency treatment.

A. Under emergency circumstances, a minor may receive medical services or treatment without prior parental consent.

1. Emergency circumstances exist when delaying treatment to first secure parental consent would endanger the life or health of the minor.

2. It should be a defense to an action basing liability on lack of parental consent, that the medical services were provided under emergency circumstances.

B. Where medical services or treatment are provided under emergency circumstances, the parent should be notified as promptly as possible, and his or her consent should be obtained for further treatment.

C. A parent should be financially liable to persons providing emergency medical treatment.

D. Where the emergency medical services are for treatment of chemical dependency (Standard 4.7); venereal disease, contraception, or pregnancy (Standard 4.8); or mental or emotional disorder (Standard 4.9), questions of notification of the parent and financial liability are governed by those provisions and Standards 4.2 B., 4.2 C., and 4.3.

Commentary

In emergency circumstances, physicians may not be able to secure parental consent in advance of treatment. The obvious necessity to render immediate assistance led courts to read an “emergency” exception into the common law rule requiring parental consent. *Jackovich v. Yocum*, 212 Iowa 914, 237 N.W. 444 (1931); *Luka v. Lowrie*, 171 Mich. 122, 136 N.W. 1106 (1912); J. Waltz and F. Inbau, *Medical*

Jurisprudence, 169-72 (1971); *Restatement (Second) of Torts* § 63 (1965). Typically, however, the "emergency" was defined narrowly to apply to situations involving immediate danger to life or limb if treatment was not forthcoming. See, e.g., *Rogers v. Sells*, 178 Okla. 103, 61 P.2d 1018 (1936); Pilpel, "Minor's Rights to Medical Care," 36 *Albany L. Rev.* 462 at 464 (1972). Statutes in a number of jurisdictions have incorporated this "emergency" exception but with a broader definition of what constitutes an emergency than the initial common law interpretations. Such statutes exempt physicians and hospitals from liability for failing to obtain parental consent for "examination and treatment of a minor, including blood transfusions, when delay in treatment will endanger the life, limb, or mental well-being of the patient." Mass. Gen. Laws Ann., ch. 112, § 12E (Supp. 1970). See also Ga. Code Ann. § 88-2905 (1971); Ill. Ann. Stat. ch. 91, § 18.3 (Smith-Hurd Cum. Supp. 1972); Md. Ann. Code art. 43, § 135 (Supp. 1971). Standard 4.5 A. 1. adopts this policy of a broad "emergency" exception, authorizing immediate treatment for the minor without parental consent, when "an attempt to secure consent would result in delay of treatment which would increase the risk to the minor's life, health, or mental health." Ala. Code, tit. 22, § 104(18) (Cum. Supp. 1973). Since treatment is permitted prior to obtaining parental consent, Standard 4.5 A. 2. provides that a physician furnishing emergency treatment will not incur liability for rendering services without prior consent. Note, "Torts—Medical Treatment of Minor," 9 *Wake Forest L. Rev.* 148 (1971).

Although the emergency situation justifies dispensing with prior parental consent, under Standards 4.2 A. and 4.5 B., the parents must be notified of the treatment as promptly as possible and their consent obtained for further treatment. We assume that in virtually every instance, the minor-patient would consent to the physician notifying the parents of the circumstances and treatment. Even if the minor objects to notification, however, Standard 4.5 B. requires the physician to inform the parent. In the absence of an emergency, the minor would not be permitted to receive the treatment without parental involvement, and there is no compelling reason why the child should be permitted to bar parental involvement solely because of the emergency circumstances. If anything, the argument for disclosure is stronger precisely because of the emergency justification. Accordingly, the parents should be notified as promptly as possible and their consent obtained for additional treatment. Thereafter, treatments are governed by the provisions of Standard 4.1. Since the interests of the parent and

minor coincide in securing emergency treatment as expeditiously as possible, Standard 4.5 C. provides that the parents will be financially liable. See, *e.g.*, Standard 4.3.

Standard 4.5 D. provides that whether provided on an emergency basis or not, if the emergency treatments are for medical conditions associated with chemical dependency (Standard 4.7); venereal disease, contraception, or pregnancy (Standard 4.8); or mental or emotional disorders (Standard 4.9), the requirements of parental consent for further treatment and concomitant financial liability are inapplicable. Rather, parental notification decisions should be governed by the policies of Standard 4.2 which militate against disclosure over the minor's objection because of the potential deterrent effect on minors seeking treatment that disclosure could have and the social desirability of minors receiving the treatments.

4.6 Mature minor.

A. A minor of [sixteen] or older who has sufficient capacity to understand the nature and consequences of a proposed medical treatment for his or her benefit may consent to that treatment on the same terms and conditions as an adult.

B. The treating physician should notify the minor's parent of any medical treatment provided under this standard, subject to the provisions of Standard 4.2 B.

Commentary

Another exception to the common law doctrine requiring parental consent is the rule that allows an unemancipated "mature minor" to validly consent to medical treatment where the procedure is for the benefit of the minor and, in the judgment of the treating physician, the minor has sufficient intelligence to understand its nature and consequences. See, *e.g.*, *Bishop v. Shurley*, 237 Mich. 76, 211 N.W. 75 (1926); *Lacey v. Laird*, 166 Ohio St. 12, 139 N.E.2d 25 (1956); *Younts v. St. Francis Hospital*, 205 Kan. 292, 469 P.2d 330 (1970). No reported cases impose liability on a doctor or hospital for failing to obtain parental consent to a medical treatment when the consenting minor was over the age of fifteen and the procedure was for his or her benefit. See, *e.g.*, Wadlington, "Minors and Health Care: the Age of Consent," 11 *Osgoode Hall L.J.* 115 at 119 (1973); Pilpel, "Minors' Rights to Medical Care," 36 *Albany L. Rev.* 462 at 466 (1972). Statutes in several states have adopted this rule and permit an unemancipated minor of sufficient maturity

and judgment to consent to treatment without prior parental consent. See, e.g., Miss. Code Ann. § 7129-81(h) (Supp. 1971) which provides that "Any unemancipated minor of sufficient intelligence to understand and appreciate the consequences of the proposed surgical or medical treatment or procedures . . . "may effectively consent to such treatment." See also N.H. Rev. Stat. Ann. § 318-B:12-a (Supp. 1971). Standard 4.6 A. adopts the policies underlying the common law and statutory exceptions that allow a "mature" minor to consent to normal and necessary medical treatment for his or her own benefit. The underlying assumption is that the maturity of the minor warrants an additional degree of autonomy and self-determination in such personal matters.

Although this provision allows [sixteen-year-old] minors to consent to treatment on their own behalf, Standard 4.5 B. requires a physician treating a minor under this provision to notify the parents of this fact. This standard removes the normal disabilities imposed upon minors in recognition of their increased maturity, sophistication, and responsibility. It does not follow from this, however, that the minor can or should be permitted to exclude his or her parent from knowledge of or involvement in the course of treatment. In the absence of countervailing considerations, therefore, the parent should be advised of the course of treatment. Of course, if the treatments concern chemical dependency (Standard 4.7); venereal disease, contraception, and pregnancy (Standard 4.8); or an emotional disorder (Standard 4.9), those provisions control the parental notification decision.

The brackets around sixteen in Standard 4.5 A. are intended to minimize the significance of the age of the minor, thereby placing the emphasis on the minor's capacity to understand the nature and consequences of the proposed treatment as the essential prerequisite to informed consent to the treatment.

Standard 4.6 B. provides only that the parents must be notified of treatment. Standard 4.3 provides that parents will be financially liable for the medical services rendered only to the extent that they consent to them and that in the absence of their consent, the minor and/or his or her medical insurer will be liable. The effect of this provision, therefore, is to enable a mature minor to receive medical services for which he or she is able and willing to pay, in addition to those required as an absolute minimum under neglect standards, but which the parents do not want to provide. Since the parents have complied with their formal responsibilities by providing the child with a minimum level of medical care, in the absence of their consent, the minor is financially responsible for the

additional treatments received for his or her benefit. While it may be observed that hinging parental financial liability on notice and consent makes the mature minor exception a hollow right, in the absence of an emergency situation or some other compelling special circumstance, the policies favoring parental involvement, participation and consent should be implemented. The requirement of parental consent to impose financial liability creates an incentive for the minor to consult with his or her parent and increases the likelihood that they will be involved in the decision making process.

4.7 Chemical dependency.

A. A minor of any age may consent to medical services, treatment, or therapy for problems or conditions related to alcohol or drug abuse or addiction.

B. If the minor objects to notification of the parent, the person or agency providing treatment under this provision should notify the parent of such treatment only if he or she concludes that failing to inform the parent would seriously jeopardize the health of the minor, and complies with the provisions of Standard 4.2.

Commentary

Alcoholism and drug abuse are unfortunately prevalent problems among youth. See, e.g., J. Brenner, R. Coles, and D. Meagher, *Drugs and Youth: Medical, Psychiatric and Legal Facts* (1970). Parents and minors may fail to recognize these as medical problems requiring treatment. In addition, many teenagers "are particularly concerned about preventing parental knowledge of their drug related conditions. . . ." Stern, "Medical Treatment and the Teenager," 7 *Clearinghouse Review* 1 (1971). Statutes in a number of states "clearly indicate a legislative recognition that communications between parent and child, even when there has been no semblance of legal emancipation, often may be strained or nonexistent on some subjects. It is because of the fear that requiring a minor child to go to his parent for consent may frustrate him from seeking medical care related to drug use . . . that some jurisdictions have dropped all age restriction in these areas of concern." Wadlington, "Minors and Health Care: The Age of Consent," 11 *Osgoode Hall L. Rev.* 115 at 122 (1973).

Standard 4.7 A. allows a minor of any age to consent to the full range of medical and mental health services for treatment of the physical and psychological problems related to alcohol or drug

dependency and abuse. See, *e.g.*, Ala. Code Ann., tit. 22, § 104 (17) (Cum. Supp. 1972), which permits any minor, with no age minimum, to consent to “medical, health, or mental health services to determine the presence of, or to treat . . . drug dependency, [or] alcohol toxicity. . . .” By allowing minors to consent to treatment of drug related conditions without parental consent, the standard implicitly authorizes “crisis intervention centers” or similar organizations that provide medical services, counseling, and other assistance to minors in connection with alcohol or drug abuse. Since one of the primary impediments to physicians and organizations providing drug counseling and treatment to minors is their potential liability for rendering services without parental consent, one effect of this standard may be to dispel “the apprehensive attitude of physicians and hospitals . . . regarding the potential liability of providers if they treat minors without their parents’ consent.” Stern, *supra* at 1.

In recognition of the potential deterrent effect that requiring parental consent may have on minors seeking treatment, and the desirability of encouraging them to seek medical assistance, this standard dispenses with the requirement of prior parental consent, allowing the minor to consent to services on his or her own. These standards do not prevent the minor, or the physician with the minor’s consent, from subsequently disclosing to the parents the nature of the treatment. However, if the minor objects to parental disclosure, but the physician nonetheless thinks it important to disclose to the parents, the physician must first attempt to persuade the minor to inform the parents; if the minor insists on nondisclosure his or her decision is controlling unless the physician is satisfied that nondisclosure would adversely affect the minor’s health. See Standard 4.2. As noted previously in the commentary to Standard 4.2, statutes are typically silent as to the physician’s duty to disclose “to a parent that the consenting minor is receiving treatment unless the minor himself agrees to such disclosure, or at least insulate the physician from any duty to make such a disclosure by giving him discretion in this regard.” Wadlington, *supra* at 122; Conn. Gen. Stat. Ann. § 19-496c (Cum. Supp. 1972); Cal. Civ. Code § 34.6 (Cum. Supp. 1972). The rationale of Standard 4.2 and this standard with respect to parental notification is that the social desirability of minors receiving treatment for alcohol and/or drug problems outweighs the potential negative impact of parental non-involvement. If a general policy of parental notification would deter a substantial number of persons who might otherwise seek medical help from doing so, then a general policy of nondisclo-

sure should be adopted unless the medical facts of the particular case require disclosure.

In most instances of treatment under this provision, there will be neither prior parental consent nor subsequent disclosure of treatment. Accordingly, the parents will not be financially liable. Requiring parents to pay for these treatments would obviously obviate the policies of nondisclosure and thus might deter the minor from seeking treatment. Since the minor can always consent to parental notification, nothing precludes the parent from assuming financial liability when such disclosure is made. In the absence of parental disclosure and financial liability, however, financial responsibility is governed by the provisions of Standard 4.3, which places the burden upon the minor and/or his or her insurer.

4.8 Venereal disease, contraception, and pregnancy.

A. A minor of any age may consent to medical services, therapy, or counseling for:

1. treatment of venereal disease;
2. family planning, contraception, or birth control other than a procedure which results in sterilization; or
3. treatment related to pregnancy, including abortion.

B. If the minor objects to notification of the parent, the person or agency providing treatment under this standard should notify the parent of such treatment only if he or she concludes that failing to inform the parent would seriously jeopardize the health of the minor, and complies with the provisions of Standard 4.2.

Commentary

Under Standard 4.7, *supra*, a minor may consent to treatments for chemical dependency. This standard permits minors to consent to medical services for problems associated with sexual activity—venereal disease, contraception, and pregnancy, another area in which minors may be unwilling or unable to obtain parental consent.

Probably the most urgent unmet medical need for this neglected section of our population is in the area of their sexual and emotional lives. The sexually active teenage girl who is denied contraceptive service constantly risks a hazardous pregnancy. . . . A pregnant teenager may be denied legal abortion services and be compelled to incur a greater risk to life by resorting to backstreet butcher-abortionists or to carrying an unwanted and undesirable pregnancy to term. From

all points of view, statistics show epidemic proportions of illegitimacy, [and] venereal disease. Pilpel, "Minors' Rights to Medical Care," 36 *Albany L. Rev.* 462 (1972).

For a variety of reasons, minors may be unwilling to acknowledge to their parents that they are sexually active and require medical services or treatment. Similarly, parents may refuse to consent to contraceptive services in an effort to deter the minor from sexual activity, or may refuse to consent to an abortion on moral or religious grounds. Adolescent sexuality is, perhaps, the most potentially divisive area of intrafamily conflict, in part, because of its practical, physical consequences, but also because of its symbolic implications—the development of extra-familial relationships as part of an assertion of personal independence and autonomy. See, e.g., G. Konopka, *The Adolescent Girl in Conflict* (1966).

The policy underlying this standard is that the long range interests of the minor and the community require legislation allowing a minor of any age to consent to medical services, therapy, and counseling for the many problems associated with sexual activity including: treatment of venereal disease, family planning, contraception and birth control, and pre-natal treatment for pregnancy and abortion. The overriding importance of the minors' health and the society's welfare requires subordination of the parental interests despite the potential adverse impact on the family.

Perhaps the most important policy interest which must be balanced against the goal of assuring timely and effective extension of medical care to minors is the impact which shifting the discretionary power from parent to child (and sometimes very young child) may have on the family unit as a functioning entity. States which have opted for low or no age floors in specific areas such as sex and drug problems must be considered to have decided that in a substantial number of cases, the traditional decision making process of the family unit had broken down or was somehow ineffective. Wadlington, "Minors and Health Care: The Age of Consent," 11 *Osgoode Hall L. Rev.* 115 at 123-4 (1973).

Such legislation is based on the recognition that "where minors may be reluctant to seek parental consent, enabling them to obtain counseling and medical care without involving their parents may not only be in their best interests, but may also serve the public interests in providing adequate health care for all persons, limiting the spread of disease, and preventing unwanted pregnancies." Note, "The Minors' Right to Abortion and the Requirement of Parental Consent," 60

Va. L. Rev. 305 at 312 (1974). While it may be desirable to involve the parents in these decisions, it is more important that the minor receive treatment. Since requiring parental consent might deter minors from seeking treatment, the basic policy of this standard is that the minor alone may consent to treatment.

Standard 4.8 A. 1. authorizes minors of any age to consent to the diagnosis and treatment of venereal diseases without parental consent. In response to the epidemic rates of venereal disease infections among adolescents in recent years, the legislatures of virtually every state have enacted such statutes. Surveys of legislation governing minors' right to consent to treatment for venereal disease without parental consent are contained in Pilpel, "Minors' Rights to Medical Care," 36 *Albany L. Rev.* 462 (1972); Pilpel and Wechsler, "Birth Control, Teen-Agers, and the Law," 3 *Fam. Planning Perspectives* 37 (1971). The typical rationale for dispensing with parental consent was provided by the New Jersey Legislature at the time of the adoption of N.J. Stat. Ann. § 9:17 A-4 (1971 Cum. Supp.):

Since contraction of a venereal disease is subject to serious reproach within the family circle, the necessary parental consent to treatment may not be sought by the minor because of fear or embarrassment. Allowing the child to secure competent medical treatment and to consent thereto, without the necessity for either knowledge by or consent of the parent, would eliminate one of the major bars to his seeking and receiving treatment.

The threat to public health from venereal disease is of such gravity that the infected person should be treated as soon as diagnosed to protect his health and prevent the spread of the disease to others. In view of the danger posed and the increasing numbers of minors infected, it is essential that this highly vulnerable segment of our population be accorded greater freedom in securing prompt medical treatment.

In order to facilitate prompt and early treatment for the minor, notification of others who may be infected, and protection of the public health, this standard dispenses with the requirement of parental consent. To the extent that even subsequent disclosure to the parent that the minor has received treatment would be an impediment or deterrent, parental notification over the minor's objection is authorized only when the physician concludes that the health of the minor would be impaired by nondisclosure. See Standard 4.2 B. and commentary. Obviously, statutes which *require* physicians to notify parents when they treat a minor for venereal

disease are inconsistent with these policies. See, e.g., *Hawaii Rev. Stat.*, tit. 31, § 577A (3), (physician *must* inform “spouse, parent, custodian or guardian” of patient under 18 found to have a venereal disease); *Neb. Rev. Stat.*, § 71-1120 (1967).

Standard 4.8 A. 2. authorizes minors of any age to consent to medical services or counseling for family planning, birth control, or contraception which does not result in sterilization. One ever-present possible concomitant of sexual activity is conception. “The unplanned pregnancies of unmarried minors represent a substantial source of population pressure . . . 41 percent of all illegitimate births in California were to women under twenty and 40 percent of all California women who married before their twentieth birthday were pregnant at the time the ceremony was performed.” Note, “Minors and Contraceptives: The Physician’s Right to Assist Unmarried Minors in California,” 23 *Hastings L.J.* 1486 at 1487 (1972). See also U.S. Bureau of Census, *Statistical Abstracts of the United States* 51 (1972). The undesirable consequences of unplanned and unwanted adolescent pregnancies may include the termination of the pregnancy through an illegal abortion with the attendant physical or psychological risks. In addition, bearing the child may pose risks for the mother’s and the infant’s health. See, e.g., Mencken, “The Health and Social Consequences of Teenage Childbearing,” 4 *Fam. Planning Perspectives* 45 (1972); Note, “Minors and Contraceptives,” 23 *Hastings L.J.* 1486 at 1488 (1972); Note, “The Minor’s Right to Abortion and the Requirement of Parental Consent,” 60 *Va. L. Rev.* 305 at 307 (1974). In addition, there are a variety of social disabilities associated with adolescent pregnancy including withdrawal from school, social stigma, or precipitate marriage accompanied by a greater likelihood of subsequent divorce. Note, “Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy,” 88 *Harv. L. Rev.* 1001 at 1010 (1975). Thus, birth control information and contraceptive devices should be readily available to prevent pregnancy and avoid the undesirable choices which it forces on the pregnant adolescent.

In response to the argument that making contraceptive devices available to minors will undercut the state’s and the parents’ interest in controlling the morality of the child, it is sufficient to note that no relationship has been found between the availability of contraceptives and the level of sexual activity among teenagers. See, e.g., Gordis, et al, “Adolescent Pregnancy: A Hospital Based Program for Primary Prevention,” 58 *Am. J. of Pub. Health* 849 (1968); Pilpel and Wechsler, *supra*. On the contrary, “the availability of birth control cannot be thought to be the determinant of whether or not

[teenagers] engage in sexual relations. The development of a youthful standard of sexual morality is a matter for the home, the church, and the community: it cannot be maintained through ignorance of the availability of birth control." Dembitz, "Law and Family Planning," 1 *Fam. L. Q.* 112 (1967). While denying contraceptive information and devices to teenagers may be intended to deter adolescent sexuality, it is a short-sighted policy that has not achieved its desired result in the past.

Just as legislatures allow minors to consent to treatment of venereal disease without parental consent, a number of jurisdictions also allow physicians to provide birth control information and devices to minors without parental consent. See, e.g., Cal. Welf. & Inst. Code § 10053.2 (1971); Md. Ann. Code art. 43, § 135 (1972); Pilpel and Wechsler, *supra*.

Of course, the result of eliminating the parental consent requirement will be that in some instances minors will simply obtain contraceptives without informing their parents. But it is difficult to see why the state should attempt to compensate for such breakdowns in parent-child relations by reinforcing parental authority, especially since the practical consequences of withholding contraceptives are so much more serious than those of permitting access unguided by parents. Note, "Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy," 88 *Harv. L. Rev.* 1001 at 1019 (1975).

The increased availability of birth control and family planning information and devices reflects changes in social attitude as well as changes in the positions taken within the medical profession and by the federal government. The American Medical Association, the American College of Obstetricians and Gynecologists, the American Academy of Pediatrics and other medical organizations have taken the position that:

[T]he teen-age girl whose sexual behavior exposes her to possible conception [should] have access to medical consultation and the most effective contraceptive advice and methods consistent with her physical and emotional needs; the physician so consulted should be free to prescribe or withhold contraceptive advice in accordance with his best medical judgment in the best interests of his patient. Quoted in Pilpel and Wechsler, "Birth Control, Teenagers and the Law," 3 *Fam. Planning Perspectives* 37 at 43 (1971).

With various medical organizations taking the position that sexually active minors should have access to contraceptive information and

that legal impediments discouraging physicians from providing these services or deterring minors from seeking them should be eliminated, the federal government has taken steps to increase the availability and dissemination of birth control information and devices. See, e.g., The Family Planning Services and Population Research Act, amendments to 18 U.S.C. § 1461, 1462; 39 U.S.C. 4001 (intended to "assist in making comprehensive voluntary family planning services readily available to all persons desiring such services"). Standard 4.8 A. 2. is clearly consistent with these policies.

Allowing minors to consent to obtaining birth control information and contraceptive devices may create some legal anomalies. For example, permitting minors to obtain contraceptive devices may conflict with the policies underlying criminal statutory rape provisions which prevent women below the age of sixteen, seventeen, or eighteen, from consenting to sexual intercourse. Similarly, it might be argued that physicians providing contraceptive devices to minors may be "contributing to the delinquency of a minor." See, e.g., Cal. Penal Code § 272 (1970); N.Y. Penal Code § 260.10 (McKinney Cum. Supp. 1971). However, the policies underlying this standard should prevail in any conflict that may arise.

In order to encourage minors to avail themselves of these services and information, physicians should, pursuant to Standard 4.2 B., not disclose to the parent that the treatments have been provided since "Many—perhaps most—young people will not ask for contraceptive services unless reasonably sure that their parents will not be involved." Pilpel and Wechsler, *supra*. Only where failing to notify the parents would seriously jeopardize the minor's health may the physician inform them of the treatment over the minor's continuing objections. In such a case, the physician must comply with the notification requirements of Standard 4.2.

Although this standard allows physicians to provide family planning and contraceptive information and devices, it expressly denies the minor the authority to consent to sterilization as a form of contraception, although such procedures may be justified for independent medical reasons. This restriction on sterilization is consistent with medical consent statutes that allow minors to obtain treatment or advice "concerning venereal disease, pregnancy or *contraception not amounting to sterilization*." See, e.g., Md. Stat. art. 43 § 135 (a) (3) (1973 Supp.); accord, Ky. Rev. Stat. § 214.185 (1972). The decision is too important, the consequences too far reaching, and other less drastic forms of contraception too readily available to allow this decision to be made by the minor alone. Only where sterilization is required as a medical necessity—when an illness or

disease requires surgery, and sterilization is a necessary concomitant—or where pregnancy or abortion would seriously endanger the life or health of the minor and alternative methods of birth control have proved ineffective, should sterilization even be contemplated. In such situations, the decision should only be made with parental involvement. Even then, as a recent British case suggests, the power to consent may be limited. See *New York Times*, p. 8, col. 1 (Sept. 18, 1975).

Standard 4.8 A. 3. authorizes minors of any age to consent to medical treatments related to pregnancy, including the termination of pregnancy by abortion. Statutes in a substantial number of jurisdictions now provide that minors may consent to medical treatments related to pregnancy without parental consent. See, e.g., Cal. Civ. Code Ann. § 34.5; Hawaii Rev. Stat., tit. 31, ch. 577A, § 577A 2 (1970 Supp.); Md. Code Ann., art. 43, § 135 (1971); Minn. Stat. Ann. § 144.342 (1971). These statutes allow minors to obtain any medical care or treatment related to pregnancy, although some impose a minimum age for eligibility. See, e.g., Alaska Stat., tit. 9, ch. 65, § 09.65.100(b) (1970 Supp.) (female minors over fifteen); Del Code Ann., tit. 13, § 707 (Supp. 1970) (female minor twelve years or over). Typical of these statutes is Ala. Code Ann., tit. 22, § 104 (Cum. Supp. 1972) which allows a minor fourteen or older who is a high school graduate, married, or pregnant to consent to “any legally authorized medical, dental, health, or mental health services for himself or herself.” Cal. Civ. Code § 34.5 (1971) provides that “an unmarried, pregnant minor may give consent to the furnishing of hospital, medical, and surgical care related to her pregnancy. . . . The consent of the parent or parents of an unmarried, pregnant minor shall not be necessary. . . .” All of these statutes reflect the obvious importance of providing prompt and effective prenatal and postnatal treatment for the mother and the infant. The policy of Standard 4.8 A. 3. is to provide such unlimited access.

A more difficult question is whether a minor’s right to consent to medical and surgical treatment related to pregnancy includes therapeutic abortion within the meaning of the term “treatment related to pregnancy.” See generally Note, 60 *Va. L. Rev.*, *supra*. Although *Roe v. Wade*, 410 U.S. 113 (1973) struck down statutes prohibiting or unduly restricting abortions, the court specifically reserved the issue of whether a minor could obtain an abortion without parental consent. 410 U.S. 113, 165 n. 67 (1973). The resolution of this issue, like many others in these standards, requires a balancing of the interests of the minor, the parents, and

the state. With respect to family decision making authority and the requirement of parental consent, it may be argued that the decision to have an abortion is precisely the kind of choice that a young girl should not be permitted to make alone, due to her alleged immaturity of judgment or the emotional nature of the decision.

There is merit to the contention that a teenage girl who finds herself unmarried and pregnant should not make the abortion decision on her own because of the intense emotional and psychological stresses she is under. Normally the minor's parents would be sensitive to her situation and would not withhold consent if she clearly desired to have an abortion and her physician concurred in that decision. In such a case, it is obviously preferable that the parents be involved. Their support and advice might be of crucial value in aiding the young women to deal with the moral, ethical, and emotional issues inherent in the abortion decision. Note, 60 *Va. L. Rev.*, *supra* at 328.

On the other hand, from the standpoint of the pregnant girl, parental involvement in the decision to obtain an abortion may be highly undesirable. Indeed, requiring parental consent in the interest of preserving family autonomy when the minor seeks an abortion "may exacerbate family conflicts and undermine mutual respect between parent and child. When a parent-child conflict arises over an emotional issue such as abortion, the peace of the family has already been disrupted to such an extent that the justification for the rule [requiring parental consent] no longer exists." Note, 60 *Va. L. Rev.* *supra* at 330.

A number of legislatures have struggled with the question of the proper balance of the minor's interest and the parent's interest in deciding whether to require parental consent when a minor seeks an abortion. Several medical care statutes allowing minors to consent to medical treatments related to pregnancy either exclude therapeutic abortions from those treatments to which the minor may consent, or impose a higher age of consent for abortions than for other treatments related to pregnancy. See, *e.g.*, Mo. Stat. Ann. § 431.061 (Supp. 1972) (allowing minor to consent to medical and surgical care for pregnancy, but excluding abortion); Hawaii Rev. Stat. § 577A-1, A-2 (Supp. 1972); Ore. Rev. Stat. ch. 381, §§ 1, 2, 3 (1971) (allowing fifteen-year-old to receive birth control information and pregnancy treatment, but not allowing consent to abortion until eighteen). Other states allowing minors to consent to treatment related to pregnancy specifically approve "lawful therapeutic procedures [which] include abortion as permitted under the law of this State and any subsequent amendments thereof," without

regard to age. Del. Code Ann., tit. 13, § 708 (Supp. 1970). The California statute allowing minors to consent to medical and surgical care related to pregnancy has been construed to include therapeutic abortion as one aspect of "treatment of pregnancy." See *Ballard v. Anderson*, 4 Cal. App. 3d 873, 484 P.2d 1345 (1971). In analyzing Cal. Civ. Code Ann., § 34.5, the court reasoned that "an unmarried pregnant minor understandably might be reluctant to seek parental consent for medical care related to her pregnancy and that the parents of such a minor might refuse consent for reasons unrelated to the health of the minor," *Ballard v. Anderson*, 4 Cal. App. 3d 873, 484 P.2d 1345 at 1350 (1971), and therefore concluded that "minors may obtain therapeutic abortions under law without the necessity of parental consent." This standard adopts the policy that the termination of pregnancy through abortion is within the ambit of treatment for pregnancy to which the minor may consent on her own. See *Ballard v. Anderson*, 4 Cal. App. 3d 873, 484 P.2d 1345 (1971). Requiring parental consent as a precondition to obtaining an abortion might only deter the minor from seeking a legal therapeutic abortion and force recourse to illegal, unsafe alternatives. Moreover, a serious constitutional question remains, even after *Roe v. Wade*, as to whether a requirement of a parental consent simply achieves by indirection what a state may not achieve directly by delegating to the parents power which the state itself may not constitutionally exercise. See, e.g., Note, 60 *Va. L. Rev.*, *supra*. Several courts that have confronted this issue have concluded that requiring parental consent for a minor to receive an abortion may constitute an unconstitutional condition on the rights of the minor child to privacy and to exercise control over her own reproductive functions. In *State v. Koome*, 84 Wash. 2d 901, 530 P.2d 260 (1975), a physician was prosecuted under a state criminal statute which made it a crime to perform an abortion on an unmarried minor without her parent's consent. The court struck down the statute because it "too broadly encumbers the right of unmarried minor women to choose to terminate pregnancy, and unjustifiably discriminates between similarly situated groups of women in terms of their right to obtain a legal abortion." *Id* at 262. The court reasoned that while the parental consent requirement might be intended to improve the quality of the minor's abortion decision, "the state cannot constitutionally require consent where it gives the parent or guardian 'the authority to withhold consent for abortions for any reason or no reason at all.'" *Id* at 265. See also *Coe v. Gerstien*, 376 F. Supp. 695 (S.D. Fla., 1973); *Doe v. Rampton*, 366 F. Supp. 189 (D. Utah, 1973); *Jones v. Smith*, 278 So. 2d 339 (Fla. App., 1973). Similarly, in

Note, "Parental Consent Requirements and the Privacy Rights of Minors: The Contraceptive Controversy," 88 *Harv. L. Rev.* 1001 at 1020 (1975), following an analysis of the relevant interests of the state, the parents, and the child, the author concludes that "requirements that minors obtain parental consent before obtaining contraceptives should be declared unconstitutional." Accordingly this standard dispenses with any requirement of prior parental consent before a minor may obtain an abortion.*

Needless to say, in view of the underlying policy of this standard permitting minors to seek abortions on their own, the decision to disclose to the parents after the fact that the child has received such a treatment must be limited. As provided in Standard 4.2, in the face of a minor's continuing objection to disclosure, the physician is permitted such disclosure only after reaching the medically justified conclusion that failure to advise the parents would seriously jeopardize the minor's health, and efforts to persuade the minor to consent to disclosure have proved fruitless.

Since Standard 4.8 A. 3. authorizes minors to consent to medical

*Since these standards and commentary were approved by the Commission, the U.S. Supreme Court has ruled on the issue of parental consent requirements for minors seeking abortions. In *Planned Parenthood of Central Missouri et al v. Danforth*,—US—(July 1, 1976), the Court held that a state statute that required the "written consent of one parent or persons in loco parentis of the woman if the woman is unmarried and under the age of eighteen years" was an unconstitutional infringement on the privacy interests of the pregnant woman and constituted an impermissible delegation of this decision to a third party. Addressing the related parental consent and spousal consent requirements of the Missouri statute, the Court held that "The state cannot delegate to a spouse [or parent] a veto power which the state itself is absolutely and totally prohibited from exercising. . . . We cannot hold that the state has the constitutional authority to give the spouse [or parent] unilaterally the ability to prohibit the wife from terminating her pregnancy, when the State itself lacks that right." The Court rejected arguments by the state that the parental consent requirements were justified because the state may subject minors to more stringent legal requirements than are permissible for adults, that minors are less capable than adults of acting in their own best interests, and that parental consent requirements will enhance parental authority and control.

In the companion case of *Bellotti v. Baird*,—US—(July 1, 1976), the Supreme Court remanded for state supreme court interpretation a Massachusetts statute that also required parental consent. The Court reasoned that the district court which invalidated the state statute should have abstained from a constitutional ruling until the state supreme court had an opportunity to construe the statute in such a way as to avoid the constitutional issue. The implication of these cases is that while a parental veto is constitutionally invalid, a provision for parental notification that did not interfere with the minor's ability to obtain an abortion might not be.

treatment related to pregnancy, the issue of whether the minor has a "right" to carry the unborn child to term over the objection of the parent must be addressed. Specifically, the question would arise when the parent seeks injunctive relief through the juvenile court to compel the minor to have an abortion. Not infrequently, when an unmarried minor has a child, her parents are placed in a surrogate parent role, and forced to assume additional childrearing responsibilities and financial burdens. In balancing the interests of the parents and the minor, should the unmarried minor have the "right" to impose these burdens on the parent, or in the alternative, should the parents have a legally enforceable right to compel the minor to submit to an abortion?

This issue was squarely raised in *In re Smith*, 16 Md. App. 209, 295 A.2d 238 (1972), when the parent sought a juvenile court order requiring her sixteen year old daughter, who refused to consent, to submit to a therapeutic abortion. The Maryland Court of Special Appeals construing the relevant abortion statute, and minor consent statute, concluded as did the California court in *Ballard v. Anderson*, 4 Cal. 3d 873, 484 P.2d 1345 (1971), that the minor has a right to consent to her own abortion without reference to parental consent, and that the right to consent also includes the power to withhold her consent, even over the objections of the parent. Accordingly, while the parent might insist that she receive an abortion, the coercive power of the juvenile court would not be available to the parent to compel that result. See, e.g., Comment, "Minor's Right to Refuse Court-Ordered Abortion," 7 *Suffolk L. Rev.* 1157 (1973). As the court in *In re Smith*, 295 A.2d 238 (1973), held,

if a minor may consent to medical treatment as an adult upon seeking treatment or advice concerning pregnancy, the minor, and particularly a minor over 16 years of age, may not be forced, more than an adult, to accept treatment or advice concerning pregnancy. Consent cannot be the subject of compulsion; its existence depends upon the exercise of voluntary will of those from whom it is obtained; the one consenting has the right to forbid. And we feel that "medical treatment" within the meaning of the minor consent statute encompasses termination of pregnancy within the contemplation of the abortion statute. . . . The short of it is that the Juvenile Court did not have the power to compel Cindy to resort to medical procedures relative to a termination of her pregnancy on the grounds that her mother wanted her to have an abortion. 16 Md. App. 209, 225, 295 A.2d 238, 246 (1973).

The opinion attempts to resolve an extremely difficult conflict be-

tween parent and child. While the decision may reflect a correct interpretation of the minor consent statute, the result may be inconsistent with the legislative policies underlying the liberalized abortion laws and minor consent statutes, as well as those making birth control and related medical services available to minors. Presumably, one strong motivation of the legislature, in adopting this legislation, was a desire to curb the increase in unwed pregnancies and illegitimate births. See, e.g., Comment, 7 *Suffolk L. Rev.*, *supra* at 1162-63. By interpreting the statutes to permit the minor to withhold her consent and override her parent's judgment, the court may contravene the legislative purpose of preventing unplanned families.

In reaching its result in *In re Smith*, the court had to "balance the undesirable practical consequences of being an unwed mother in our society against the equally undesirable result of forcing a young girl to submit to an abortion against her wishes." Comment, 7 *Suffolk L. Rev.*, *supra* at 1163.

By granting Cindy the right to make the final decision herself, the appeals court has recognized that there are instances where the parental consent requirement itself is simply not in the best interest of the minor child. . . . The courts must now decide at what point the enforcement of parental authority ceases to be in the best interests of the child. In *Smith*, the appeals court has recognized that the imposition of court-enforced abortions based solely on the wishes of the parents is such a point. A juvenile court simply does not have the authority, the appeals court reasoned, to compel a minor to undergo treatment relative to the termination of her pregnancy on the sole ground that her mother wants her to have an abortion. Comment, 7 *Suffolk L. Rev.*, *supra* at 1166.

Applying the general principles of family autonomy in an area such as this, there is simply no basis for effective juvenile court intervention on the side of either the parent or the child. As a consequence, the court should avoid inserting itself into such intra-family disputes. While the practical effect of decisions like *In re Smith*, 16 Md. App. 209, 295 A.2d 238 (1972) and *Ballard v. Anderson*, 4 Cal. 3d 873, 484 P.2d 1345 (1971), and this standard is to deny parents' access to the juvenile court to impose their views on the minor, nothing in these standards prevents the parent from using whatever informal powers of persuasion or coercion they might have to achieve their objectives.

Although this standard denies juvenile courts the power to compel abortions over the minor's objections, there remains the question of

whether the court could compel some less drastic form of contraception, such as the implantation of an intrauterine contraceptive device. Several commentators have argued that since practically every state has statutes conferring juvenile courts jurisdiction over a minor "whose behavior is injurious to his own or other's welfare," or "who so deports himself as to injure or endanger the morals or health of himself or others," and since sexual relations outside of marriage by a minor may be immoral and/or injurious to the minor's health, and since the juvenile court can, in the exercise of its power as *parens patriae*, impose such conditions of probation as would protect the welfare and morals of the minor, that therefore the court could order the implantation of an IUD over the minor's objections. Compare Young, Alverson, and Young, "Court-Ordered Contraception," 55 *A.B.A. J.* 223 (1969) with Note, "Court-Ordered Contraception in California," 23 *Hastings L.J.* 1505 (1972). Proponents of the exercise of juvenile court jurisdiction to compel contraception argue that preventing pregnancy would provide additional time and opportunities for social case work and other interventions to succeed. "Its use should therefore not be denied to those who need it most, as part of their rehabilitation from previously incorrigible unwed mothers into good and useful citizens." Young, Alverson, and Young, *supra* at 226. Courts, in a variety of contexts, have ruled that the right to bodily privacy is not absolute, and may be overcome by a compelling state interest. See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (authorizing vaccination of individuals against their will); *Schmerber v. California*, 384 U.S. 757 (1966) (authorizing withdrawal of blood without consent in search for evidence of crime); *Buck v. Bell*, 274 U.S. 200 (1927) (authorizing sterilization of the feeble-minded). On the other hand, it may be argued that compelling contraception would not, of itself, have any positive effect on the morals of the minor, nor would it rehabilitate the minor. Moreover, in the absence of procedural safeguards, such an authority would lend itself to grave abuses of power. "Therefore, a balancing of the positive and negative effects to the juvenile and society of a court ordering contraception or requiring it as a condition of probation shows that the possibilities for abuse outweigh any possible benefit. A juvenile court ought not to compel the youthful mother to submit to insertion of an IUD or require such submission as a condition of probation." Note, 23 *Hastings L.J.*, *supra* at 1525. Since the premise of these standards authorizing minors to consent to their own treatment is respect for their autonomy and integrity, it would be inconsistent to simultaneously require them to submit to court-ordered contraception.

Since this standard permits a minor to consent to the various treatments without prior parental consent, and bars subsequent parental notification unless required as a medical necessity, parents should not be financially responsible for the costs of treatment and services provided under this authorization. As provided in Standard 4.3, the minor and/or his or her insurer should bear the costs of whatever services are rendered. In view of the significance of the problems, a number of public and private agencies already exist which make access to treatments without cost for venereal disease, family planning, pregnancy, and abortion, more readily available than some other forms of critical medical treatment. Such agencies should be encouraged to continue providing these services and additional federal and state monies made available to them to assure that minors who seek and consent to treatments in this area have as complete access as possible.

4.9 Mental or emotional disorder.

A. A minor of fourteen or older who has or professes to suffer from a mental or emotional disorder may consent to three sessions with a psychotherapist or counselor for diagnosis and consultation.

B. Following three sessions for crisis intervention and/or diagnosis, the provider should notify the parent of such sessions and obtain his or her consent to further treatment.

Commentary

These standards authorize minors to consent to psychotherapy or counseling in connection with chemical dependency, Standard 4.7 and Commentary, or in connection with treatment of pregnancy, venereal disease, or contraception, Standard 4.8 and Commentary. In addition, Standard 4.6 authorizes a mature minor—one who is sixteen years or older and possessing sufficient capacity to understand and appreciate the nature of the proposed course of treatment—to consent to treatments which may include psychotherapy or counseling. Thus, the effect of Standard 4.9 A. is simply to extend to minors between fourteen and sixteen the option of consenting to up to three sessions of psychotherapy and counseling for emotional or mental disorders *not* related to alcohol and drug abuse, or sexual activity. Effectively, this provision allows a variety of youth counseling agencies, hot lines, drop-in centers, and the like, to provide limited counseling services to minors whose needs are not already subsumed in Standard 4.6, 4.7, or 4.8. The number of psychotherapeutic or counseling sessions to which minors may consent

without parental notification is restricted, however, to allow crisis intervention or initial diagnosis, but not long-term psychotherapy without parental notification, consent, and involvement.

This authorization is similar to the statutes in several jurisdictions which allow minors to consent to treatments related to mental or emotional disorders. For example, in Maryland "A minor who has attained the age of 16 years and who has or professes to have a mental or emotional disorder may consent to diagnosis and consultation of the disorder by a physician or clinic." Md. Stat. Ann., art. 43, § 135(a) (Supp. 1973). See also Ala. Code. tit. 22, § 104 (15) (Cum. Supp. 1973) which provides that "Any minor who is fourteen years of age or older may consent to mental health services." In authorizing minors to consent to counseling services, such statutes recognize that a minor may need assistance to cope with the various stressful physical and psychological changes accompanying puberty and adolescence.

It is recommended that the states adopt uniform licensing requirements for psychotherapists as a protection against untrained and unqualified practitioners prescribing potentially harmful treatment or therapy. Such requirements would not be designed to inhibit legitimate experimentation or innovation, nor to limit diversity in treatment models, but to bar psychotherapists who have not earned the necessary credentials.

This standard does not extend an unlimited right to the minor to consent to therapeutic intervention. Standard 4.9 B. imposes an obligation on the physician providing treatment to notify the parent after an opportunity for initial observation and diagnosis. This is a different notification provision than that used under Standards 4.7 and 4.8, where the physician may notify only if *nondisclosure would be detrimental* to the minor's physical or mental health. This difference is justified by the potential impact that counseling could have on the familial relationship; the need to involve the family in therapy if it is to be effective; and the typically lengthier time span over which the services would be provided. Accordingly, the parent must be notified after three sessions, and his or her consent to additional treatment obtained. In the event that the parent refuses to participate in or permit the minor to continue in therapy or counseling, the provision of such services under order of the juvenile court and without parental consent is governed by the *Abuse and Neglect* volume, Standard 2.1 C. Despite the obvious problem that some minors who might benefit from intervention will not receive it, unless the parental refusal falls below the societally defined minimum level of medical care so as to amount to abuse, the

decision of the parent as to provision of therapy or counseling must be controlling. The dangers of clinical overreaching, and the impact of intervention on familial autonomy require that, in the absence of emotional abuse, state or other outside interference be constrained.

Under Standard 4.3 B., the minor and/or his or her insurer would be financially liable for the initial three sessions. Following parental notification, the parent could ratify and assume the previously incurred obligations.

PART V: YOUTH EMPLOYMENT

5.1 Employment during school.

A. No minor below the age of sixteen who is required to attend school should be employed during the hours in which he or she is required to be in school, as indicated on the work permit. See Standard 5.4.

1. This prohibition should not apply to a minor employed during school hours in a school sanctioned work-study, vocational training, or apprenticeship program.

5.2 Minimum age of employment.

A. No minor below twelve years of age should be employed in any occupation, trade, service, or business:

1. except that, with the consent of the minor's parent, no minimum age limitations or restrictions should apply to a minor employed:

a. by his or her parent in nonhazardous occupations, as defined in Standard 5.3; or

b. by third parties in domestic service, casual labor, or as a youthful performer, provided that such exempt services should not be performed by a minor required to attend school during hours in which the school is in session. See Standard 5.1.

5.3 Employment in hazardous activities.

A. No minor below sixteen years of age should be employed in any occupation determined to be hazardous.

B. The secretary of labor [or state labor commissioner] should promulgate specific standards and regulations defining what occupations are hazardous.

1. The secretary should regularly review and investigate to determine if a particular occupation or employment should be added to or deleted from the list of those which are hazardous.

C. The prohibition on employing minors in hazardous activities does not apply to a minor fourteen or older who is employed in or supervised under a state or federal apprentice training or work-study program in which the minor receives training and supervision.

5.4 Work permit as proof of eligibility for employment.

A. No minor below sixteen years of age should be employed without presenting to an employer or prospective employer a permit to work, which is the sole basis by which eligibility to work should be established.

B. A work permit should be issued by or under the authority of the school superintendent of the district or county in which the minor resides, upon request by a minor, and upon a showing that the minor is at least twelve years of age, as established by a birth certificate or other reliable proof of age including the oath or affirmation of a parent.

C. The work permit should contain the following information:

1. the name, address, and description or picture of the minor;
2. the date of birth of the minor;
3. the name, address, and position of the issuing officer;
4. the date of issuance of the permit;
5. the hours during which the minor is required to attend school, and when his or her employment is thereby prohibited; and

6. a statement that no minor under sixteen years of age may work during school hours, or in hazardous activities, except as part of a recognized work-study or apprentice program.

D. Every employer should require a minor employee or prospective employee to furnish a work permit as proof of age and authorization to be employed.

1. Every employer should obtain a copy of the work permit from the issuing officer and retain it in his or her possession. An employer of a minor is entitled to rely upon such permit as evidence of age and legal hours of employment.

Commentary

Every state has "child labor laws," which regulate the standards, conditions, hours, and circumstances under which young workers may be employed. See, *e.g.*, Note, "Youth Unemployment and Child Labor Laws," 59 *Minn. L. Rev.* 574, 603-608 (1975) for a comprehensive table of current legislation regulating the employment of minors. There is considerable variation in these statutes

in terms of the range of occupations covered, the hours and times during which minors may work, the ages at which minors may be employed, and the like. Despite their pervasiveness, there has been surprisingly little critical evaluation of their purpose or impact by scholars or courts. Even recent legislative revisions have not systematically re-examined either the purposes or the effects that these laws have on the employment opportunities available to minors. See, e.g., Colo. Rev. Stat. Ann. § 80-6-1 *et seq.* (Supp. 1973); Iowa Code § 92.1 *et seq.* (1972); Child Labor Standards Act, Minn. Stat. § 181A.01 *et seq.* (Supp. 1975).

Statutes restricting child labor were enacted in the course of the American "industrial revolution" to prevent minors from being employed for long hours under dangerous circumstances. There is broad authority for the proposition that, as valid exercises of the state's police power, "the Legislature may undoubtedly forbid the employment of children . . . at any regular occupation if the interest of the children and the general welfare of society will thereby be secured and promoted." *Ex parte Spencer*, 149 Cal. 396, 86 Pac. 896 (1906). A variety of humanitarian and economic justifications have been offered in support of restrictions on child labor. These include: preventing children from engaging in hazardous occupations at their peril, *Sturges and Burn Mfg. Co. v. Beauchamp*, 231 U.S. 320 (1913); preventing the maiming and injuring of children "whereby they would become burdens upon the public," *Perry v. Tozer*, 90 Minn. 431, 97 N.W. 137 (1903); diminishing ignorance and immorality as a supplement to compulsory education laws, *Houlihan v. Raymond*, 49 N.J. Super. 85, 139 A.2d 37 (1958); preventing juvenile delinquency, *In re Lewis*, 193 Misc. 676, 84 N.Y.S.2d 790 (1948); preventing the overwork of children during the period of their physical and mental development, *Casey v. Male*, 72 N.J. Super. 288, 178 A.2d 249 (1962); preventing children from injuring themselves by reason of their own inexperience and heedlessness, *Gill v. Boston Stores of Chidal*, 337 Ill. 70, 168 N.E. 895 (1929); and preventing "competition between weak and underpaid labor, and mature men who owe to society the obligations and duties of citizenship." *Kruczkowski v. Polonia Pub. Co.*, 203 Mich. 211, 168 N.W. 932 (1918), 14 A.L.R. 818, 820 (1921).

Moreover, courts did not require detailed evidence of the benefits to the state or to the child which might result from the statutes. "It is competent for the state to forbid the employment of children in certain callings merely because it believes such prohibitions to be in their best interest." *State v. Shorey*, 48 Ore. 396, 86 Pac. 881 (1906). Furthermore, because the "growth of a child is gradual

and the age of maturity varies with different children, and it is impossible for any person to fix the exact time when a child is capable of protecting itself," the courts have traditionally deferred to legislative judgments regarding age limits. *Ex parte Weber*, 149 Cal. 392, 86 Pac. 809 (1906). The doctrine of *parens patriae* and the police power of the state to protect the physical, mental, and moral welfare of children gave state legislatures virtually free reign to regulate and restrict child labor.

It has been held that such statutes are founded upon the principle that the supreme right of the state to guardianship of children controls the natural rights of the children when the welfare of society, or of the children themselves, conflicts with the parental right that the integrity of such statutes has been upheld under the police power of the state . . . that every presumption is in favor of their constitutionality. *Kowalczyk v. Swift and Co.*, 329 Ill. 308, 314, 160 N.E. 588, 590 (1928).

Accordingly, courts uniformly held that state child labor regulations do not violate any of the fundamental rights of the parent, *Sturnes v. Albion Mfg. Co.*, 147 N.C. 556, 61 S.E. 525 (1908), such as the right of parents to employ their children in a lawful occupation, *People v. Erver*, 141 N.Y. 129, 36 N.E.4 (1894), even where the prohibition also interfered with family religious practices as well, *Prince v. Massachusetts*, 321 U.S. 158 (1944).

Although the early restrictive legislation was advocated to protect minors against exploitation, physical injury, unsafe conditions, abuse, and "moral pollution," these humanitarian purposes were tempered by economic realities as well. When most productive labor was relatively unskilled, children could be employed more cheaply than adults and still produce comparable goods at less cost, providing the manufacturer with additional profits or a competitive advantage because of lower costs of production.

Communities depended on factories for their economic sustenance and the competition between the states to have industries locate within their borders was keen. The threat of the exploiters to remove their plants to states with lower standards of social legislation sounded the death knoll to many a drive for reform. Comment, "Child Labor Legislation—Its Past, Present and Future," 7 *Fordham L. Rev.* 217 at 220 (1938).

Congress attempted to remedy this situation by imposing minimum

child labor standards on the states, through its power to regulate interstate commerce. This initial effort by Congress was invalidated by the Supreme Court in *Hammer v. Dagenhart*, 247 U.S. 251 (1918) as was a later indirect attempt to impose an excise tax on goods manufactured by child labor, *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).

During the depression of the 1930s, the economic situation re-suscitated nationwide interest in effective federal child labor legislation. In view of the prior Supreme Court rulings, several constitutional amendments were proposed:

Between the ages of seven and seventeen years over two million children were gainfully employed in December, 1932, while ten or eleven million adults were in desperate need of work. The makers of homes were penniless while children performed their work for a pittance. . . . Our present state of affairs requires that a child be displaced in the industrial scheme of things. Aside from the attractiveness of the humanitarian ideal of a workaday world without children, our conclusion is that the recent interest in the proposed Child Labor Amendment springs from a purpose to safeguard for adults the field of gainful employment. "Federal Legislation—The Proposed Child Labor Amendment" 22 *Geo. L.J.* 560 at 562 (1933).

Following passage of the Federal Fair Labor Standards Act, 29 U.S.C.A. § 212; *U.S. v. Darby*, 312 U.S. 100 (1940), which included provisions limiting child labor, many states that previously had imposed only minimal restrictions also enacted more comprehensive protections.

While the original economic concerns of labor union representatives, and the humanitarian concerns of reform groups interested in child labor regulations, provided the impetus for restrictive child labor provisions, subsequent social and economic changes, coupled with increased regulation of other aspects of employment require reconsideration of the economic and humanitarian assumptions and purposes underlying child labor laws. In 1955, the National Child Labor Committee which sponsored much of the early reform legislation, recognized that many of the abuses with which they were concerned were no longer a problem.

Today with the development of minimum wage laws, a five day week, provisions for overtime pay, stricter compulsory school attendance laws and a highly unionized labor force, these same labor regulations are becoming less of a restraint on employers eager to employ chil-

dren as on young people seeking jobs that are not safe or suitable for workers under 18 years of age. "Child Labor v. Work Experience," Annual Report of the National Child Labor Committee, 1955.

Increasingly, there is questioning of the appropriateness of many of the restrictive aspects of current child labor laws. J. Coleman, et al., *Youth: Transition to Adulthood* (1974).

It is quite true that the original child labor statutes were passed at a time when children were often employed for long hours at low wages to the detriment of their health, education, and general upbringing. Circumstances have changed. Children nowadays may be handicapped instead by the lack of opportunity for work experience at an early age. The ends sought by the statute have necessarily shifted. *Vincent v. Rigg*, 30 N.Y.2d 406, 285 N.E.2d 689 (N.Y. 1972).

The combined effects of the complex child labor regulations—the limitations and restrictions on working hours; the involved permit and certification procedures; the detailed lists of prohibited employments; the threat of criminal liability for even unwittingly employing a minor; and the imposition of punitive damages for work-related injuries sustained by minors—impose added burdens on a young person which others do not face and consequently tend to discourage the employment of minors. See generally Note, "Youth Unemployment and Child Labor Laws," 59 *Minn. L. Rev.* 575 (1975).

Although the original statutes may have been intended as protective, it is not clear that they still serve that function. Teenage unemployment and underemployment, rather than abuses and exploitation of child labor, are the more significant current problem. The unemployment rate for minors is approximately three times the national unemployment rate. During the 1975 recession, the unemployment rate for sixteen- and seventeen-year-old minors was well in excess of 20 percent and considerably higher for minority group youths. Other factors besides restrictive legislation certainly contributed to this disparity. An employer with a hiring choice between experienced, comparatively stable adults and inexperienced, relatively unstable teenagers, would naturally tend to prefer adults. Moreover, an expansion in the proportion of women working has introduced further competition for the unskilled and/or part-time jobs that teenagers frequently seek. See, e.g., Silberman, "What Hit the Teenagers," in M. Herman, S. Sadofsky, B. Rosenberg, eds., *Work, Youth and Unemployment* (1968). While child labor laws may not be the primary cause of youth unemployment, their com-

plexity and penalties may be a factor in discouraging the employment of youth. "Unemployment rates are usually highest for the youngest, least experienced, and least educated. Many employers may prefer to hire 18-19 year olds. Furthermore, many occupations and/or establishments are closed to 16 and 17 year olds by law because of the nature of the jobs." Hayghe, "Employment of High School Graduates and Drop-outs," *Monthly Labor Review* 49, 52 (May, 1972). These economic and social conditions have prompted several recent child labor legislative revisions which attempt to increase employment opportunities for younger persons by minimizing: limitations on maximum hours; entrance ages; nightwork; prohibited occupations; and work permits. Levy, "State Labor Legislation Enacted in 1973," *Monthly Labor Review* 22, 23 (January, 1974).

The guiding policy underlying these standards will be to reduce the restrictions imposed on the employment of minors to the greatest extent feasible to insure, if not greater employment, at least competitive equality with adult workers. Eschewing protective rationales, except for young children below the age of twelve, these standards are designed to reinforce the compulsory education policies of the *Schools and Education* volume by prohibiting the employment of minors during periods when they are required to attend school.

In order to achieve consistency with the policy favoring compulsory education, see the *Schools and Education* volume. Standard 5.1 prohibits minors required to attend school from working during hours when school is in session, except as part of a school-sanctioned work-release program. This restriction is consistent with most state child labor laws which equate the minimum age for working during school hours with the compulsory school attendance age. Several legislatures which have reconsidered their prohibitions on employing school age minors during school hours have retained this prohibition. See, e.g., Colo. Rev. Stat. § 80-6-5(2) (Supp. 1973); Iowa Code Ann. § 92.4 (1972); Kan. Stat. Ann. § 38-601 (1973); Neb. Rev. Stat. § 48-304 (1974). In light of the policies favoring compulsory education, and the opportunities for employment of minors during school hours through apprentice and student-learner programs, it is not necessary to provide additional authority for school officials to excuse younger children from school attendance in order to work when the school officials deem it in the "best interest of the child." See, e.g., Colo. Rev. Stat. § 80-6-13 (Supp. 1973); Utah Code § 34-23-3 (1973). The net effect of these provisions will be to drastically reduce the restrictions on the employment of minors, streamline

the limited remaining administrative-regulatory processes, and make the residual restrictions consistent with their primary remaining purposes, which are reconciling work opportunities with compulsory education provisions, and enhancing employability.

The threshold issue in formulating child labor standards is establishing the minimum age for employment in various kinds of activities. The majority of jurisdictions allow minors fourteen years of age to work outside of school hours at nonhazardous occupations. In more than half of the states, fourteen is the minimum age for employment in factories and stores. See, *e.g.*, Del. Code Ann. § 511 (1953); Colo. Rev. Stat. Ann. § 80-65 (Supp. 1973); Hawaii Rev. Stat., § 390-2 (Supp. 1973); Iowa Code Ann. § 92.3 (1970); Ill. Rev. Stat. ch. 48 § 31.11 (Smith-Hurd 1973); Kan. Stat. Ann. § 38-601 (1973). Similarly, youths between fourteen and sixteen are permitted under the Federal Fair Labor Standards Act, 29 U.S.C.A. § 203 (1), to work outside of school hours at jobs which are nonhazardous. Several states set fourteen as the minimum age for employment in stores and sixteen as the minimum age for employment in factories. See, *e.g.*, Mass. Ann. Laws ch. 149 § 60 (1976); N.C. Gen. Stat. § 110-6 (1975); N.Y. Labor Law § 131 (McKinney 1965); Pa. Stat. Ann. tit. 43, § 42 (1964); Va. Code Ann. § 40.1-100 (D) (1); (2); (E) (Supp. 1973). While other statutes are extremely complex and at first blush appear to prohibit the employment of minors under sixteen, upon closer examination, it becomes apparent that certain jobs are available to younger people as well. See, *e.g.*, Cal. Labor Code § 1290 *et seq.* (West 1971); Fair Labor Standards Act 29 U.S.C.A. § 203 (1). Thus, through a variety of mechanisms, most states permit minors fourteen years or older to work in safe, nonfactory jobs outside of school hours. In addition, many states allow minors below the age of fourteen to perform casual jobs which have traditionally been available for children. See, *e.g.*, Colo. Rev. Stat. Ann. § 80-6-6 (Supp. 1973); Kan. Stat. Ann. § 38-614 (1973); Utah Code Ann. § 34-23-6; 34-23-7 (1973). The particular types of employment these statutes authorize pose little danger to the physical well-being of minors. Moreover, in the absence of such exceptions, it would be virtually impossible to enforce the prohibition against such employment.

In order to increase the availability of employment for young people and eliminate the unnecessary and confusing restrictions, the standards dispense with most age-graded restrictions, or occupational prohibitions other than those which are hazardous for minors. The intricate age-graded restrictions, as well as the "store" versus "factory" distinctions employed in several statutes are neither

meaningful nor self-obvious as such, and don't take into account the vast range of individual differences in any employment situation. The provisions of Standard 5.2 establishing a minimum age of employability of twelve for most purposes, coupled with Standard 5.3 regulating the employment of minors in hazardous activities provides a sufficient mechanism for such occupational safeguards as may be necessary much more directly and specifically.

The net effect of Standards 5.1-5.4 is to repeal all restrictions on the employment of minors over sixteen years of age, and to drastically reduce the restrictions remaining on those under sixteen. Persons over sixteen are no longer required to attend school (see the *Schools and Education* volume), may enter into binding contracts (see Part VI, *infra*), and are capable of exercising a considerable degree of autonomy in a number of other respects as well. It therefore seems inappropriate to impose additional restrictions or consign them to low paying, dead-end jobs on a protective rationale. Current restrictive policies place minors at a competitive disadvantage in their quest for employment without any demonstrable off-setting advantages. Standard 5.1 attempts to redress this balance by placing minors sixteen years or older in the same competitive position as older workers. For minors below the age of sixteen, Standard 5.1 only attempts to reconcile their employment opportunities with the requirement that they attend school. Standard 5.2 establishes a minimum age of employability, prohibiting the employment of minors below the age of twelve except under relatively limited circumstances and then only with their parent's consent. Standard 5.3 provides some additional protections against employment of minors aged twelve to sixteen in hazardous activities. There are no further restrictions imposed on the employment of minors of any age. For minors aged twelve or older, there is no formal parental consent requirement as a precondition of employment, since we assume that in most ongoing families, the informal decision making process is more than adequate to provide whatever additional limitations on employment might be deemed necessary. If parents do not want their child to work, or to work under the particular circumstances in which he or she is employed, their informal powers of persuasion should be more than ample. Similarly, if a minor does not wish to work under circumstances in which the parents want him or her to, noncompliance is a satisfactory protection. Additional legal mechanisms are simply unnecessary.

Standard 5.2 provides that no minor below the age of twelve may be employed in any occupation, trade, or business. Whatever the virtues of youthful employment or the economic circumstances

of the particular child, it appears to the IJA-ABA Joint Commission on Juvenile Justice Standards that some minimum age for employment should be established. In view of the enormous physical and developmental differences associated with early adolescence, a relatively low minimum age was adopted. Minors below the age of twelve are prohibited from engaging in any forms of gainful employment subject to limited exceptions. These exceptions for employment by the parents themselves in nonhazardous activities, or by others in domestic service, casual labor, or artistic endeavors are common, legislatively recognized exceptions to the more general prohibition on youthful employment. See, *e.g.*, Colo. Rev. Stat. Ann. § 80-6-6 (1973); Utah Code Ann. § 34-23-7 (1973). Moreover, unlike the employment of minors over the age of twelve, the employment of these younger children requires the prior consent of the parents as an additional safeguard. For purposes of this provision, a "parent" who may employ a minor or consent to his or her employment by others includes a natural parent, adoptive parent, or custodial parent who is otherwise exercising legal custody and control over the minor.

One of the original purposes of child labor regulations was to protect minors from dangerous and unhealthy work. Child labor laws accomplished this by designating certain occupations as hazardous. Minors were prohibited from employment in these dangerous activities. Virtually all child labor laws set a higher minimum age for work defined as hazardous than they do for work which is safe. See, *e.g.*, Iowa Code Ann. § 92.8 (1971); Kan. Stat. Ann. § 38-602 (1973); Mass. Ann. Laws, ch. 149 § 62 (1954); Cal. Labor Code §§ 1293, 1294 (West 1971); Colo. Rev. Stat. Ann. § 80-6-10 (1971); Del. Code Ann. tit. 19 § 512 (1953); Ill. Ann. Stat. ch. 48 § 31.7 (Smith-Hurd 1969); N.M. Stat. Ann. § 59-6-5 (Supp. 1973). The Federal Fair Labor Standard Act, 29 U.S.C.A. § 203(1) prohibits the employment of minors under eighteen in hazardous occupations, as these are defined in 29 C.F.R. § 570.50 *et seq.* The higher minimum age for hazardous occupations effectively closes a broad range of jobs to youth. Once an occupation is designated as hazardous, there is apparently little reconsideration of the designation in light of subsequent technological or safety advancements. While procedures for reconsidering and reclassifying hazardous occupations exist, see 29 C.F.R. § 570.41 *et seq.* (1975), few amendments reflect recent changes in conditions of employment. The standards or criteria for deciding whether a job is too dangerous for a young person are difficult to determine. In addition, the lists of occupations prohibited in the various states are complex

and occasionally very vague. See, *e.g.*, Cal. Labor Code §§ 1292, 1293, 1294 (West 1971). Furthermore, there is evidence that the prohibitions on hazardous occupations present an obstacle to the employment of youth even in safe jobs, since the complexity or the vagueness of the laws tends to discourage employers from hiring youth at the risk of unwittingly violating the law. Bureau of Labor Statistics, U.S. Department of Labor, *Youth, Unemployment and Minimum Wage* (1970). Surveys of state employment offices indicate that the complexity of these regulations may cause unnecessary youth unemployment. See *id.* at 109, 128-29.

In an effort to simplify the hazardous occupation restrictions, Standard 5.3 proposes several major changes in existing laws. First, it lowers the age barrier by foreclosing employment in hazardous activities to minors below sixteen, instead of the current eighteen. Furthermore, Standard 5.3 changes the classification procedures currently utilized to designate occupations as dangerous in the federal system. See, *e.g.*, 29 *C.F.R.* § 570.50 *et seq.* (1975) or those states which have recently amended their laws: *e.g.*, Colo. Rev. Stat. Ann. § 80-6-10 (Supp. 1973); Iowa Code Ann. § 92.8 (1971); Kan. Stat. Ann. § 38-602 (1973); Utah Code Ann. § 34-23-2 (Supp. 1973).

Standard 5.3 B. suggests a different approach to the process of classifying occupations as hazardous by focusing directly on work injury or injury severity rates. The statistics published by the U.S. Bureau of Labor Statistics do not contain injury severity and frequency rates by age or by the categories of jobs prohibited under the child labor laws. While there appears to be some correlation between those jobs which are prohibited for young workers by federal (or state) regulation and those with high injury rates there are also some striking exceptions. The work injury rates published by the Bureau of Labor Statistics indicate that some of the categories of occupations prohibited under the Federal Labor Standards Act are safer than other occupations not restricted at all. See U.S. Bureau of Labor Statistics, Department of Labor, "Handbook of Labor Statistics" 361-78 (1972). While a number of the occupations classified as hazardous by the Federal Labor Standards Act appear to be hazardous—using injury frequency and injury severity as criteria—other hazardous occupations have comparatively low rates of injury. Other occupations not currently classified as hazardous have comparatively higher rates of injury frequency and severity than those currently included. See Note, "Child Labor Laws," 59 *Minn. L. Rev.* 575, n. 108 (1975). Thus, it seems clear that if the purpose of hazardous occupation classifications is to protect minors,

many current classifications have to be reconstructed. Under current practices, states authorize either special commissions, e.g., Colo. Rev. Stat. Ann. § 80-6-10(3) (Cum. Supp. 1971); Hawaii Rev. Stat. § 390-6 (Supp. 1974) or labor departments, e.g. Cal. Labor Code § 1296 (West 1971); Del. Code Ann. tit. 19, § 512(c) (1974), to designate activities which are hazardous for young workers. Under Standard 5.3 B., the Secretary of Labor is responsible for promulgating reasonable standards based on objective evidence of particular hazards in order to restrict the access of minors to employment opportunities.

Standard 5.3 A. reflects another departure from prevailing law by setting sixteen rather than eighteen as the minimum age for employment in hazardous occupations. Minors over sixteen are not required to attend school and they, as well as young people who have completed their education, should be encouraged to enter into the job market with a minimum of restrictions. Coleman, *supra*. On the basis of the available evidence one may conclude that minors sixteen to eighteen are no more likely to be injured at work than the older, equally inexperienced workers, suggesting that inexperience—with which age is associated—is more implicated in the dangerousness of an occupation than chronological age per se. Bureau of Labor Statistics, U.S. Department of Labor, *Monthly Labor Review* (Jan. 1974). Accordingly, Standard 5.3 C. allows minors to receive supervised work experiences prior to their entry into the job market. Under this provision, minors aged fourteen to sixteen employed or enrolled in apprenticeship programs or work-study programs with adequate supervision will not be barred from working at what would otherwise be hazardous activities. This provision reflects the policy of statutes in a number of the jurisdictions. The recently enacted statutes in Colorado, Colo. Rev. Stat. Ann. § 80-6-10(b), (c), (d), (e) (Supp. 1973); New Mexico, N.M. Stat. Ann. § 59-6-5 (Supp. 1973); Kansas, Kan. Stat. Ann. § 38-602 (1973); and Utah, Utah Code Ann. § 34-23-2 (Supp. 1973), exempt apprentices and student learners from the hazardous occupation restrictions. Similarly, the federal regulations allow exceptions to some of the hazardous occupation prohibitions, 29 C.F.R. § 570.50 (1975). It is generally agreed that the dangers justifying restrictions on youth employment can be alleviated by proper training and supervision. Accordingly, minors who are enrolled in apprenticeship or vocational training programs would be exempted from the hazardous occupation restrictions.

Standard 5.4 addresses the issues of enforcing the restrictions on working for minors below sixteen years of age. In most jurisdictions,

the basic regulatory mechanism is some form of certification system, authorizing the issuance of "work permits." Most of the states require the employer or the child to obtain an employment certificate for the minor-employee. See, *e.g.*, Cal. Labor Code §§ 1299-1300 (West 1971); Del. Code Ann. tit. 19, § 541-44 (1953); Hawaii Rev. Laws § 390-3 (Supp. 1974); Ill. Rev. Stat., ch. 48, §§ 31.9, 31.13 (1969). Obtaining a certificate tends to be somewhat complicated, except in those states, see, *e.g.*, Colo. Rev. Stat. Ann. § 80-6-11 (Supp. 1973), Utah Code Ann. § 34-23-10 (Supp. 1973), which have simplified their certification procedures to encourage youth employment. Some jurisdictions require a minor to obtain a separate certificate for each job, and require that the employer sign a pledge of employment before a permit is issued. See, *e.g.*, Cal. Labor Code § 1299 (West 1971); Del. Code Ann. tit. 19, § 541 (1953); Mass. Gen. Laws Ann., ch. 149 § 87 (1) (1976); N.J. Rev. Stat. § 34:2-21.8 (1973). Work certificates are occasionally used as a mechanism to safeguard the health of working minors. Some jurisdictions require a physician to perform a physical examination on the minor and submit a report before a minor may work. See, *e.g.*, Del. Code Ann. tit. 19, § 545 (1953); Ill. Rev. Stat. ch. 48, § 31.12-4 (1969); N.J. Rev. Stat. § 34:2-21.8(3) (Supp. 1973). Other states require the issuer of the permit to ascertain that the child is in good physical health. See, *e.g.*, Minn. Laws. ch. 432, § 5(3) (1974); N.M. Stat. Ann. § 59-6-8(1) (Supp. 1973); N.Y. Labor Law § 139 (McKinney Supp. 1973). As part of the certification procedures, some jurisdictions require employers to obtain or to check and file the certificates of each young worker. See, *e.g.*, Iowa Code § 92.10 (1972); Kan. Stat. Ann. § 38-604 (1973). Under federal law, an employer may protect himself against unintentional violations of minimum age provisions only by obtaining and keeping on file an employment certificate for each minor employed (29 U.S.C.A. § 203, 211 (1965); 29 C.F.R. §§ 570.2-570.9 [1972]). Recent studies of state experiences with child labor laws and their impact on youth employment suggest that the expense and cumbersome machinery of work certificates may pose a major obstacle to the employment of youth. Bureau of Labor Statistics, U.S. Department of Labor, "Youth Unemployment and Minimum Wage" 121 (1970). The burdens of certification and the penalties for employing minors in violation of the restrictive legislation ultimately penalizes minors by providing employers with incentives to hire older workers for whom such safeguards are unnecessary.

Any regulatory system entails some encumbrances. However, a certification system less onerous than current practices could elimi-

nate some obstacles for prospective employers and employees, and thereby encourage the employment of minors. The administrative mechanism proposed in Standard 5.4 attempts to minimize the administrative burdens, provide a mechanism to enforce the law, and provide employers with the information they need to comply with the law. The mechanisms proposed in Standard 5.4 represent a departure from many of the older regulatory schemes. The responsibility for obtaining a work permit rests with the minor rather than the employer. Although the actual enforcement of this responsibility will occur when the employer demands to see the permit, the minor will have a greater incentive to procure the permit than the employer. The procedure for obtaining the permit is as simple as administratively feasible. A minor aged twelve to sixteen simply applies for a permit at the school he or she attends. Standard 5.4 utilizes schools and school officials as the administering agency because they will generally be the most accessible and knowledgeable officials available. Since the *Schools and Education* volume requires that children remain in school until age sixteen, it is the primary agency with which all minors up to sixteen necessarily come into contact on a regular basis.

Under Standard 5.4 B. the issuance of the permit itself is non-discretionary. Upon satisfactory proof of minimum age, which may be established by birth certificate, other legal documents, school records, or the oath or affirmation of parents or guardians, the permit must be issued. This use of the schools as the administrative clearinghouse is consistent with a number of jurisdictions' approach to the issue. Similarly, establishing eligibility on the basis of any reasonable proof of age is also consistent with the more recent, liberalized statutes. See, e.g., Colo. Rev. Stat. Ann. § 80-6-11(3) (Supp. 1973).

Since the function of the work permit certification system is to reconcile employment opportunities with mandatory school attendance and certain restrictions on hazardous occupations, if a minor establishes age eligibility there is no basis for denying a permit. Many of the other purposes for which certification was used are not incorporated in this system. Accordingly, there is no basis for a discretionary withholding of the permit. The requirement of a physical examination is eliminated. It probably does not, in operation, provide "true" physical protection, and it probably does discourage the employment of minors. Most employment does not require a physical examination. If there is concern for minors' health, it should be addressed directly through special school pro-

grams or other medical outreach programs, rather than as part of a system that will only apply to those minors seeking employment.

Standard 5.4 C. prescribes the information to be contained in a work permit. The permit should identify the minor, including a picture. It should also include the minor's age. It should identify the issuing school authority and when the permit was issued. The permit should contain a statement that employing minors below the age of compulsory school attendance during school hours is prohibited. The permit should describe the regular school hours, thereby giving notice when such employment is prohibited. One copy of the permit, with the information it contains, is issued by the school authority directly to the minor. The minor retains this copy in his or her possession. When a minor seeks employment, the employer should require the minor to furnish a work permit establishing age and eligibility. When the minor is employed, the employer should then contact the issuing school authority and request a photocopy or duplicate of the permit issued to the minor. This photocopy requirement is consistent with many current practices and provides proof against alteration or forgery. When the document is forwarded by the school authority to the employer, the employer may rely upon such document as evidence of the minor's age and the hours during which the minor may be employed.

This procedure has several virtues over current practices. By issuing the permit directly to the minor on a nondiscretionary basis, whatever regulatory objectives exist will be satisfied in as simple and straight-forward a fashion as possible. It eliminates the burdens of requiring employers to promise to employ a particular minor if a permit is issued, or to obtain the original permit, retain it, and then return it to the issuing authority at the conclusion of the employment. By placing a copy of the permit in the hands of the most interested party, the minor employee, and providing a simple method for cross-validating the information provided by the minor, a number of administrative impediments may be avoided.

By implication, Standards 5.1-5.4 also abolish many of the sex-based distinctions that are presently incorporated in a number of child labor laws. Historically, child labor laws were passed in conjunction with similar movements restricting the circumstances under which females could be employed. Many of the restrictions on the employment of adult females are currently under attack as denials of equal protection or as violations of civil rights or equal employment opportunity provisions. See generally "Developments in the Law—Employment Discrimination and Title VII of the Civil Rights

Act of 1964," 84 *Harv. L. Rev.* 1109 (1971); 42 U.S.C. § 2000(e) (1970), 29 C.F.R. § 1604.2(b) (2) (1974). Many of the child labor laws incorporate similar restrictions, typically setting higher ages or more stringent conditions on the employment of females than of males. See, e.g., Cal. Labor Code § 1297 (West 1971) (working as messengers, boys over sixteen, girls over eighteen); Cal. Labor Code § 1298 (West 1971) (street occupations and peddlers, boys over ten, girls over eighteen). Such discriminatory restrictions on females but not on males have been judicially upheld in several jurisdictions as part of the state's greater solicitude for the "health, safety, and morals of its juveniles" and in deference to the perceived greater vulnerability of girls than of boys. See, e.g., *Warshafsky v. Journal Co.*, 63 Wis. 2d 131, 216 N.W.2d 197 (1974). While there may be valid sex-linked differences in employment that are related to bona fide occupational qualifications, many of the current distinctions contained in child labor laws are predicated on "stereotyped characterizations of boys and girls and do not take into account individual capacities, preferences, and skills." Note, "Child Labor Laws," 59 *Minn. L. Rev.* 575 at 593 (1975). While the sex role stereotypes included in a number of child labor provisions are being eliminated through statutory amendments fostering equal treatment of young boys and girls in some states, many states have not yet taken these steps. Standards 5.1-5.4 do not explicitly address this question because they deal exclusively with age based discrimination to facilitate coordination with compulsory education laws. By inference, however, sex is no more appropriate a basis for classifications for minor females than it is for adults, in the absence of bona fide occupational qualifications.

5.5 Enforcement of child labor laws.

Enforcement of the provisions of Standards 5.1-5.4 should be by civil fines.

Commentary

There are several mechanisms available to enforce child labor laws. As a supplement to the certification procedures, a number of jurisdictions authorize the imposition of fines, e.g., N.D. Cent. Code § 34-07-21 (Supp. 1973); Wash. Rev. Code Ann. § 49.12.170 (Supp. 1973), some ranging up to \$10,000 for repeated violators, 29 U.S.C. § 216(a) (1970), or even imprisonment for violators of

the law. Cal. Labor Code § 1308 (West 1971); Colo. Rev. Stat. Ann. § 80-6-16 (Cum. Supp. 1971). However, from the absence of reported cases, it appears that criminal sanctions are rarely imposed.

Since the purpose of these standards is to encourage youth employment, consistent with the policies on compulsory education, the threat of criminal sanctions for violations of these provisions seems inappropriate. In the absence of the "solemn moral condemnation" by the community of violators of these provisions, it debases penal provision to invoke the criminal sanction. See, *e.g.*, Kadish, "Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations," 30 *U. Chi. L. Rev.* 423 (1963). On the basis of previous experience, criminal penalties including incarceration are rarely utilized because of the severity of the sanction, thereby encouraging nonenforcement of these provisions. Finally, criminal punishment, with its implications of moral culpability, greatly increases the procedural safeguards which are required, making enforcement more difficult, expensive, and time consuming.

Since compliance in the future, rather than punishment for the past, is the primary purpose of these regulations, civil fines have a variety of enforcement advantages. The illegal employment of minors reflects either negligence or intentional economic decisions. If it is a matter of negligence, a civil penalty is the appropriate consequence to "educate" the employer for the future. If the decision is a rational, economic one predicated on economic advantages realized by employing minors illegally, then a graduated schedule of fines can be invoked to influence this economic calculus by discouraging and deterring such violations. By treating fines as civil rather than criminal, the burdens of enforcement will be eased. In addition, voluntary compliance by employers will be easier because admissions of civil violations and the payment of fines do not entail the implications of culpability or the admission of wrongdoing that criminal penalties do. Finally, as a result of the foregoing, employers will not be as reluctant to employ minors for fear of the potential consequences that even technical violations may entail. Accordingly, Standard 5.5 proposes that violations of the conditions of employment specified in Standards 5.1-5.4 should be met with civil penalties only.

5.6 Restrictions on hours of employment.

Adult and minor employees should be subject to the same restrictions on the total number of hours per day, or per week, or the actual hours during which they may be employed.

Commentary

One of the more restrictive aspects of current child labor statutes are the provisions which limit the number of daily or weekly hours which a minor may work. Most jurisdictions limit the employment of minors under sixteen to a maximum of eight hours per day and forty hours per week, see, *e.g.*, Colo. Rev. Stat. Ann. § 80-6-5 (Cum. Supp. 1971); Minn. Stat. § 181A.04(4) (1974), although some allow employment up to forty-eight hours per week, *e.g.*, Del. Code Ann. tit. 19, § 515 (Cum. Supp. 1970); Ill. Ann. Stat. ch. 48, § 31.3 (Smith-Hurd 1974). Other states prohibit minors who are attending school from working more than three or four hours per day on school days, or more than a combined total of ten hours per day of school and work. See, *e.g.*, Iowa Code Ann., § 92.7 (1972) (four hours); Utah Code Ann. § 34-23-3 (1974) (four hours); Hawaii Rev. Stat. § 390-2(4) (Supp. 1974).

These restrictions place minors at a competitive disadvantage with adult employees in several respects. One consequence of these limitations may simply be to discourage the employment of minors when adults who can work longer hours may be available. The forty-hour restrictions also bar minors from earning time-and-a-half pay for overtime work, since overtime compensation only applies to hours worked in excess of forty hours per week, 29 U.S.C. § 207 (1970). The policy of Standard 5.6 is not that anyone should be allowed to or required to work sixty or more hours per week. Rather Standard 5.6 abolishes restrictive hourly differentials to avoid placing minors, especially those who may no longer be enrolled in school, at a competitive disadvantage with adults for those positions for which both are qualified. The purpose is to eliminate hourly disparities which encourage economic discrimination on the basis of age.

Similarly, there are a number of statutes which, in addition to prescribing maximum hours daily and weekly, also prohibit the employment of minors during certain hours of the night. While allowing for some "vacation" variation depending upon whether or not school is in session, most jurisdictions only allow minors to be employed during the daytime, *e.g.*, 6 a.m. to about 10 p.m. See, *e.g.*, Ariz. Rev. Stat. Ann. § 23-231 (Cum. Supp. 1974) (6 a.m.-9:30 p.m.); Conn. Gen. Stat. Ann. § 31-12 (Cum. Supp. 1974) (6 a.m.-10 p.m.); Kan. Stat. Ann. § 38-603 (1973) (7 a.m.-10 p.m.); Wis. Stat. Ann. § 103.64 (1974) (7 a.m.-6 p.m.). The rationale for these hourly restrictions, in addition to the maximum daily and weekly hourly restrictions, appears to be concern that working at night

would interfere with a minor's education or that minors might be subject to criminal victimization or economic exploitation. More recently, however, legislative reforms reducing the hourly restrictions appear to be concerned that minors who are not working at night may themselves become criminals, and allowing minors to work at night may actually reduce juvenile crime. See, *e.g.*, Ark. Stat. Ann. § 81-707 (Cum. Supp. 1973). There have been a number of such reforms reducing the hourly restrictions on minor employment.

Recently, the Iowa legislature extended the hours children under 16 could work on summer nights from 7:00 to 9:00. . . . In Kansas children under 16 can work until 10:00, as can minors under 18 in New Jersey. In New Mexico, children under 14, who were once prohibited from working after 7:00 can now work until 9:00. Minors under 16 in North Carolina who in the past could only work until 6:00, can now work until 7:00 before school days and 9:00 on other days. In Utah children under 16 can work until 9:30. And the legislature in Pennsylvania extended work hours during summer vacation from 7:00 to 10:00 for youths 14 and 15, and to midnight for youths 16 and 17. Note, "Child Labor Laws—Time to Grow Up," 59 *Minn. L. Rev.* 575, 588-89 (1975).

Whether extending the permissible hours of employment will have any impact on juvenile delinquency is problematical. It is clear, however, that such extensions are consistent with the general policies of these standards encouraging employment opportunities for minors by eliminating disparities based on age between minor and adult employees. Accordingly, Standard 5.6 proposes that restrictions on the hours during which minors may be employed should be the same as those applicable to adult employees. As a practical matter, the vast bulk of jobs for which most minors would qualify will not involve working beyond the hours currently dictated by the statutory restrictions. While it is not desirable that minors work long hours, especially at night before school the next morning, in the absence of economic necessity, most teenagers and their parents would not undertake or permit such a schedule. Accordingly, such restrictions on the total number of hours and when they are worked should be determined by the minor, the parent or guardian, and the operation of the marketplace, rather than by legislative fiat which accomplishes very little in the way of additional protections and places minors at a further competitive disadvantage with potential adult employees. Although this abolition of restrictions on the hours during which minors may be employed represents a major departure

from the legislative policies of a majority of jurisdictions, at least a few states have already embarked on this course. See, *e.g.*, Mont. Rev. Codes Ann. § 10-201 (1968); Nev. Rev. Stat. § 609.190 (1973); Wash. Rev. Code Ann. §§ 26.28.060, 49.12.120 (Supp. 1973). The net effect of abolishing legislative restrictions on the number of hours daily or weekly that a minor may work, or when he or she may work them, is to put minors in the same competitive position as adults with respect to employment, thereby increasing the likelihood that minors may successfully seek employment.

5.7 Compensation and minimum wage.

A. State and federal minimum wage laws should apply equally to minors and adults, without wage variations or differentials on the basis of age.

B. Persons performing similar work should receive similar compensation without regard to the age of the worker.

Commentary

Legislatures in a number of jurisdictions presently permit employers to pay minors a lower minimum wage than the wage they pay adults for comparable work. Note, "Child Labor Laws," 59 *Minn. L. Rev.* 575 at 598, n. 144 (1975). The economic argument favoring youth differentials—not extending full minimum wage coverage to minors—is that minimum wage laws aggravate the levels of unemployment by making it uneconomical to employ persons whose marginal productivity is below that level.

According to some economic theorists, wages set higher than the rate that would prevail in a free market must result in some workers not being able to find jobs. The workers left unemployed will probably be those who are less productive, either because they are inexperienced or because they are inadequately trained or equipped. It is generally assumed that since young people tend to be inexperienced, they are rapidly priced out of the labor market. Their potential contribution to the economy—their marginal productivity—may be less than the increasing minimum wage. Theoretically, therefore, minimum wage laws might be one cause of the teenage unemployment problem. *Id.* at 598.

If the minimum wage rate is set at a level higher than would be set by the market place, workers whose marginal productivity is less than the "artificially" established level will not be employed. It is assumed that by virtue of inexperience, inadequate training, or

lower levels of education youth have a lower marginal productivity than adults and that it is economically inefficient to employ them at the levels established by minimum wage laws. On the basis of the foregoing economic considerations, several commentators have urged that the minimum wage levels for minors should not be as high as for adults. They fear that equality will preclude employability,

particularly in the 14 to 18 age range and for those with little experience, since their productivity may be significantly below that of experienced and mature workers. To the extent that the minimum is set at a relatively high level and is effective, it will discourage the employment of the young whose productivity is not yet sufficiently high. Panel on Youth of the President's Science Advisory Committee, Report, *Youth: Transition to Adulthood* 168 (1974).

In short, there is concern that the levels of youth unemployment will be aggravated if employers are required to pay a minimum wage rate which may be greater than an unskilled, inexperienced young worker is worth. In such a situation employers would either dispense with their services altogether or hire older, more experienced workers at the same cost.

A related argument against extending the minimum wage to minors is that it may preclude employers from investing in human capital through apprenticeship, job training, or learner programs, while paying a correspondingly lower wage. The diseconomy of employing unskilled minors at the higher rates established by minimum wage laws may preclude employers from developing apprentice programs or on-the-job training that would increase the marginal productivity of minor employees, thereby justifying the additional or higher wages paid. This focuses on the

effect on the incentive to employers to provide general training on the job for the young. Such training is costly to the employers, and to the extent that it is general rather than specific and hence transferable to other jobs and employers, it will be supplied by employers to the young only if it is offset by lower wages during the initial training period. This is the rationale behind the variety of formal and informal apprenticeship arrangements in the labor market. A high and uniform minimum wage level discourages such arrangements and transfers the training to the schools, which are not the best places for it. *Ibid.*

Under the Fair Labor Standards Act, 29 U.S.C.A. § 214(c) (1975), and a number of state laws, see, e.g., Ariz. Rev. Stat. Ann. § 23-311

(1974); Wash. Rev. Code Ann. § 49.12.121 (1973), employers are permitted to hire youth at a rate corresponding to 85 percent of the adult minimum wage. These youth differentials are intended to encourage employment of minors by making it more economically feasible to hire and train them and increase their level of productivity until it is comparable with adults. According to this theory, employers will only invest in human capital, e.g., provide job training, if they can recoup some of their initial investment in the form of reduced wages during the training period.

There are several compelling counterarguments which justify extending minimum wage equality to minors. The first is simply that the asserted relationship between minimum wages and youth unemployment, if there is one, is much more attenuated and problematical than opponents of minimum wage laws recognize. The U.S. Department of Labor conducted a study on youth unemployment and the minimum wage; they reviewed the available data and literature under the federal and state minimum wage programs and considered the experiences from foreign countries. They concluded that there are too many variables affecting the levels of youth unemployment to attribute any significant relationship to the impact of minimum wage laws alone.

The most important—and at the same time discouraging—conclusion to emerge from available analyses is that they do not permit confident conclusions about the effect of minimum wage laws upon the employment experience of teenagers. . . . When all variables that have a legitimate claim to consideration are included, the measures of minimum wages not infrequently have the wrong sign and/or are not statistically significant at conventional levels. . . . U.S. Department of Labor, *Youth Unemployment and Minimum Wage* 44-45 (1970).

While minimum wage laws may have some impact on youth employment, the effects are obscured by a number of other relevant variables. As a result, no significant or causal relationship can be established between minimum wage levels and youth unemployment. The inconclusiveness of this major study by the Department of Labor is not offset by the more recent studies, some of which report finding a relationship between minimum wages and teenage unemployment, Kosters and Welch, "The Effects of Minimum Wages on the Distribution of Changes in Aggregate Employment," 62-1 *Am. Econ. Rev.* 323 (1972) and others which do not. Perella, "Working Teenagers," *Children Today* (May 1972). Thus, the data do not provide a conclusive basis for resolving this issue.

A similar response may be made to the argument favoring youth differentials. The data are inconclusive that allowing employers to hire young trainees at subminimum wages will encourage the employment of minors. Note, "Child Labor Laws," 59 *Minn. L. Rev.* 575 at 599-601 (1975). The U.S. Department of Labor attempted to discover "whether subminimum wage rates encourage the employment of teenagers and the extent to which employers used or failed to use certificates [authorizing employing student-workers at 85% of the minimum wage]," U.S. Department of Labor, Bureau of Labor Statistics, *Youth Unemployment and Minimum Wage* 107 (1970). These studies found little impact of state or federal wage differentials on the employment of youth. The study found that many employers did not utilize the provisions allowing employment at subminimal wages; that differentials of fifteen percent were not sufficient to offset the perceived differential in teenage training, education, or experience; and that most youth were unwilling to work for a wage substantially below that set by minimum wage provisions.

There is an important additional argument against maintaining minimum wage differentials between adults and minors. Many minors are in competition for the unskilled or part-time jobs which women, minorities, and the elderly may also seek. To the extent that a wage differential for minors would encourage economic discrimination in their favor, it could do so against other groups who may be equally deserving of special consideration. It could give a legal, economic advantage to minors over other workers who would not be permitted to work for less than the adult minimum wage. Such a wage differential solely on the basis of age could raise an equal protection problem. As a dissent from the recommendations of the Panel on Youth, the President's Science Advisory Committee points out, "The subminimal wage permits employers to pay young workers a lower wage than adults for the same job performed under the same conditions, solely because of their age." Coleman, et al., *Youth: Transition to Adulthood* 179 (1974). If such a suggestion were made with respect to black employees or female employees its unfairness would be apparent and its constitutionality suspect. Thus, the argument that lower wages will encourage the employment of minors founders on the counterargument that to the extent that such economic discrimination is successful, it discriminates against other classes of workers.

Accordingly, in the absence of compelling data showing either that equal minimum wages will adversely affect minors' employability,

or that minimum wage differentials are successful or nondiscriminatory, Standard 5.7 A. establishes economic equality between minors and adults with respect to minimum wage laws.

Standard 5.7 B. carries the position of economic equality beyond minimum levels of compensation by providing that persons who perform similar work should receive similar compensation, without regard to the age of the worker. People should be paid on the basis of their labor and productivity. A young worker should not be discriminated against solely on the basis of age when he or she is, in every productive sense, the equal of an older worker.

5.8 Workmen's compensation.

All minors, whether or not lawfully employed under the provisions of these standards, should be subject to the same rights and remedies as adults under applicable workmen's compensation laws.

Commentary

There are a variety of mechanisms for enforcing the provisions of child labor laws. Criminal penalties ranging from fines, see, *e.g.*, Wash. Rev. Code Ann., § 49.12.170 (Supp. 1973); 29 U.S.C. § 216(a) (1970) to imprisonment, Cal. Labor Code § 1308 (West 1971); Hawaii Rev. Stat. § 390-7 (Supp. 1974) are available to sanction persons who employ minors in contravention of the child labor restrictions. An additional disincentive is found in the workmen's compensation laws of approximately one-third of the states, which provide for additional compensation to be paid to minors who are injured on the job while unlawfully employed. See, *e.g.*, Mich. Comp. Laws Ann. § 418.161 (1) (b) (Cum. Supp. 1974); N.J. Stat. Ann. § 34.15-10 (Cum. Supp. 1974). These penalty provisions usually require the employer to pay double the compensation that would normally be awarded to an injured employee, or a minor employee lawfully employed. The employer is liable for the punitive provision and may not be reimbursed by an insurer. *E.g.*, N.J. Stat. Ann. § 34.15-10 (Cum. Supp. 1974).

Such provisions probably have an adverse effect on the employability of youth by giving employers another incentive to hire older workers in an effort to avoid accidentally, but illegally employing a minor for whom additional compensation may be required. Note, "Child Labor Laws," 59 *Minn. L. Rev.* 575 at 597 (1975). In view of the policy of these standards to enhance the employability of minors to the greatest extent possible, by eliminating cumbersome provisions or policies which create economic

disincentives to hire minors, Standard 5.8 A. eliminates the workmen's compensation disparity between adults and minors. There is no obvious justification to require an employer to pay additional penalty awards to injured minors solely on account of minority. To the extent that disability compensation takes into account the injured worker's life expectancy, minors would probably be entitled to greater compensation for similar injuries than a substantially older employee. That is a different issue, however, than the penalty provisions currently in force. To the extent that enforcement of the child labor laws is of concern, it should be accomplished directly through enforcement, rather than indirectly through compensation penalties which discourage the employment of a larger group of minors in order to avoid falling afoul of the prohibitions regarding a few.

PART VI: MINORS' CONTRACTS

6.1 Minors' contracts.

The validity of contracts of minors, other than those governed by other standards of this volume, should be governed by the following principles:

A. The contract of a minor who is at least twelve years of age should be valid and enforceable by and against the minor, as long as such a contract of an adult would be valid and enforceable, if:

1. the minor's parent or duly constituted guardian consented in writing to the contract; or
2. the minor represented to the other party that he or she was at least eighteen years of age and a reasonable person under the circumstances would have believed the representation; or
3. the minor was a purchaser and is unable to return the goods to the seller in substantially the condition they were in when purchased because the minor lost or caused them to be damaged, the minor consumed them, or the minor gave them away.

B. The contract of a minor who has not reached the age of twelve should be void.

C. Release of a tort claim by a minor should be valid, if an adult's release would be valid under the same circumstances:

1. if the minor is at least twelve years of age, if the release is approved by the minor, the minor's parent, and, if suit is pending, by the court; or
2. if the minor has not reached the age of twelve, if the release is approved by the minor's parent, and, if suit is pending, by the court.

Commentary

There can be no disagreement with the proposition that common law (and to a great extent legislative) doctrines concerning minors' contracts have not kept pace with the development of a complex, commercial society oriented to a youth culture. The doctrines are conceptual, take inadequate account of variations in maturity levels among minors, make predictability in commercial transactions difficult, and unduly subordinate the proper interests of merchants. The legislatures have paid entirely too little attention to the need to reform common law doctrines; legislative modifications have not been uniform and have been addressed to relatively narrow aspects of the problem. A new legislative approach to the problem of minors' contracts would be welcome. But see commentary, section C., *infra*. A new approach should at once provide protection only to those minors who may not be able adequately to care for their own financial interests while providing more adequate protection for the interests of adults with whom minors engage in financial transactions. The evidence for these conclusions abounds in the lengthy—but hardly exhaustive—survey of the doctrines and the unsatisfactory legislative responses to them, detailed in commentary, section C., *infra*. The academic commentary, although hardly uniform in recommendations for modification, uniformly deplores the current situation. See, e.g., H. Clark, *Domestic Relations* § 8.2 (1968); Edge, "Voidability of Minors' Contracts: A Feudal Doctrine in a Modern Economy," 1 *Ga. L. Rev.* 205 (1967); Nanin, "The Contracts of Minors Viewed from the Perspective of Fair Exchange," 60 *N.C. L. Rev.* 517 (1972); Note, "Restitution in Minors' Contracts in California," 19 *Hastings L.J.* 1199 (1968).

The following paragraphs summarize judicial and statutory doctrines relating to minors' contracts.

A. *The general rule.* At common law, a minor's contracts are voidable, but not void. Thus, in most jurisdictions, one who agrees to sell a fifteen year old a stereo may find himself forced three years later, when the minor reaches the age of majority, to accept tender of the used and battered stereo, if the buyer still has it, and in return to refund the money the child paid for it. *Cf. Central Bucks Aero, Inc. v. Smith*, 226 Pa. Super. 441, 310 A.2d 283 (1973) (seller's only remedy is to recover the item and not its value); *In re Bierman*, 271 F. Supp. 774 (D.C. Ohio 1967) (if minor does not retain the specific consideration received by him or her, he or she may disaffirm without tendering or accounting for it).

The policy underlying the rule is claimed to be the need to pro-

protect the minor from his or her own improvidence, even if that protection produces hardship or economic loss to another. *Hamrick v. Hospital Service Corp.*, 110 R.I. 634, 296 A.2d 15 (1972). The disability may only be invoked by the minor, and the other party cannot plead nullity of the contract if the minor seeks to enforce it. *Scott v. Continental Ins. Co.*, 259 So. 2d 391 (La. App. 1972); *General Machinery & Supply Co. v. National Acceptance Co.*, 472 P.2d 735 (Colo. App. 1970) (party cannot rescind contract with a partnership having an infant member, although the infant can disaffirm the contract to the extent of his personal liability); *Harris v. Ward*, 224 So. 2d 517 (La. App. 1969) (a person injured by minor's automobile cannot plead nullity in order to recover under seller's insurance).

1. Return of consideration. If the minor retains the consideration in specie, he or she must return it; otherwise the minor has no obligation to return the consideration. Nor, in most cases, does he or she have to pay for its deterioration, disappearance, or use. See *McGuckian v. Carpenter*, 43 R.I. 94, 110 A. 402 (1920). However, if the minor has received insurance payments for its loss, he or she may be obligated to return that amount instead of the item.

2. Ratification and disaffirmance. Upon reaching majority a minor may choose to ratify his or her contract or to disaffirm it. The minor must ratify or disaffirm it in whole—he or she may not choose to keep some parts and not others. *Dairyland County Mut. Ins. Co. v. Roman*, 498 S.W.2d 154 (Tex. 1973); *Holland v. Universal Underwriters Ins. Co.*, 270 Cal. App. 2d 447, 75 Cal. Rptr. 669 (1969). The ratification need not be formal, but mere silence is not enough. *Warwick Municipal Emp. Credit Union v. McAllister*, 110 R.I. 399 293 A.2d 516 (1972). The minor's continued conduct or retention of benefits may, however, constitute ratification. *Weiland v. City of Akron*, 13 Ohio App. 2d 73, 233 N.E.2d 880 (1968).

The minor may choose at any time before reaching majority, or within a reasonable time thereafter, to disaffirm the contract. No formal action of disaffirmance is required, but the intent must be communicated to the adult party, *St. Paul Fire and Marine Ins. Co. v. Munz*, 19 Ariz. App. 5, 504 P.2d 546 (1972), e.g., by the institution of a suit to recover the consideration, by raising infancy as a defense in an action on the contract, by returning the consideration, or by initiating a lawsuit for injuries for which a release had been made during minority. See, e.g., *Celli v. Sports Car Club of America, Inc.*, 105 Cal. Rptr. 904, 29 Cal. App. 3d 511 (1972). The relative maturity of the infant is relevant in determining what is a reasonable period for disaffirming after majority. *Eastern Airlines, Inc. v. Stuhl*,

65 Misc. 2d 901, 318 N.Y.S.2d 996 (1970), *aff'd*, 68 Misc. 2d 629, 327 N.Y.S.2d 752 (1971).

B. Exceptions to and alterations of the general rule. The nature of the doctrine has led to the development of a variety of exceptions. The underlying tension is not difficult to ascertain.

Perhaps the most outstanding characteristic of the law of minors' contracts is the general lack of any single, consistent principle underlying the decisions. Irreconcilable conflict has resulted from attempts to protect the minor on the one hand and to prevent injustice to persons dealing with the minor on the other. Note, "Restitution in Minors' Contracts in California," 19 *Hastings L.J.* 1199 (1968).

1. The "necessaries" doctrine. Some protection is afforded merchants by the traditional "necessaries" doctrine, *i.e.*, that the minor may *not* disaffirm a contract for a necessary. There is no catalogue of what is, and what is not, a necessary. What is necessary for one minor might not be for another, depending upon his or her social and economic background. It is not confined to bare subsistence. *Daubert v. Moseley*, 487 P.2d 353 (Okla. Sup. Ct. 1971). Thus, contact lenses have been held to be a necessary, *Cedis v. White*, 71 Misc. 2d 481, 336 N.Y.S.2d 362 (1972), while a contract with an employment agency, *Fisher v. Cattani*, 53 Misc. 2d 221, 278 N.Y.S. 2d 420 (1966), and an apartment lease, *Magnolia Courts, Inc. v. Webb*, 63 Tenn. App. 309, 470 S.W.2d 16 (1970), have been denied the status. The cases split on automobiles. Compare *Warwick Municipal Emp. Credit Union v. McAllister*, 110 R.I. 399, 293 A.2d 516 (1972) (not a necessity although used for commuting to work), with *Rose v. Sheehan Buick, Inc.*, 204 So. 2d 903 (Fla. App. 1967) (a necessity because used for school, business, and social activities). "Proper" education is also a necessary, but what is proper depends upon individual circumstances. See, *e.g.*, *Publishers Agency, Inc. v. Brooks*, 14 Mich. App. 634, 166 N.W.2d 26 (1960). Attorney's fees have been held in some cases not to be a necessary. *Watts v. Houston*, 65 Okla. 151, 165 P. 128 (1917). The prosecution of personal injury claims and the protection of personal liberty, security, or reputation are necessary, but services relating to the infant's estate are not. Annot., 13 A.L.R.3d 1251, 1259-1262 (1967).

2. Misrepresentation and estoppel. Where a minor has fraudulently misrepresented his or her age to induce an adult to contract, some courts have held the minor estopped to assert his or her infancy as

a defense to a suit on the contract. *Manasquan Savings & Loan Ass'n. v. Mayer*, 98 N.J. Super. 163, 236 A.2d 407 (1967); Annot., 29 A.L.R.3d 1270, 1272 (1970). Where the minor brings suit to rescind the contract, some courts have allowed the adult party to counterclaim for the fair value of the use or depreciation of the property involved. See H. Clark, *Domestic Relations* § 8.2 (1968). Other courts have refused to estop the misrepresenting minor because to do so would contradict and undermine the protections the doctrine seeks to create. *Ibid.*

The three elements of estoppel by representation are: justified and good faith reliance upon the minor's statements as to his or her age; the minor must have received and be retaining the benefits received under the contract (if the minor tenders back the benefits he or she has received, the minor may disaffirm notwithstanding the misrepresentation, in which case he or she may be liable for depreciation or use); and the minor must be capable of and be shown to have acted with conscious, fraudulent intent. Annot., 29 A.L.R.3d 1272 (1970). A few states have codified the estoppel for misrepresentation doctrine. See, e.g., Wash. Rev. Code Ann. § 26.28.040 (1961).

3. Value of use and depreciation before disaffirmance. The judicial response to a seller's effort to recoup the amount by which the goods have depreciated while in the minor's possession or the value of their use during that period has been extremely varied. Some of the decisions are at the extremes: rigid enforcement of the right of avoidance requiring the return only of what remains in specie; per contra, conditioning disaffirmance upon making the innocent seller whole. The "middle of the road" courts have: a. charged for only that depreciation resulting from negligent or otherwise tortious treatment of the property; or b. allowed set-off for depreciation or use value only for fair and provident contracts; or c. held the minor accountable for any insurance received for the loss or damage of the property; or d. held the minor accountable for the value or use, limited to the actual benefit derived by the minor. See Note, 19 *Hastings L. J.* 1199 (1968).

4. The New Hampshire benefit rule. In New Hampshire, a minor can disaffirm his or her contract, but the minor remains liable, in an action for restitution, for the benefits he or she has received whether or not the contract is properly described as one for necessities. *Porter v. Wilson*, 106 N.H. 270, 209 A.2d 730 (1945). See Note, 19 *Hastings L.J.* 1199, 1205-06 (1968). The doctrine requires the court to find that the adult was not guilty of fraud or overreaching, and that the contract provided some benefit to the minor. The benefit

is measured not by its market value or the contract price, but by its value to the individual minor—considering his or her station in life. *Id.* at 1206-07. See also *Restatement of Restitution* § 139, Comment *a* at 559 (1940).

C. Statutory modifications. By statute minors have been authorized to make binding contracts in isolated situations. A number of statutes expressly provide that a minor cannot disaffirm a contract transacted under the authority of statute. See, *e.g.*, Cal. Civ. Code § 37 (West 1954); Idaho Code § 32-105 (1963); Okla. Stat. Ann. tit. 15, § 21 (1972). The authorizing statutes cover a variety of topics, including some described in other standards of this volume. See, *e.g.*, Part IV, *supra*. The following enumeration is illustrative.

Statutes in California, Idaho, North Dakota, and Oklahoma make a minor liable for the “reasonable value” of necessities, if he or she is “not under the care of a parent or guardian able to provide them.” A seller would bear the risk that the minor is not “under care.” See Cal. Civ. Code § 36 (West Supp. 1974); Idaho Code § 32-104 (1963); N.D. Cent. Code § 14-10-11 (1971); 15 Okla. Stat. Ann. tit. 15, § 20 (1972). An infant entertainer or professional athlete can, with judicial approval, make a binding contract for his or her services in California. The court can require that part of the earnings be put into trust. Cal. Civ. Code § 36 (West 1954). Judicially approved contracts cannot be disaffirmed. Cal. Labor Code § 1700.37 (West 1971). See also N.Y. Gen. Oblig. Law § 3-105 (McKinney 1964) (judicial approval of infant entertainers’ contracts). In many states a minor who has been accepted at an institution of higher learning can execute a legally binding promissory note for a loan necessary to attend the institution. See, *e.g.*, Ill. Ann. Stat. ch. 29, § 43 (Smith-Hurd 1969); N.J. Stat. Ann. 9:17A-2 (Supp. 1974-75). A minor in Oklahoma between the ages of sixteen and eighteen can only disaffirm a contract for a motor vehicle by restoring the consideration, 15 Okla. Stat. Ann. tit. 15 § 19 (1972).

In a number of states, minors are specifically authorized to transact insurance contracts. The statutes usually limit beneficiaries to immediate family members. See Cal. Ins. Code § 10112 (West 1972) (under 15½, parental approval required); 73 Ill. Ann. Stat. ch. 73, §§ 854, 981 (Smith-Hurd 1965) (age 15); N.Y. Ins. Law § 145 (McKinney 1966) (age 14½, payments to minors limited to \$3000/year). Minors are sometimes given full rights in savings and loan institutions, *e.g.*, the institution may issue them shares, make payments, accept releases and receipts. See 32 Ill. Ann. Stat. ch. 32 § 951 (Smith-Hurd Supp. 1974); N.J. Stat. Ann. 17:12B-81

(1970) (required to be sixteen to vote); N.Y. Banking L. § 394 (McKinney 1971). Minors may rent safe deposit boxes in some states and are treated as adults in all transactions relating to the safe deposit box. N.J. Stat. Ann. 46:39-3 (Supp. 1974-75); N.Y. Banking L. § 334 (McKinney 1971). The New Jersey Banking Act applies to all depositors, regardless of infancy. N.J. Stat. Ann. § 17:9A-229.4 (1963). A minor in Idaho may hold and transfer stock in land and building corporations. Idaho Code Ann. § 30-1310 (1963).

D. Judicial emancipation statutes. In a few states the minor can petition a court to be relieved of the contractual disabilities of minority. *Okla. Stat. Ann. tit. 10, § 91* (1966) provides complete relief:

The district courts shall have authority to confer upon minors the rights of majority concerning contracts, and to authorize and empower any person, under the age of eighteen (18) years, to transact business in general, or any business specified, with the same effect as if such act or thing were done by a person above that age; and every act done by a person so authorized shall have the same force and effect in law as if done by persons at the age of majority.

The statute is not limited by an age minimum, *U.S. Fidelity and Guaranty Co. v. Cruce*, 129 Okla. 60, 263 P. 464 (1928). The statute provides as a standard for a decree that the court find:

the said petitioner is a person of sound mind and able to transact his affairs, and that the interests of the petitioner will be thereby promoted. . . . *Okla. Stat. Ann. tit. 10, § 92* (1966).

For similar statutes see Kan. Stat. Ann. § 38-108 (1973); Tenn. Code Ann. § 23-1201 (1953). See also Standard 2.1 C. 1., *supra*.

E. The academic commentators. Although recommendations that the minor's contractual disability be abolished are hard to find, academic commentators seem to agree that the present rule is too harsh and unrealistic in a modern society. Edge, "Voidability of Minors' Contracts: A Feudal Doctrine in a Modern Economy," 1 *Ga. L. Rev.* 205, 219-23 (1967), questions whether the doctrine arose because of concern for minors, suggesting that it may have been designed to maximize the profits of landowners, and subsequently to entitle parents to a child's wages for a longer period. Moreover,

the conclusive presumption that 21 is the age of capacity to contract has also been attacked. It is felt that juries handle more difficult questions than this in other areas, and that the courts exist for the purpose of making such determinations, as they do for minors in tort and criminal cases. Thus we can protect minors with a less than conclusive presumption. *Id.* at 222-223.

The following arguments favoring modification of the traditional rule have usually been made: a child reaches intellectual maturity long before his or her official minority ends; we do not compel education beyond the age of 16; continental European countries hold children liable for their acts, *e.g.*, Switzerland follows an equity rule, Germany holds a child over seven liable if he or she has "the understanding necessary for realizing his responsibility" (German Civil Code § 828); if the concern relates to the child's lack of discretion, approval by a responsible adult should be enough to protect the child; a variety of special statutes for isolated situations proves that there is no consensus that the minor needs absolute protection; the litigated cases are not the result of impulse buying, but more deliberated, expensive transactions; teenagers spend a great deal of money, and it is unrealistic to contend that we want to deter their commercial transactions; the right to contract may be in the best interest of the minor, aiding in his or her training and development.

This volume recommends that the age of majority be reduced from twenty-one to eighteen. See Standard 1.1 *supra*. A number of state legislatures have already adopted that reform and there certainly seems to be a trend in that direction. *Ibid.* In light of that development, recommendations to reform the law of minors' contracts—by and large by establishing an age below majority at which a person is bound by his or her deals under varying circumstances—may well be "a solution in search of a problem." In the first place, the plethora of appellate court cases involving the issue may well seriously misrepresent how adequately the marketplace in fact works: it is not impossible that most kids make purchases without difficulty and obtain credit without undue inconvenience because merchants extend credit to decent risks despite the fact that they have no legal protection, and that most kids honor their debts without taking advantage of the leverage that the disability doctrine gives them. A casual survey of major (department store) sellers in one city indicates that minors can obtain charge accounts from many merchants if they have parental permission and a regular job and that merchants who do extend credit to minors have lower loss ratios with minors than they have with adults. (Automobile dealers

seem to be much less willing to sell to minors than other merchants; but considering the average size of the purchases, the risk to the merchant and to the minor, and the danger of the items to passengers, pedestrians, and other drivers, that caution may have substantial social utility.) Equally important, reduction of the age of majority to eighteen may take care of that part of the situation which can be considered a "problem" when all the pertinent interests are taken into account, *i.e.*, the young people most likely to be interested in obtaining credit and in making autonomous commercial transactions, those who range in age from eighteen to twenty-one, will no longer be impeded by rules which deter merchants from dealing with them; and the most egregious appellate court decisions, those which extend the protections of "infancy" to independent youths close to the age of twenty-one, will no longer disrupt normal commercial transactions. See, *e.g.*, *Kiefer v. Fred Howe Motors, Inc.*, 39 Wis. 2d 20, 158 N.W.2d 288 (1968) (married youth, twenty years and seven months old, who purchased a used car to drive to work may disaffirm contract and return car; change in disability doctrine must be made by legislature). Until there is further substantial change in American culture, there may not be a pressing need to eliminate commercial restrictions on youths below the age of eighteen. It is at least arguable that the existing rules, with all their inconsistencies and conceptual niceties, will operate to protect a class disproportionately likely to be disadvantaged by unscrupulous merchants without imposing any significant burdens on reputable merchants, or on the small number of youths who want to engage in commercial transactions on their own. Without additional empirical data, these arguments are difficult to evaluate. This standard recommends national modifications of the traditional rules and assumes that legislatures considering these recommendations will investigate the underlying factual issues more thoroughly.

Standard 6.1 clearly indicates, of course, that any minor is entitled to claim any defense to contractual liability which would be available to an adult under similar circumstances, *e.g.*, fraud, duress, failure of consideration, unconscionability. The provisions of Standard 6.1 A. governing the contracts of minors between the ages of twelve and eighteen, are designed to provide merchants with considerably more protection against disaffirmance than they now have; in addition, they seek to clarify and simplify many of the extant doctrines (*e.g.*, abolishing the "necessaries" doctrine) while imposing liability on minors when their contracts were likely to have been most carefully deliberated and where it is most unfair to deny protection to the merchant. Thus, where the minor's parents' consent

to the contract is obtained (and there is no factual dispute about that consent), it is fair to assume that the minor gave sufficient thought to the obligation he or she was undertaking, to be bound even if the parent does not also bind himself or herself. Similarly, if the minor misrepresented his or her age to a merchant (and where the merchant is in a position to say that he or she had good cause to believe the misrepresentation despite the ready availability of driver's license information to confirm the minor's claim), fairness requires that the minor be bound. Finally, Standard 6.1 A. 3. articulates several circumstances under which it seems fair to require even a minor of whom advantage was taken by a merchant to abide by his or her deal. Even a minor who did not deliberate adequately before purchasing an item should not be permitted to use or abuse it and then disaffirm. The minor can disaffirm so long as he or she can make the merchant reasonably whole, but not otherwise. Even relatively innocent youths should know, or be taught, that it is not socially acceptable to "have your cake and eat it too."

The provisions of Standard 6.1 C. require additional comment. A number of states have enacted special rules to govern settlement of tort claims by and for minors. This recommendation deliberately takes a risk that the parents of a minor will "settle cheap" with an insurance company, at the minor's expense, and the further risk that some parents who have settled their child's claim will not apply the recovery solely for the benefit of the child. The recommendation assumes that that risk is worth taking because family autonomy is also encouraged and the administrative costs of filing suit in every situation in which a minor is injured, in order to obtain judicial approval, are eliminated. Where suit has been brought, the provision requires judicial approval of the settlement. A contrary view of this problem can be gleaned from the concerns expressed in H. Clark, *Domestic Relations* 238-240 (1968).

9

Dissenting View

Statement of Commissioner Patricia M. Wald

My main philosophical problem with this volume is that, while constructively resolving many old debates about emancipation, minors' contracts, and support obligations, it does little to advance or challenge fundamental rethinking about children's relationships to parents and to the state. Its purposely narrow scope is premised on a doctrine of family autonomy that I cannot wholeheartedly endorse; I would have started from another premise—that children from birth forward are presumed to have all the legal rights of adults against anyone who intentionally or negligently harms them, at the same time recognizing that parents' responsibilities, especially with younger children, inevitably carry with them authority to make many difficult and risk-taking decisions for their children. Such a premise might have produced a quite different volume.

On the specific matters covered in the volume, I object to Standard 3.4 A., which terminates all parental support obligations at age eighteen, including support in a college education. In the present educational and employment situation in this country, I believe that a parent who has the means to do so should, in appropriate circumstances, be subject to the obligation to provide a college education for his/her offspring. A college education is today a necessity for access to most higher paying jobs; in default of parental support, a child must earn his or her way, a difficult job at best, or rely on scholarships or federal aid. In doing so he/she inevitably competes for these scarce resources with the children of parents who genuinely cannot pay for their children's college. I believe the fairer allocation of the burden is on parents who can afford to pay and a court should be able to enforce such an obligation.

Standard 3.4 B. 1. also terminates the parents' support obligation prior to age eighteen if the child is managing his or her own financial affairs and living apart from the parent. I think such an absolute standard makes it too easy for the irresponsible parent whose own

behavior is so intolerable that the child feels compelled to move out and is thereby condemned to eke a bare existence when his or her parent should still be responsible for providing a decent standard of living for the child. The policy thus puts a premium on parental "push-outs." Although clearcut rules are always attractive, they can engender injustice, and I would reserve to a court power to order support for a child under eighteen when it is clear that if the parent had acted responsibly the child would still be at home, supported, and probably still in school.

In a similar vein, I reject the qualifier in Standard 2.1 B. 2. that a child may sue a parent for tortious conduct only "so long as the behavior is not related to the exercise of family functions." Aside from the fact that the definition of what constitutes a "family function" will engender controversy and diversity (e.g., if the father is driving the child to kindergarten and an accident occurs, is he exercising a family function?), I cannot accept any justification for immunizing a negligent parent who injures a child, whether it is in the course of familial duty or not. Why shouldn't a maimed child sue a parent who failed to reasonably protect the child from a hot stove or a stairway; I cannot think that family cohesion is endangered any more by a lawsuit than by the smoldering resentment that comes from unvindicated wrongs. After all, if the relationship is good the child will not sue (unless there is insurance). I fail to see any logical nexus between the drafters' aim of targeting insured injuries only for lawsuits and the standard itself which is tied to "family functions." The commentary's approval of an "expansive" interpretation of the "family functions" exemption to cover "care, custody, control, discipline, and supervision" of children makes me still more uneasy.

With respect to minors' rights to medical care, I would not distinguish between access to family planning, treatment for pregnancy, alcoholism and narcotics, venereal disease, mental and emotional illness, and other medical needs. While society's stake may appear to be higher in insuring prompt medical attention to these specific symptoms, the untreated child's injury from medical neglect of other conditions can produce just as serious long-term effects. I would prefer a general policy of permitting children in the age range of twelve to fourteen to seek medical help independently with a physician's unilateral authority to notify parents only where an immediate danger to the child's health is at stake. I found the provisions for use of health insurance intelligent and ingenious. Unfortunately the medical standards do not anywhere deal with a child's right to refuse parentally-imposed treatment, a much litigated and I think a significant issue.

I worry too about Standard 5.2 A. 1., legitimizing employment of children of any age for any length of time outside of school hours with parental consent, as domestic servants, or casual laborers. While I agree with a general loosening of child labor laws for youths above twelve, I can see exploitation potential in not permitting any age floor or work hour ceilings for the below twelve group. A young child could be consigned to washing dishes or apple picking every waking hour outside of school. I would certainly allow legislative or administrative brakes on the length of his or her out-of-school waking day.

Finally, even the guarantee of the "same constitutional rights" to minors as adults in Standard 7.1 leaves unanswered questions: Can state custodians impose any kind of religious training even on very young wards? Can curfews be imposed on teenagers only? Can states delegate to parents the authority to control their children's freedom of expression, association, or religion? Cf. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), 44 U.S.L.W. 5197 (July 1, 1976). I am afraid these questions remain.

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