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NOTES

UNDERSTANDING FAITH: WHEN RELIGIOUS PARENTS DECLINE CONVENTIONAL MEDICAL TREATMENT FOR THEIR CHILDREN

I. INTRODUCTION

The doctrinal teachings of Christian Science,¹ Jehovah's Witness,² and numerous other religious minorities in America³ oppose

1. Christian Science is a branch of Christianity established in the United States in 1879. As a central tenet, Christian Science relies on God for healing. Through the help of practitioners specially trained in praying for and counseling the sick, believers attest that the concentration of faith cures disease without doctors, drugs, or surgery. For an overview of the teachings of Christian Science, see CATHERINE L. ALBANESE, *AMERICA: RELIGIONS AND RELIGION* 235-40 (2d ed. 1992); CHRISTIAN SCIENCE PUBLISHING SOCIETY, *CHRISTIAN SCIENCE: A SOURCEBOOK OF CONTEMPORARY MATERIALS* (1990). This Note relies heavily on Christian Science treatises, testimonies, and other resources to support its arguments. These sources are used not because they are more authoritative than any other religious source, but because they are voluminous, readily available, and reveal the significance of religious belief and conduct in the context of medical treatment decisions.

2. Adherents to Jehovah's Witness interpret blood transfusions as a violation of biblical prohibitions against the ingestion of another human's blood. Thus, they traditionally shun transfusions, any medical procedure that increases the likelihood of transfusion, or even the recirculation of their own blood once it has been removed from their bodies, even where a transfusion may be necessary to save an otherwise healthy person. *See, e.g., In re Alice Hughes*, 611 A.2d 1148 (N.J. Super. Ct. App. Div. 1992) (involving a Jehovah's Witness who had refused blood transfusions prior to undergoing a hysterectomy in which complications arose). For general discussions of the Jehovah's Witness position regarding blood transfusions, see Gary R. Anderson, *Medicine vs. Religion: The Case of Jehovah's Witnesses*, 8 HEALTH AND SOC. WORK 31 (1983); J. Lowell Dixon & M. Gene Smalley, *Jehovah's Witnesses: The Surgical/Ethical Challenge*, 246 JAMA 2471 (1981).

3. *See, e.g., In re D.L.E.*, 645 P.2d 271 (Colo. 1982) (involving followers of the General Assembly and the Church of the First Born, which resist medical care in favor of spiritual treatment); *In re Hamilton*, 657 S.W.2d 425, 427 (Tenn. Ct. App. 1983) (describing a tenet of The Church of God of the Union Assembly requiring adherents to "live by

all or certain medical treatments. Following these tenets, members perceive great harm in conventional care. Thus, parents who abide by these faiths may be inclined to withhold conventional medical care from their ailing children.⁴

The number of adherents to religious faiths that proscribe conventional care seems small in comparison to the rest of modern society.⁵ To many citizens, these religious faiths seem preposterous.⁶ Yet reliance on faith in God to spare a child is rooted in the same ancient authority upon which most Americans' religious beliefs are grounded.⁷ In the book of Genesis, Abraham's God instructs him to take his son to the sacrificial altar.⁸ Abraham unquestioningly complies despite the awful prospect of losing his child. As he wields his knife above his son, Abraham hears an angel's call. He learns that because of his unwavering faith, God will not take his son's life. Obedience to God's word regarding the welfare of one's child is a fundamental element of most Americans' religious upbringing.

Despite the ancient foundation of this principle in the majority

faith" rather than by "medicine, vaccinations or shots of any kind"); *see also* Wayne F. Malecha, Note, *Faith Healing Exemptions to Child Protection Laws: Keeping the Faith Versus Medical Care for Children*, 12 J. LEGIS. 243, 244-46 (1985) (detailing the history of the Faith Assembly church, which teaches reliance on faith healing).

4. *See, e.g.*, Walker v. Superior Court, 763 P.2d 852 (Cal. 1988), *cert. denied*, 491 U.S. 905 (1989). The cases cited thus far illustrate the position of parents who withhold medical treatment for religious reasons. *See supra* notes 2-3.

5. Exact numbers of adherents to religious groups which oppose some or all conventional medical treatment are not available. The Christian Science Church reports it has approximately 500,000 members in the United States; critics call that estimate an exaggeration. *See* David Margolick, *In Children's Deaths, a Test for Christian Science*, N.Y. TIMES, August 6, 1990, at A-11 (chronicling parental prosecutions and the perspectives from both sides). If one includes, however, the number of Americans whose religious doctrine imposes any restrictions involving conventional medical treatment, the estimate would rise dramatically. Roman Catholic opposition to abortion and contraception is well known; however, numerous other religious systems, including Judaism, Islam, and Old Order Amish, contain tenets which may conflict with conventional medical treatment. *See generally* THE ENCYCLOPEDIA OF BIOETHICS (Warren T. Reich ed., 1978) (providing background information regarding medical perspectives of each of these religions).

6. The prosecutions of religious parents who withhold medical care, as well as the media attention accorded the prosecutions, reflect society's general perception of the religious parents' positions as inappropriate. *See, e.g.*, Margolick, *supra* note 5, at A-11 (characterizing the common facts involved in Christian Science parents' prosecutions as "horrific").

7. Approximately 83% of Americans adhere to the Judeo-Christian tradition which grows out of the Old Testament. *See* U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 70 (114th ed. 1994) (Table 85).

8. *Genesis* 22:1-19.

culture, state legislatures condemn the practice of withholding medical care from children based on the state's asserted interest in protecting children.⁹ However, even courts adopting the states' position have recognized that the parents on trial for relying on spiritual treatment do not intend to harm the children; the parents truly believe their actions would have been of benefit.¹⁰ To the parents, withholding medical care or relying on spiritual treatment is the safest and best choice for the child; it is the choice least likely to cause the child harm.¹¹

Despite their beneficent intent in withholding conventional care, parents who decline conventional treatment for religious reasons may face civil and criminal penalties for their children's deaths.¹² Parents may invoke the First Amendment protection of free exercise as a defense, thus triggering strict scrutiny of the

9. See *infra* notes 13-23 and accompanying text.

10. See *Walker v. Superior Court*, 763 P.2d 852, 867-68 (Cal. 1988) (discussing cases in which courts acknowledged that defendants were sincere, affectionate, and intended no harm to the child), *cert. denied*, 491 U.S. 905 (1989); *Commonwealth v. Twitchell*, 617 N.E.2d 609, 620 (Mass. 1993) (stating that "[e]vidence showed that the defendant parents were deeply motivated toward helping their child").

11. See Nathan A. Talbot, *The Position of the Christian Science Church*, 309 NEW ENG. J. MED. 1641 (1983) (summarizing the benefits of the Christian Science dependence on spiritual treatment for children); Emily K. Worden, *When Ethics Clash: Helping Patients Caught Between Religion and Medicine*, 5 NURSING LIFE 48 (1985) (recognizing the need, as a caregiver, to respect Jehovah's Witness parents as loving, caring people when their religious beliefs clash with medicine). Despite the lack of the parents' ill will toward their children, courts find legally sufficient culpability as their conduct must be judged against a reasonable person standard. The debatable issue of whether religious people ought to be judged by comparing them to reasonable people who do not follow the tenets of their faith is beyond the scope of this Note.

12. See, e.g., *Walker*, 763 P.2d at 852 (involving parents charged with involuntary manslaughter and felony child endangerment); *Hermanson v. State*, 570 So. 2d 322 (Fla. Dist. Ct. App. 1990) (affirming conviction of Christian Science parents charged with child abuse resulting in third-degree murder), *vacated*, 604 So. 2d 775 (Fla. 1992); *Twitchell*, 617 N.E.2d at 609 (charging Christian Science parents with involuntary manslaughter); *State v. McKown*, 475 N.W.2d 63 (Minn. 1991) (charging Christian Science parents with second-degree manslaughter), *cert. denied*, 502 U.S. 1036 (1992).

In addition to criminal and civil suits, parents may face the imposition of forced medical care for children. See, e.g., *People ex rel. Wallace v. Labrenz*, 104 N.E.2d 769 (Ill. 1952) (justifying the compulsion of a blood transfusion for eight-day-old infant over parents' religious objections on the basis of the state's interest in protecting life), *cert. denied*, 344 U.S. 824 (1952); *In re Gregory*, 380 N.Y.S.2d 620 (N.Y. Fam. Ct. 1976) (ordering medical and dental examinations for three children whose mother, a member of the Church of God and Christ, refused such treatment). See generally Barry Nobel, *Religious Healing in the Courts: The Liberties and Liabilities of Patients, Parents, and Healers*, 16 U. PUGET SOUND L. REV. 599, 636-55 (1993) (chronicling state and judicial compulsion of life-saving, corrective, or preventative medical attention).

applicable laws. However, courts that reach the constitutional question unanimously characterize the state's interest in protecting children as paramount. Despite the possibility of exempting religious individuals burdened by generally applicable laws, the judicial decisions do not question the preeminence of the states' interest in protecting children. Almost automatically, courts find the interest sufficiently compelling to justify the burden that punishing the parents imposes on religious free exercise.

This mechanical legal balancing, however, does not adequately reflect the interests of religious parents. The compelling interest test reflects the secular vision of legislatures and judges, overlooking or trivializing the perhaps immeasurable value of faith to the believer. Understanding the nature of religious faith casts doubt upon the appropriateness of weighing the state's abstract interest in child welfare more heavily than the parent's religious interest.

This Note does not advance the impossible position that the state may never assert its interest in protecting children against the rights of a religious parent, or even that a religious parent's right to make health care decisions for a child is absolute. Children deserve special protection. When faced with a religious parent declining conventional treatment, however, the court should not begin and end its inquiry with what the state perceives to be the child's best interest.

Part II of this Note summarizes the judiciary's application of the compelling interest test to situations in which parents face civil or criminal punishment for unsuccessfully relying on faith to heal their gravely ill children. The legal background section also includes the treatment by the Supreme Court and Congress of religious individuals requesting exemption from generally applicable laws.

Part III of this Note suggests why the compelling interest test inadequately protects the religious interests of parents who were disappointed in their reliance on faith by attempting to elucidate the importance of religious faith in the life of the believer. The guarantee of First Amendment religious liberty ought to protect free exercise, especially in cases where religion attains its greatest functional value. According to the sociology of religion, religion's ultimate purpose is to respond to the existential suffering of humans in the face of mortality. Religious beliefs that dictate forbearance from conventional medical treatment are most sorely tested when the believer confronts a child's critical illness. Yet, as concluded in Part IV, it is precisely at that time when the religion

serves its most important role in the life of the believing parent. Though the state's abstract interest in protecting children may remain compelling, understanding the value of faith supports the parents' exemption from punishment.

II. LEGAL BACKGROUND

A. Parents' Religious Decisions to Forego Childrens' Medical Treatment

The Supreme Court has never decided a case in which parents faced civil or criminal punishment for declining conventional life-saving treatment for their child on religious grounds. However, in a nonmedical context, the Court has pronounced that the state's interest in protecting children easily overrides parental religious freedom, regardless of the severity of the burden.¹³ In *Prince v. Massachusetts*,¹⁴ the Court established that the "right to practice religion freely does not include liberty to expose . . . the . . . child to ill health or death."¹⁵ The Court asserted that even the defendant to the action could "hardly dispute[] . . . that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare."¹⁶ The state, acting *in parens patriae*,¹⁷ could legitimately restrict individuals' religious freedom in order to protect the well-being of children under their guardianship.

Interestingly, *Prince* did not involve a religious parent's decision which jeopardized the life of a child. Rather, the defendant allowed a child in her custody to sell Jehovah's Witness reading materials in violation of child labor laws.¹⁸ In *Prince*, the circumstances posed no direct or immediate threat to a child's life or

13. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 233-34 (1972) (stating that the power of the parent, even when linked to a free exercise claim, may be subject to limitation if it appears that parental decisions will jeopardize the well-being of the child); *Jacobsen v. Massachusetts*, 197 U.S. 11, 38 (1905) (recognizing the state's overriding interest in protecting "[t]he safety and the health of the people").

14. 321 U.S. 158 (1944).

15. *Id.* at 166-67 (citing *People v. Pierson*, 68 N.E. 243 (N.Y. 1903)).

16. *Id.* at 167.

17. Under the doctrine of *parens patriae*, dating back to the English constitutional system, the power to act as "father of the country" passed from the king to the states. The United States Supreme Court upheld the doctrine as early as 1890. See *Church of Jesus Christ of Latter Day Saints v. United States*, 136 U.S. 1, 57 (1890).

18. *Prince*, 321 U.S. at 161-62.

health. Absent such a threat, the Court's martyrdom language reflects the facile manner in which it discounted the parent's or guardian's religious interest. An individual "martyring" herself by selling the *Watch Tower*, the Jehovah's Witness paper, may not comparably martyr a child: "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."¹⁹

The martyrdom language was conveniently appropriated by a court deciding specifically whether to punish a parent for her religious decision to forego life-saving medical treatment for her child. In *Walker v. Superior Court*,²⁰ the California Supreme Court directly confronted whether the religious liberty guaranteed by the free exercise clause exempted a parent who relied on spiritual treatment for a child from criminal culpability. The defendant was a Christian Scientist whose administration of spiritual treatment failed to cure her daughter's acute meningitis.

The *Walker* court categorized the protection of the lives of the state's children as "an interest of unparalleled significance."²¹ The court asserted that all of society depends upon the welfare of children; a democratic society rests, for its continuance, "upon [the] healthy, well-rounded growth [of young people] into full maturity as citizens."²² While the court acknowledged the possibility that the mother intended only to benefit the child, the court implied that she actually sacrificed the life of her daughter and found that "[r]egardless of the severity of the religious imposition, the governmental interest is plainly adequate to justify its restrictive effect."²³

Due to the absence of life-threatening circumstances in *Prince*, the Supreme Court obviously did not require a threat to the child's life to trigger the state's compelling interest in protecting children.²⁴ However, the relevant state statutes in *Walker* regarding

19. *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944).

20. 763 P.2d 852 (Cal. 1988) (holding that treatment for a dying child by spiritual means alone does not exempt the parents from felony liability although such an exemption exists in non-life-threatening situations), *cert. denied*, 491 U.S. 905 (1989).

21. *Id.* at 869.

22. *Id.* (quoting *Prince*, 321 U.S. at 168).

23. *Id.* at 870.

24. In fact, the *in parens patriae* doctrine has been invoked to uphold mandatory school attendance laws, *see State v. Bailey*, 61 N.E. 730, 732 (Ind. 1901); regulation or

parents' obligation to obtain health care for their children reflect this policy.²⁵ California exempts a parent or guardian from culpability for child neglect, a misdemeanor, if spiritual treatment is administered to an ailing child.²⁶ However, if the child dies without receiving medical care, the parents may be liable under involuntary manslaughter and felony child endangerment provisions for the failure to obtain medical care.²⁷ California's statutory scheme is typical of most states.²⁸

prohibition of child labor, *see* *Sturges & Burn Mfg. v. Beauchamp*, 231 U.S. 320, 325 (1913); and compulsory vaccination laws, *see* *Jacobsen v. Massachusetts*, 197 U.S. 11, 38 (1905).

25. Wrongful death actions against the religious parents inherently reflect a policy not to interfere until the child's condition is life-threatening, as they accrue only when the parents' reliance on faith for a cure has proven unsuccessful.

26. *Walker v. Superior Court*, 763 P.2d 852, 856-62 (Cal. 1988), *cert. denied*, 491 U.S. 905 (1989). The exemption to child neglect in California is as follows:

If a parent provides a minor with treatment by spiritual means through prayer alone in accordance with the tenets and practices of a recognized church or religious denomination, by a duly accredited practitioner thereof, such treatment shall constitute "other remedial care", as used in this section.

CAL. PENAL CODE § 270 (West 1988).

27. Involuntary manslaughter is defined as the unlawful killing of a human being without malice "in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution or circumspection." CAL. PENAL CODE § 192(b) (West 1988). The felony child endangerment statute provides: "Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or . . . willfully causes or permits such child to be placed in such situation that its person or health is endangered, is punishable by imprisonment . . ." *Id.* § 273a(1).

28. For a list of states which recognize spiritual healing as a means of treatment under child neglect or endangerment statutes, *see* *Hermanson v. State*, 604 So. 2d 775, 776 n.1 (Fla. 1992).

Parents have successfully argued the statutory scheme violates due process, as the criminality of their reliance on spiritual treatment depends on the outcome. *See, e.g., id.* at 781 (quashing a conviction under Florida's felony child abuse and third-degree murder statutes on the grounds that the statutes failed to clearly indicate the point at which a parent's reliance on religious beliefs in the treatment of the child became criminal conduct); *State v. McKown*, 461 N.W.2d 720 (Minn. Ct. App. 1990), *aff'd*, 475 N.W.2d 63 (Minn. 1991), *cert. denied*, 502 U.S. 1036 (1992) (dismissing indictments of parents who withheld medical treatment for religious reasons due to the due process violation inherent in the statutory scheme). *But see, e.g., Walker*, 763 P.2d at 871-73 (denying a due process violation based on lack of fair notice); *Commonwealth v. Twitchell*, 617 N.E.2d 609, 617 n.13 (Mass. 1993) (asserting that *Walker* was the more reasoned analysis compared to *Hermanson* and *McKown*).

The *Walker* court explained that the exemption at the level of child neglect did not negate the state's *in parens patriae* interest in the child's well-being. *Walker*, 763 P.2d at 858-60. Despite the criminal nature of the charge, the child neglect statutes did not intend to punish neglectful parents. *Id.* at 859. Rather, the legislature meant to protect the public from the burden of routinely supporting a child who has an able parent. *Id.*

The exceptions for spiritual treatment are an example of the state legislatures' general overt protection of the right of religious parents to control their children's health care within the framework of society's broad respect for the private realm of family life. The judiciary fiercely protects a wide range of parental decisions from government interference.²⁹ Parenting rights, including decisions regarding child-bearing and child-rearing, are "basic civil rights"³⁰ which constitute a "fundamental liberty interest"³¹ under the due process clause of the Fourteenth Amendment. "It is settled now . . . that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood."³² Specifically, parents possess the right to make decisions regarding their children's religion and religious upbringing.³³

The right of parents to make virtually all health care decisions for their children stems from these more general parenting rights that the Supreme Court has declared fundamental. "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."³⁴ Parents possess the controlling, if not sole, capacity to make decisions concerning their child's welfare. According to the Supreme Court, "[it] is cardinal . . . that the custody, care and nurture of

29. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 236 (1972) (upholding the interest of parents in guiding the religious future and education of their children); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (invalidating a state statute requiring students to attend public rather than private schools as it "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (recognizing the right of an individual under the Fourteenth Amendment "to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience").

30. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

31. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

32. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2806 (1992).

33. See *Wisconsin v. Yoder*, 406 U.S. 205, 213-14, 231-32 (1972) (affirming "the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children"); *Prince*, 321 U.S. at 165 (recognizing the rights of parents to give children religious training and to encourage them in the practice of religious belief); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (invalidating statute forbidding children to attend private schools). See also STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 192 (1993) ("[N]o nation that strips away the right of parents to raise their children in their religion is worthy of allegiance.").

34. *Yoder*, 406 U.S. at 232.

the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.³⁵

The custodial prerogatives of parents over their children encompass the power to make specific health care decisions for the child.³⁶ The Supreme Court has affirmed that an individual's constitutional liberty interests include the right to be free of unwanted medical treatment,³⁷ even if the treatment is life-saving,³⁸ despite the general interest of the state in protecting life. To refuse parents authority for making health care decisions for their children may deprive the children of their constitutional right to decline treatment. "Children . . . retain 'rights,' to be sure, but often such rights are only meaningful as they are exercised by agents acting with the best interests of their principals in mind."³⁹ As urged by Justice Brennan, to deny the exercise of the right through the responsible guardian would be to deny the right itself.⁴⁰ The state's general interest in an individual's life cannot be abstracted from the interest of the person living that life, or from the interest of one guaranteed the right to make decisions in that person's welfare.⁴¹

Despite the broad rights of parents, the *Walker* court emphasized that serious health problems trigger the state's willingness to interfere. When the child's condition deteriorates and becomes life-threatening, the state need not respect the reliance of parents on their religious faith:

[P]rayer treatment will be accommodated as an acceptable means of attending to the needs of a child only insofar as

35. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

36. The California Supreme Court has specifically held that custody of a child includes the right to make decisions regarding the child's care, health, and religion. *Burge v. City and County of San Francisco*, 262 P.2d 6, 12 (Cal. 1953) (holding that custody of a child includes the right to make health care and religious decisions for the child).

37. *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 278 (1990). The *Cruzan* majority applied the due process clause to find a constitutionally protected liberty interest in refusing unwanted medical treatment. The dissenting opinion characterized the right of competent individuals to refuse medical treatment as fundamental. *Id.* at 304-09 (Brennan, J., dissenting). Justice O'Connor's concurring opinion has been read as raising the right to refuse treatment to a fundamental level as well. See Richard E. Shugrue, *The Patient Self-Determination Act*, 26 CREIGHTON L. REV. 751, 759 (1993).

38. *Cruzan*, 497 U.S. at 278-79.

39. *Id.* at 308 (Brennan, J., dissenting) (citing *Thompson v. Oklahoma*, 487 U.S. 815 (1988)).

40. *Id.*

41. *Id.*

serious physical harm or illness is not at risk. When a child's life is placed in danger, we discern no intent to shield parents from the chastening prospect of felony liability.⁴²

The *Walker* court accepted an inherent flaw in the statutory scheme. "Under ordinary circumstances, . . . the case of a true believer in faith healing will not even come to the attention of the authorities, unless and until someone dies."⁴³ The court recognized that parents could not be punished until a child died. At that point the state's interest in protecting a particular child was largely moot. Regardless of this inconsistency, the *Walker* court upheld the legitimacy of the statutory scheme which subordinated the parents' religious liberties to the state's *in parens patriae* interest in the welfare of a gravely ill child.⁴⁴

In *Walker* and other cases in which parents and guardians face civil or criminal penalties for their religiously motivated refusal of conventional medical treatment for their children, the defendants argued that the free exercise clause of the First Amendment protected their decisions.⁴⁵ Parents and guardians argue that traditional statutory and common law doctrines should not apply when religious belief inspires the decision to withhold conventional treatment.⁴⁶ Thus, these cases comprise one segment of a broader debate over whether the Free Exercise Clause requires the creation of religious exemptions from generally applicable laws with secular purposes.

42. *Walker v. Superior Court*, 763 P.2d 852, 866 (Cal. 1988), *cert. denied*, 491 U.S. 905 (1989).

43. *Id.* at 871 (quoting Comment, *Religious Beliefs and the Criminal Justice System: Some Problems of the Faith Healer*, 8 LOYOLA L.A. L. REV. 396, 403-04 (1975)). Another line of cases has developed in which state agents become aware of the reliance of parents on spiritual healing for sick children before the child dies, raising the issue of whether courts may order treatment over the parents' religious objections. *See, e.g., People ex rel. Wallace v. Labrenz*, 104 N.E.2d 769, 773 (Ill. 1952) (ordering a blood transfusion for a child who would "almost certainly die" without it), *cert. denied*, 344 U.S. 824 (1952); *In re Willmann*, 493 N.E.2d 1380, 1384 (Ohio Ct. App. 1986) (compelling a seven-year-old to accept treatment which gave him a 60% chance of survival).

44. *Walker*, 763 P.2d at 866.

45. *See, e.g., id.* at 869-71. Because the courts in *Hermanson* and *McKown* dismissed the criminal cases on due process grounds, they declined to reach the constitutional defenses presented by the parties. *Hermanson*, 604 So. 2d at 781; *McKown*, 475 N.W.2d at 69 n.9.

46. *See, e.g., Walker*, 763 P.2d at 852 (illustrating parents arguing that they should not be prosecuted for the death of their daughter because of their religious beliefs barring medical treatment).

B. *The Free Exercise Exemption Generally*

Government action which substantially burdens an individual's free exercise of religion traditionally receives review under the compelling interest standard. As was argued in *Walker*, religious conduct is protected from encroachment by the government under the First Amendment to the United States Constitution.⁴⁷ However, the Supreme Court initially declined to protect religious conduct by distinguishing it from religious belief. In *Reynolds v. United States*,⁴⁸ the Court ruled that while laws "cannot interfere with mere religious belief and opinions, they may with practices."⁴⁹ Under the *Reynolds* test, the Court granted absolute protection to religious beliefs while denying any protection to religious conduct, regardless of the impact of the government's action on free exercise.⁵⁰

Although the Court denied absolute protection to religious conduct, it subsequently provided some protection from government infringement by requiring strict scrutiny of government action that substantially burdens religious conduct. In *Sherbert v. Verner*,⁵¹ the plaintiff was discharged by her employer and was unable to find other work because her religion, Seventh-Day Adventism, prohibited her from working on Saturday. The state did not consider religious motivation "good cause" for rejecting suitable work, and denied her claim for unemployment compensation benefits.⁵² The Supreme Court ruled, however, that when a state burdens an individual's free exercise of religious belief, it can justify its action only by showing a "compelling state interest."⁵³ After finding that the denial of benefits indirectly imposed a burden on the plaintiff's free exercise,⁵⁴ the Court held that the state could not justify the burden because it failed to prove that denying the claimant her

47. The free exercise clause states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I.

48. 98 U.S. 145 (1878) (upholding conviction of a Mormon for violating a federal prohibition on polygamy in the territories of the United States).

49. *Id.* at 166.

50. *Id.* at 166-67.

51. 374 U.S. 398, 407 (1963) (ruling that all government actions burdening the free exercise of religion must serve a compelling interest).

52. *Id.* at 400-01.

53. *Id.* at 406.

54. *Id.* at 403.

benefits was necessary to accomplish a compelling state interest.⁵⁵

The *Sherbert* Court's opinion offered some guidance in determining what qualified as a compelling state interest by stating that "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."⁵⁶ According to the Court, only public dangers meet this definition and justify burdening the free exercise of religion. Specifically, the conduct permissibly regulated in prior cases "invariably posed some *substantial* threat to public safety, peace or order."⁵⁷

Interpreted strictly, the substantiality component of the compelling interest test under *Sherbert* could serve to invalidate almost every law that offends any individual's religious sensibilities or practices, thus paralyzing the government's ability to advance secular principles.⁵⁸ Recognizing this threat, the Court denied that the First Amendment requires "the Government itself to behave in ways that the individual believes will further his or her spiritual development."⁵⁹ The "incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs,"⁶⁰ do not require the government to prove a compelling state interest. In contrast, where government action compels individuals, "by threat of sanctions, to refrain from religiously motivated conduct or to engage in conduct that they find objectionable for religious reasons,"⁶¹ the state must establish a compelling interest.

The *Sherbert* compelling interest test does not limit the interests to be balanced against the government's to those of the indi-

55. *Id.* at 406-09.

56. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

57. *Id.* at 403.

58. See *Bowen v. Roy*, 476 U.S. 693, 699-701 (1986). In *Bowen*, the Supreme Court refused to exempt a Native American receiving Aid to Families with Dependent Children (AFDC) benefits from the statutory requirement that recipients furnish the state welfare agencies with their Social Security numbers. The Court did not question the father's sincerity in insisting that obtaining a Social Security number for his daughter would rob her of spiritual purity in violation of his religious beliefs. *Id.* at 695-701. However, the Court held that the government's interest in maintaining an efficient, fraud-resistant system outweighed the burden on the father's rights caused by forced compliance with the requirement. *Id.* at 712.

59. *Id.* at 699.

60. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988).

61. *Bowen*, 476 U.S. at 703.

vidual religious believer. In *Wisconsin v. Yoder*,⁶² the Court granted an exemption from compulsory school attendance laws for the Old Order Amish, who educate and train their children within their own community after the eighth grade. The Court reiterated *Sherbert's* ruling that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."⁶³ Though the Court identified the state's "paramount responsibility"⁶⁴ for public education, the exemption was justified as the Amish community's refusal to participate posed no threat to "the public safety, peace, order, or welfare."⁶⁵

In the *Yoder* court's analysis, the scope of religious interests that were considered extended far beyond the individual. First, the Court recognized that the Amish people's religion encompassed more than each individual's religious beliefs. Their religion embodied the ritualistic conduct of the entire Amish community. "[F]or the Old Order Amish, religion is not simply a matter of theocratic belief . . . the Old Order Amish religion pervades and determines virtually their entire way of life."⁶⁶ In other words, the religious conduct itself played a vital role in the continued survival of the religious community. Thus, the Court found that requiring attendance would not only take away the right of Amish parents to control their children's upbringing, but would essentially deprive the entire Amish community of its way of life.⁶⁷

Forcing the Amish community to abandon its religious tradition carried intolerable consequences:

The impact of the compulsory-attendance law . . . carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent . . . [It] carries with it a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to

62. 406 U.S. 205 (1972).

63. *Id.* at 215.

64. *Id.* at 213.

65. *Id.* at 230.

66. *Id.* at 216. Following scriptural commands, the Amish sect pursued an extremely old-fashioned lifestyle, eschewing intellectual and scientific education and accomplishments, and limiting contact with contemporary society. *See id.* at 216-17.

67. *Wisconsin v. Yoder*, 406 U.S. 205, 217-18, 232-33 (1972).

some other and more tolerant region.⁶⁸

The societal evil of forced religious assimilation constituted a hazard to the public interest in the First Amendment as well as to the Amish community and its individual members.⁶⁹ Recognizing both the subjective interests of the religious actors and the objective interests of society in religious liberty, the Court awarded the exemption.⁷⁰

*Employment Division v. Smith*⁷¹ marked a significant departure from *Sherbert's* strict scrutiny review of free exercise challenges to generally applicable laws.⁷² Two members of the Native American Church had been denied unemployment benefits after being discharged for their use of peyote, a natural drug used in the Church's sacraments. In its first review of the case, the Supreme Court reasoned that if peyote use were illegal, imposing the lesser penalty of the denial of unemployment benefits, as opposed to imposing criminal sanctions, would not violate the free exercise clause.⁷³ On remand, the Oregon Supreme Court determined that peyote use was illegal, but the State could not enforce its drug law against sacramental peyote use without violating the First Amend-

68. *Id.* at 218.

69. *Id.*

70. *Id.* at 218-19. Since *Yoder*, the Supreme Court has not upheld a free exercise claim on the merits against a general law, except for several unemployment benefits cases directly analogous to *Sherbert*. For cases in which the Court found violation of the free exercise clause of the First Amendment when a state denied unemployment benefits to a person who refused certain work because of religious beliefs, see *Frazer v. Illinois Dep't of Employment Sec.*, 489 U.S. 829 (1989); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Thomas v. Review Bd.*, 450 U.S. 707 (1981).

The absence of cases affirming *Sherbert* in other contexts has instigated charges that the Court's purported highly protective attitude toward religion is without substance. See, e.g., Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 2-3 (1994); William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 7 J. L. & Religion 363, 397-98 (1989). Furthermore, Congress' reference to pre-*Smith* cases as a guide for RFRA interpretation may contain the same ambiguity. See Berg, *supra* at 26-28 (highlighting this confusion). Further analysis of this point is beyond the scope of this Note.

71. 494 U.S. 872 (1990) [hereinafter *Smith II*].

72. The Court has also diverged from strict scrutiny when reviewing regulations involving entities or institutions in which the government has a particularly active role. See *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 353 (1987) (rejecting a First Amendment challenge to a prison policy that prevented prisoners from attending weekly religious services because of security concerns); *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (deferring to military judgment regarding a regulation challenged under the free exercise clause that prohibited the wearing of indoor headgear).

73. *Employment Div. v. Smith*, 485 U.S. 660 (1988).

ment.⁷⁴ In its second review, the Supreme Court reversed the Oregon Supreme Court, holding that enforcement of drug laws against peyote users would not violate the free exercise clause.⁷⁵ After *Smith II*, courts were not compelled to grant exemptions from generally applicable criminal laws to individuals whose religious beliefs conflicted with those laws.⁷⁶

Recognizing that *Smith II* "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion,"⁷⁷ Congress enacted the Religious Freedom Restoration Act (RFRA) in November, 1993.⁷⁸ Throughout the legislative history, Congress recognized that "laws 'neutral' toward religion may burden religious exercise as surely as laws purported on their face to interfere with religious exercise."⁷⁹ Furthermore, Congress emphasized the need to preserve for minority religions the same free exercise rights enjoyed by more established religions, whose religious rights are not likely to be encroached by neutral laws.⁸⁰ Congress concluded that the compelling interest analysis was a "workable test for striking sensible balances between religious liberty and competing prior governmental interests."⁸¹ Thus, Congress guaranteed RFRA's application in all free exercise claims, even those brought against laws of general applicability.⁸²

By mandating strict scrutiny, RFRA prevents states from concealing intentional discrimination against religious minorities through the use of facially neutral laws.⁸³ While the mandate constitutes a preemptive strike against any such deliberate handicapping of religious minorities, RFRA also enables a person whose free exercise was violated to "assert that violation as a claim or

74. *Smith v. Employment Div.*, 763 P.2d 146 (1988), *rev'd*, 494 U.S. 872 (1990).

75. *Smith II*, 494 U.S. at 890.

76. Despite its denial that the free exercise clause alone mandates exemption, the majority acknowledged the force of a hybrid free exercise right, that is, when the free exercise clause is invoked in conjunction with other constitutional protections to bar the application of neutral, generally applicable laws to religiously motivated conduct. *Id.* at 881-82. Justice Scalia explicitly included the right of parents to make certain decisions regarding their children's upbringing. *Id.* at 881.

77. 42 U.S.C. § 2000bb(a)(4) (1993).

78. *Id.* § 2000bb.

79. *Id.* § 2000bb(a)(2).

80. S. REP. NO. 111, 103d Cong., 1st Sess. 7-8 (1993); H.R. REP. NO. 88, 103d Cong., 1st Sess. 5-6 (1993).

81. 42 U.S.C. § 2000bb(a)(5).

82. *Id.* § 2000bb-3.

83. H.R. REP. NO. 88, *supra* note 80, at 6.

defense in a judicial proceeding and obtain appropriate relief against the government."⁸⁴ By offering a remedy for governmental intrusions upon an individual's free exercise right, the legislation acknowledges the harm suffered when the government restricts or denies an individual the freedom to adhere to the tenets of faith.⁸⁵ While § 2000bb(b)(1) of RFRA mandates the restoration of the standard set by *Sherbert*⁸⁶ and *Yoder*,⁸⁷ the legislative history directs courts to refer to free exercise cases decided prior to *Smith II* for guidance in determining if religious exercise has been burdened and whether the least restrictive means possible have been employed in furthering the government's compelling interest.⁸⁸

III. THE RELIGIOUS PERSPECTIVE

The extreme circumstances in which a religious parent faces civil or criminal punishment for declining conventional medical treatment for a gravely ill child dramatically illustrate the judiciary's need to understand the function of religion, and thereby its value, to a believer. To observers ignorant of the value of the believer's faith, the decision to forego medical treatment is incomprehensible. Only by attempting to understand the parent's faith to the best of its ability may the judiciary fairly conclude that the government's interest outweighs that of the religious parent. The perhaps immeasurable value of faith in such circumstances provides strong support for parental exemption from civil and criminal punishment for declining conventional medical treatment for religious

84. 42 U.S.C. § 2000bb-1(c).

85. See S. REP. NO. 111, *supra* note 80, at 4-5, 8 (discussing the importance of protecting religious practices from governmental intrusions).

86. 374 U.S. 398 (1963). See *supra* notes 51-61 and accompanying text (discussing *Sherbert*).

87. 406 U.S. 205 (1972). See *supra* notes 62-70 and accompanying text (discussing *Yoder*). Congress' reliance on *Yoder* as an interpretive tool is particularly significant, as the decision has been called the "high water mark" for free exercise claims. Jesse H. Choper, *The Rise and Decline of the Constitutional Protection of Religious Liberty*, 70 NEB. L. REV. 651, 657 (1991).

88. H.R. REP. NO. 88, *supra* note 80, at 6-7. The statutory endorsement of the constitutionally compelled free exercise exemption renders largely moot the academic debate over the propriety of religious exemptions. Opponents of religious exemptions emphasized the inherent conflicts with the fundamental constitutional principle of equal treatment and with the establishment clause, see Marshall, *supra* note 70, at 363-96 (articulating the criticisms of the free exercise exemption doctrine), and the potential for religious imposters to obtain parallel benefits as those exempted from laws of general applicability under the free exercise, see Berg, *supra* note 70, at 43 (describing the threat of "strategic behavior" by nonreligious individuals to obtain favorable treatment).

reasons.

To punish parents for their reliance on faith, when their need for it is most acute and when faith's intrinsic value is the highest seems at best, nonsensical, and at worst, oppressive. Yet, although the compelling interest test does not allow the state to interfere in a parent's religious decision to forego conventional medical treatment for a child until the child's life is threatened, it supports punishment if the parent's reliance on faith is unsuccessful. In the peculiar circumstances in which a religious parent declines conventional medical treatment for a gravely ill child, religion may fulfill its ultimate function of providing meaning amidst apparent meaninglessness in the believer's life. The parents' reliance on faith reflects the incredible significance of religion's role in their lives. This unusual if not unique value supports the parents' exemption from punishment for their decision under the free exercise clause of the First Amendment, regardless of the traditionally "compelling" nature of the state's interest in protecting children.

To support this argument, this section first articulates the nature of religious faith as understood by students of religion. Proceeding from this understanding, this section argues that the crisis confronted by parents who decline conventional medical treatment for religious reasons is a paradigmatic example of how religious identity and experience meets the parents' needs. Thus, the parents' decision deserves First Amendment protection in deference both to the parents' and society's interests in religious liberty. The nature of the parents' faith in such a crisis also exposes the questionable effectiveness of punishment, which further reduces the countervailing weight of the state's interest in protecting children.

A. *The Nature of Faith*

Because secular observers may have difficulty accepting the needs of religious believers and the extent to which religious faith fulfills those needs, the First Amendment guarantee of religious free exercise may be hollow if those charged with enforcing it fail to understand what it protects. Defining religion may comprise the most problematic aspect of the free exercise principle.⁸⁹ Yet, to concede the inability to reach a working understanding of "religion" would nullify the substantive guarantee of its free exercise.

89. Both the judiciary and commentators perceive great risk in attempting to define religion, as the act of defining inherently limits what is recognized as religion. See Marshall, *supra* note 70, at 390.

Academics use three approaches to describe religion: substantive, formal, and functional.⁹⁰ The substantive definitions focus on the inner core of particular religions, tending to emphasize a relationship with a higher being or beings, and are favored by theologians and philosophers.⁹¹ Formal definitions of religion, usually offered by historians, describe the formalities present within comparative religions: the sacred stories, rituals, and communities.⁹² Functional definitions, in contrast, emphasize the effects and significance of religion in the actual lives of believers. Preferred by scholars in the social sciences, “[t]hey stress the systems of meaning-making that religion provides and how it helps people deal with the ills, insecurities, and catastrophes of living.”⁹³

The Supreme Court has recognized the importance of religion’s functional role in its attempt to articulate religion’s nature. In two cases decided during the Vietnam War, *Welsh v. United States*⁹⁴ and *United States v. Seeger*,⁹⁵ the Court interpreted the term “religious” as used in a federal statute granting conscientious objector status.⁹⁶

Exploring the meaning of the term, the Court articulated a functional definition of religion. The believer’s view that his con-

90. See ALBANESE, *supra* note 1, at xxi.

91. *Id.*

92. *Id.*

93. *Id.* Albanese acknowledges that a definition of religion is impossible, for religion encompasses all of human life and defies the logical boundaries of good definitions. Instead, Albanese attempts to describe religion by recognizing its forms and functions. A religion defined, or even described, solely by the beliefs which comprise it, is incomplete.

94. 398 U.S. 333 (1970).

95. 380 U.S. 163 (1965).

96. See Universal Military Training and Service Act § 6(j), 62 Stat. 612 (1948). The Court interpreted the statute to determine whether the registrants could be prosecuted for their failure to submit to induction in the armed forces, rather than using a balancing test as in the parental exemptions. The statute codified a religious exemption to the otherwise universally applicable induction process; thus, it codified the legislature’s position that an individual’s religious objection to war trumps the federal government’s interest in efficiently raising an army in wartime. The statute provided, in part, that:

Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual’s belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.

Id. at 612-13.

victions were not religious was not determinative,⁹⁷ nor was the substantive content of the beliefs themselves.⁹⁸ The Court also declared that intensely personal convictions might strike a nonbeliever as incomprehensible or wrong, yet deserve protection nonetheless as religious beliefs.⁹⁹ While acknowledging the importance of the registrant's sincerity, the Court pointed out that the central consideration in determining whether the registrant's beliefs were religious was whether these beliefs played the role of a religion and functioned as a religion in the registrant's life.¹⁰⁰

Thus, the Court's interpretive efforts to define "religious" focused not on the substance of the religious beliefs—what the beliefs *are*—but on their function—what the beliefs *do*—in the believer's life. The Court recognized the most obvious function of religious belief, that of fundamentally directing an individual's behavior. Religious doctrine "communicates to man in some way a consciousness of what is right and should be done, [and] what is wrong and therefore should be shunned."¹⁰¹ Applying this functional test to the registrants' claims, the Court respected the significance and force of the registrants' religious convictions in shaping their objections to serving in the armed forces, and granted their rights to exemption.¹⁰² The functional approach precluded the Court's need to assess the substance of the beliefs themselves to determine their religious nature, and thereby their protection under the First Amendment.

The context of religious parents who face punishment for declining conventional medicine for their children further underscores the importance of a functional approach to religious belief. While the majority of society easily attests to the beneficial role of conventional medicine, the benefits of religion in the lives of parents declining medical treatment is much more difficult to recognize. Yet, if a nonbeliever can acknowledge religion's positive val-

97. In *Welsh*, neither registrant could assert that his beliefs were religious in the conventional sense. Also, neither registrant could confirm or deny that he believed in a Supreme Being, nor could either registrant confirm that he was affiliated with any recognized religious institution or group. *Welsh*, 398 U.S. at 335-37.

98. The Court emphasized that delving into the substantive content of petitioners' beliefs to determine the meaning of "religious" violated the "long-established policy of not picking and choosing among religious beliefs." *Seeger*, 380 U.S. at 163.

99. *Id.* at 184-85.

100. *Id.*

101. *Welsh v. United States*, 398 U.S. 333, 338 (1970).

102. *Id.* at 343-44; *United States v. Seeger*, 380 U.S. 163, 186-87 (1965).

ue—what religion *does* for the believer throughout the crisis—the parents' decision becomes easier to understand even if the nonbeliever cannot accept the underlying substantive beliefs.

Before exploring the purposes of religion as a means of understanding its value, it is worthwhile to assert a simple premise. Religion is not purely rational. It contains both rational and nonrational elements.¹⁰³ Thus, those who automatically dismiss the nonrational may be unable to understand the value of religious faith to a believer. Yet, the judiciary's task is to weigh the facts and principles implicated in the case before it. Where a parent declined medical treatment for religious reasons, judges and jurors must envision the state of mind of the religious defendant and consider the parent's nonrational response to a situation. To refuse to accept the nonrational elements of religion as reasonable, without understanding their nature as does the believer, violates the duty of a judge. It is possible, without accepting a religious doctrine, for a nonbeliever to understand and respect the function of religious faith in the life of a believer.

The functional view emphasizes religion's ability to strengthen people who face an unknown. The boundaries dividing the known from the unknown can be physical,¹⁰⁴ for instance, a boundary dividing land that is familiar and secure, from land that is unrecognized and frightening. Life demands temporal crossings as well, such as birth, puberty, and death.¹⁰⁵ Traversing the border from one form of life into a new form is often deeply unnerving. To ease the stress imposed when a boundary must be crossed, people call on religion for special help:

This special assistance came from the mysterious and fearful unknown, from forces that transcended, or went beyond, ordinary life. In other words, alien land and people were countered by a second form of "otherness," more powerful than the first. By enlisting the help of this second "otherness" the first was overcome, and life could go on as intended. These "other" forces that saved a difficult

103. MIRCEA ELIADE, *THE SACRED AND THE PROFANE: THE NATURE OF RELIGION* 10 (1959) (acknowledging the irrational nature of the phenomenon of religion, referred to as "the sacred"). See also ANDREW M. GREELEY, *RELIGION: A SECULAR THEORY* 33-42 (1982) (describing the religious dimension of humans as "prerational").

104. ALBANESE, *supra* note 1, at 3.

105. *Id.* at 4.

situation by their power were called religious.¹⁰⁶

In this view, humans essentially create religion to support themselves during stressful times. By enveloping the believer in this *other* power, religion comforts and guides the believer through life's frightening experiences.¹⁰⁷

Death is the ultimate boundary with which religion directly contends.¹⁰⁸ All individuals, regardless of their religious nature, confront mortality; "the fear of death is indeed a universal in the human condition."¹⁰⁹ Despite death's certainty, it "remains unapproachable, perplexing, frightening."¹¹⁰ The fear with which humans perceive death is existential; when contending with grief, humans "feel most acutely the discontinuity, the meaninglessness, of life."¹¹¹

Certainly, religion as it is commonly understood is not the only means with which humans assuage existential anxiety.¹¹² Yet, religion holds infinite and unique value in the ultimate quest of the human race:

[R]eligion alone gives hope, because it holds open the dimension of the unknown and the unknowable . . . in doing so, it relieves the absurdity of earthly life, all the impossible limitations and frustrations of living matter . . . Religion takes one's very creatureliness, one's insignificance, and makes it a condition of hope. Full transcendence of the human condition means limitless possibility unimaginable to us.¹¹³

106. *Id.*

107. See GREELEY, *supra* note 103, at 71 (stating that an individual encountering religious emotion perceives it as "other").

108. See *id.* at 15 (considering religion as an expression of hope against the inevitability of death).

109. ERNEST BECKER, *THE DENIAL OF DEATH* at ix (1973).

110. Daniel Cappon, *The Psychology of Dying*, in *THE INTERPRETATION OF DEATH* 61, 62 (Hendrik M. Ruitenbeek ed., 1984) (studying the fear of death in dying hospital patients).

111. JAMES P. CARSE, *DEATH AND EXISTENCE: A CONCEPTUAL HISTORY OF HUMAN MORTALITY* 7 (1980) (studying ten major conceptions of death and their views of the way in which humans attempt to create continuity out of the discontinuity of death).

112. Herman Feifel, *The Problem of Death*, in *THE INTERPRETATION OF DEATH*, *supra* note 110, at 125 (asserting that the major function of practically all religious and philosophical systems of thought has been to deal with this fear).

113. BECKER, *supra* note 109, at 203-04. See also GREELEY, *supra* note 103, at 97 (asserting that in developing religious images an individual formulates a "worldview," a response to the critical problems of human suffering and death, and asserting that the

The propensity to hope thankfully may be a "biological given."¹¹⁴ No one can prove that human life is guided by something more than random, capricious chance. Throughout, humans experience "sickness, suffering, tragedy, injustice, disappointment, frustration, and eventually and inevitably death."¹¹⁵ The unique ability of humans to reason renders the propensity to hope as more than a biological possibility; forced to recognize these realities, hope is perhaps a biological and spiritual human need.¹¹⁶ If religion sustains this hopefulness throughout the "outrages of human existence,"¹¹⁷ its value is immeasurable.

Again, those who do not question their own significance or do not consider their belief systems religious may not comprehend an individual's need for religious faith and activity. Yet, once the need is recognized, an understanding of the ways religion fulfills the needs of believers lends critical insight to the assessment of religion's value. A fuller description of religion, its forms and practices, may reveal its more tangible benefits as well as convey the philosophical and psychological disadvantages of living without faith.

The role of religious behavioral norms, ritual, and association discredits the simple distinction between belief and conduct some courts have relied upon to justify state encroachment of religious practice:¹¹⁸

More than a form of belief, religion is a matter of practice. Body and emotions play as large a role in a living religion as philosophical concepts. Perhaps, in fact, they play a larger role. . . . Mind and body are both necessary to human religious life.¹¹⁹

foundation for religion is hope).

114. GREELEY, *supra* note 103, at 18.

115. *Id.*

116. See BECKER, *supra* note 109, at 174 (quoting OTTO RANK, *BEYOND PSYCHOLOGY* 194 (1958)). See also GREELEY, *supra* note 103, at 12 (suggesting that without hope, despair might have wiped out the human species, which alone has acquired the capacity to reflect on its own mortality).

117. GREELEY, *supra* note 103, at 18.

118. See *supra* notes 48-55 and accompanying text (developing the Supreme Court's view of the distinction between religious belief and conduct).

119. ALBANESE, *supra* note 1, at 8-9. Religious conduct, the acts which arise out of religious belief, has had great significance in the formation and development of American culture, beginning with the departure of the Puritans from England. The religious pluralism

As the Supreme Court recognized in *Wisconsin v. Yoder*,¹²⁰ religion does not exist simply as a set of beliefs. A religion constitutes a system, a collection of stories, teachings, and symbols.¹²¹

Each component of a religious system advances the purpose of religion in the lives of its adherents, reflecting the comforting presence of the *other*. Religious *creeds* explain the meaning of human life in the universe, often appearing as theologies or sacred myths of origin. Defining a reason why a people appears in the cosmos, creeds set forth the relationship of humans to the "otherness," the divine.¹²² *Codes* govern everyday behavior. They can be highly specific directives, or tacit conventions of a society. The codes instruct people when and how to act in conformity with the moral understanding that comes from the religious creeds,¹²³ assuring believers of the righteousness of their actions. *Cultuses*, rituals which act out the understandings expressed in the creed and code, are means with which individuals summon and surround themselves with the "other" power deified in the creed.¹²⁴ Finally, religion is expressed in a *community*, the group of people within the boundaries of a shared creed, code, and cultus.¹²⁵ The com-

that typifies American culture mandated religious activity in addition to internal, spiritual belief. *Id.* at 14. Throughout America's history, the separation of church and state required membership in any religious organization to be voluntary, "leading in turn to a need for religious activism to guarantee membership in a setting of religious competition." *Id.* Continuing in the spirit of competition, religious groups noted Americans' preference for religious experience over thought, and avoided intellectual difficulties in religious thought "in order to appeal to the greatest audience of active people." *Id.* See also Alan Heimert, *The Great Awakening as Watershed*, in *RELIGION IN AMERICAN HISTORY* 127-41 (John M. Mulder & John F. Wilson eds., 1978) (asserting that the Great Awakening, the intercolonial flurry of religious revivals in the 1740s, created the confidence that human religious experience and activity could hasten the coming of the millenium and that this was a powerful contribution to America's emerging nationalism).

120. See *supra* notes 66-67 and accompanying text (summarizing the Court's acknowledgment that Amish religious beliefs and conduct were inseparable for First Amendment purposes).

121. ALBANESE, *supra* note 1, at 8. See also GREELEY, *supra* note 103, at 53-105 (explaining that religious systems consist of symbols and stories transmitted through individuals and institutions).

122. ALBANESE, *supra* note 1, at 8-9.

123. *Welsh v. United States*, 398 U.S. 333, 338 (1970). The Supreme Court recognized this component in *Welsh*, describing religion's characteristic "consciousness of what is right and should be done, of what is wrong and therefore should be shunned." See also *supra* text accompanying note 101.

124. See ELIADE, *supra* note 103, at 68-104 (describing the sacralization of time through religious ritual and festival).

125. ALBANESE, *supra* note 1, at 8.

munity which shares the beliefs and activities, cultivates and confirms the presence of religious awe.¹²⁶ As the religious beliefs provide the intellectual basis for the individual's sense that he participates in the *other* power, the conduct and community arising out of these beliefs are the means by which the believer infuses the transcendent quality of religion, the power of the *other*, into daily life.

Together, the four religious expressions ground believers in physical, temporal, and social contexts. By defining theological, moral, and community boundaries, religion shapes significant identities for individuals in their immediate surroundings and in the universe:

[O]ur religion concerns the way we locate ourselves in space through the arrangement of sacred rites and holy places as boundary markers. It concerns, too, the way we locate ourselves in time through origin stories or theological traditions that also express boundaries It concerns our place among other human beings, and it means staking out a claim on the landscape of identity.¹²⁷

Thus, an infringement upon an individual's religious liberty threatens the means by which the individual defines and perceives her very identity.

Contrasting religious experience with the experience of the nonreligious exposes the value of religious identity, the encounter with the awesome *other* power. In *The Sacred and The Profane*,¹²⁸ Mircea Eliade explores the history of religion incorporating philosophical and psychological perspectives. Eliade unabashedly affirms and glorifies the value of religious experience in human existence by elucidating the ways in which "religious man attempts to remain as long as possible in a sacred universe, and hence what his total experience of life proves to be in comparison with the experience of the man without religions feeling, of the man who lives, or wishes to live, in a desacralized world."¹²⁹

Eliade defines the "*sacred*," the sense of religiousness, simply

126. See GREELEY, *supra* note 103, at 119-24 (articulating the role of the community in validating and enhancing religious awe and hopefulness).

127. ALBANESE, *supra* note 1, at 5.

128. See ELIADE, *supra* note 103 and accompanying text.

129. *Id.* at 13.

as "*the opposite of the profane.*"¹³⁰ In elaborating why humans tend to seek the sacred and invite it into their lives, he describes what religion contributes to the believer's identity: "[t]he *sacred* is equivalent to a *power*, and, in the last analysis, to *reality*. The sacred is saturated with *being*. Sacred power means reality and at the same time enduringness and efficacy."¹³¹ By recognizing the sacred, believers receive this power and become part of what is real, what endures. Whereas living in the sacred connects an individual with objective reality, one living separate from the sacred becomes powerless: "paralyzed by the never-ceasing relativity of purely subjective experiences."¹³²

Religious faith transfers the power of the sacred to the individual. One need not abandon one's identity in this world by becoming the *other*. "By manifesting the sacred, any object becomes *something else*, yet it continues to remain *itself*, for it continues to participate in its surrounding cosmic milieu."¹³³ While the immediate reaction to the sacred is to perceive it as "other" than oneself, the believer recognizes that it is simultaneously similar, and attempts to personify it.¹³⁴ Identification with the sacred enhances one's awe, for it is the only means with which one may honor the *other*.¹³⁵

Identifying with and becoming part of the sacred implicitly draws the believer closer to the absolute source of the *other* power.¹³⁶ Commonly, religions assign the sacred some sort of divine symbol or identity; most religious traditions incorporate the image or figure of gods or a God.¹³⁷ By participating in the sacred one may approach the divine.¹³⁸

Identifying with the sacred imbues life with a sense of purpose and contribution to the universe.¹³⁹ Assuming the sacred gives

130. *Id.* at 10.

131. *Id.* at 12.

132. *Id.* at 28.

133. See ELIADE, *supra* note 103, at 12.

134. See GREELEY, *supra* note 103, at 71.

135. *Id.*

136. See ELIADE, *supra* note 103, at 70 (describing sacred time as necessarily sanctified by the presence and activity of the gods).

137. See GREELEY, *supra* note 103, at 73-78 (referring to God as the image created to articulate what one encounters in experiences of grace, while acknowledging that the idea of such an entity is almost universally available to mankind).

138. See ELIADE, *supra* note 103, at 106 (asserting that during religious experiences, religious people attempt to approach God).

139. See GREELEY, *supra* note 103, at 54.

humans incredible responsibility. This responsibility is "a different kind of responsibility from those that, to us moderns, appear to be the only genuine and valid responsibilities. It is a *responsibility on the cosmic plane*, in contradistinction to the moral, social, or historical responsibilities that are alone regarded as valid in modern civilizations."¹⁴⁰ With vast responsibilities, religious believers acquire a significant role in the enduring universe. Thus, religious experience links the individual's purpose to "Higher Purposes."¹⁴¹ The import of the role of believers contrasts starkly to the import of the role of the profane: "profane man insists that he is constituted only by human history, hence by the sum of the very acts that, for religious man, are of no importance because they have no divine models."¹⁴²

With one's identity and activity on earth linked to sacred purposes, religious faith fulfills its ultimate function. In "the return to the sources of the sacred and the real . . . human existence appears to be saved from nothingness and death."¹⁴³ Religion promises salvation by confirming the purposefulness of human experience.¹⁴⁴ Through religious experience, a believer's actions assume cosmic significance.¹⁴⁵ By participating in the sacred, that which is enduring and real, "one's existence has meaning in some ultimate sense because it exists within an eternal and infinite scheme of things."¹⁴⁶ The finiteness of earthly presence is no longer terrifying,¹⁴⁷ for the *other*, of which the believer is a part, exists and endures. The hopefulness that results from religious experience enables a future,¹⁴⁸ despite the reality of death. While conventional medicine ceases to assert any power in the face of death, religion provides a means through which humans may transcend it.

140. ELIADE, *supra* note 103, at 93.

141. GREELEY, *supra* note 103, at 54-57 (concluding that religion validates the purposefulness of human life).

142. ELIADE, *supra* note 103, at 100.

143. *Id.* at 107.

144. See GREELEY, *supra* note 103, at 54.

145. BECKER, *supra* note 109, at 91 (asserting that creatures attain cosmic significance by affirming connection with the force at the heart of creation).

146. *Id.* at 90 (interpreting Kierkegaard's message that man endures anxiety to arrive at faith).

147. See ELIADE, *supra* note 103, at 107 (describing the pessimistic vision of profane man).

148. See GREELEY, *supra* note 103, at 54.

B. *The Example of Christian Science*

The world view offered by Christian Science demonstrates how religious identity and experience may fulfill the existential needs of humans. Christian Science grants every believer the resources to become the sacred through healing. "[I]t focuses initially and primarily on the potential for transformation and healing within the individual."¹⁴⁹ The spiritual victory is not simply an opportunity, but an immediate goal for the believer to be achieved in this life.¹⁵⁰

The immediacy of the opportunity illuminates the appeal of Christian Science:

Evidence of the religious experiences of long-term, committed adherents of Christian Science suggests that it may have survived for more than a century because it has met a more basic religious need. Disaffected Protestants, particularly, have seen in it a release not just from bodily suffering but also from spiritual malaise—an alternative to the attitude that accepts with Christian resignation the tragedies of present life in hope of compensation either in a life beyond or according to some transcendent scale of eternal values.¹⁵¹

Christian Science provides hope in this life by empowering believers with the sacred.

The sole reliance of believers on spiritual treatment testifies that the "Spirit," the Christian Science construction of the sacred, is the only source of what is real:

To understand what this means to them, it is necessary to recognize the centrality of their conviction the Spirit alone is *real* in the fullest sense of the term. Matter, on the other hand, is regarded as a false, distorted, temporal, finite sense of being, from which Christianity, "scientifically" understood, progressively frees one.¹⁵²

149. Mircea Eliade, *Christian Science*, in *CHRISTIAN SCIENCE: A SOURCEBOOK OF CONTEMPORARY MATERIALS* *supra* note 1, at 5, 10.

150. *Id.*

151. *Id.*

152. ROBERT PEEL, *SPIRITUAL HEALING IN A SCIENTIFIC AGE* 34 (1987) (encouraging mutual understanding and tolerance between the disparate systems of spiritual and scientific treatments).

To the Christian Scientist, "matter" is an errant concept of substance reflecting the limitations of the human mind, and is ultimately unreal.¹⁵³ Human beings consist of much more than matter; while Christian Science doctrine does not deny that humans experience pain and suffering,¹⁵⁴ it affirms that their spiritual resources are boundless. Through understanding, an individual can arrive at and live out the realization of spiritual selfhood which renders him as God created: "perfect, upright and free."¹⁵⁵ The "only reality of sin, sickness and death is the awful fact that unrealities seem real to human, erring belief."¹⁵⁶ Once the individual fully grasps that God created humans perfect, without capacity for sickness, the believer is exempt from it.¹⁵⁷

Perceiving illness as a symptom of imperfect understanding provides the Christian Scientist with a means of transcending death. Christian Science does not profess to have attained the spiritual perfection to have conquered death. Rather, it teaches that the person lives, "continuing to strive for perfection after 'death' and that what appears to be an ending is merely a passing, ascending to a realm of higher understanding."¹⁵⁸ As life is the pursuit of Truth, it is deathless; thus, the Christian Science creed offers spiritual healing not as a means to prevent death, but to pursue perfection and truth.¹⁵⁹

In the health care dilemma presented by the opposition of Christian Science parents to conventional medical treatment, both the state that attempts to penalize the parents for withholding treatment, and the religious parents wish to further the child's well-being.¹⁶⁰ The conflict between them reveals that conventional medicine, notwithstanding its incredible powers to improve the quality of this life, and often prolong it, does nothing to assuage

153. See Eliade, *supra* note 149, at 6-9.

154. Talbot, *supra* note 11, at 1643 (summarizing Christian Science doctrine regarding spiritual treatment).

155. Pam Robbins & Robley Whitson, *Mary Baker Eddy's Christian Science*, in *CHRISTIAN SCIENCE: A SOURCEBOOK OF CONTEMPORARY MATERIALS*, *supra* note 1, at 14, 16.

156. *Id.* at 17 (citing MARY BAKER EDDY, *SCIENCE AND HEALTH WITH KEY TO THE SCRIPTURES* 466 (1906)).

157. *Id.*

158. *Id.* at 23.

159. *Id.*

160. See *supra* notes 10-11 and accompanying text (documenting the parents' belief that they act in the child's best interest).

existential fear arising out of the inevitability of death. For those in fear, religion may provide the only remedy.

IV. FAITH IN THE CRITICAL CARE CONTEXT

A. *The Value of the Parents' Faith*

Proceeding with the view that religious faith offers believers a sense of existential meaning and identity when the believer confronts the frightening boundary between life and death, the need for religion among parents facing a child's serious illness may be particularly acute, perhaps unique,¹⁶¹ and thereby its value is of the greatest significance. For the parent facing a child's life-threatening illness, numerous emotions compound the existential anxiety that generally accompanies death. Confusion intensifies the grief and fear of loss. "Children are not supposed to die. The death of a child is a senseless injustice. A child's death . . . is incomprehensible."¹⁶²

The confusion results in part from the sense that the world is out of order. "The natural order is that parents should die first."¹⁶³ Confronting the loss of a child, parents inevitably question their roles and responsibility. The crisis "brings to the fore the ultimate issues of powerlessness, guilt, and the fact that as parents they were unable to protect their own child."¹⁶⁴ Many believe the loss of a child is the worst tragedy a human being can suffer.¹⁶⁵

Such a crisis is the arena in which faith performs its ultimate function. From the creeds, codes, cultuses, and community of religion, parents may find an explanation for their suffering, meaning among confusion, and hopefulness in the face of death.¹⁶⁶ The

161. See SHERRY E. JOHNSON, *AFTER A CHILD DIES: COUNSELING BEREAVED FAMILIES* at xiii (1987) (citing a philosopher of thanatology who describes parental grief as unique because "it arouses the cultural taboo of children dying before their parents").

162. JOAN HAGAN ARNOLD & PENELOPE BUSCHMAN GEMMA, *A CHILD DIES: A PORTRAIT OF FAMILY GRIEF* at xi (1983).

163. James P. Zimmerman, *The Bereaved Parent*, in *ACUTE GRIEF* 126, 129 (Otto Margolis et al. eds., 1981). See also JOHNSON, *supra* note 161, at xiii (noting the nagging sense of confusion surrounding the death of a child due to the reversal of the natural order).

164. JOHNSON, *supra* note 161, at xiii.

165. ARNOLD & GEMMA, *supra* note 162, at xi (contending that the experience of losing a child is special and like none other). See also Zimmerman, *supra* note 163, at 126 (citing a priest describing parents who experienced the death of a child as members of the "world's unluckiest club").

166. See *supra* notes 108-17 and accompanying text (discussing the function of religion

connection to the *other* enabled by faith may be the only solace available. When a religious parent faces a child's life-threatening illness is precisely the moment when the constitutional guarantee of free exercise is most needed and deserved.¹⁶⁷

The inestimable value of religious liberty may, in principle, be unchanging. But if one accepts that crisis may intensify the believer's need for religious solace, and thereby the significance of the individual's religious liberty, the combined statutory and judicial response to parents who decline medical treatment for their gravely ill children seems simply backwards. As indicated in Part II, states generally respect the parent's right to decline conventional treatment for religious reasons until the child's condition is life-threatening.¹⁶⁸ At that point under traditional analysis, the state's interest in protecting child welfare becomes sufficiently compelling to override the parents' religious liberty. That is, at the point the parent faces the extreme crisis in which the need for religion is most apparent and immediate, the parent's religious interest must give way in order to avoid civil and criminal penalties. It is illogical that the guarantee of religious free exercise ought to protect religious liberty only until it attains its highest value.

Beyond the affront to the parents' religious liberty, a court that automatically elevates the state's interest in protecting children disregards the harm to society that accompanies a decision to punish the parents. As expressed in *Yoder*, governmental policies which force religious minorities to assimilate their fundamental beliefs and practices present an objective danger to society.¹⁶⁹ The free exercise clause recognizes the legitimacy of an American citizen's allegiance to an individual conception of divine authority, even as the content of the allegiance conflicts with the democratic will of the people.¹⁷⁰ According to the Supreme Court, no as-

in the face of suffering and death).

167. Critics may immediately counter that the child's illness may be life-threatening only if conventional medical treatment is withheld, as in the case of diabetes or some forms of meningitis. This argument is somewhat circular however, as the issue itself is whether parents ought to be punished for declining medical care and not whether medicine could cure the illness.

168. See *supra* notes 25-28 and accompanying text.

169. *Wisconsin v. Yoder*, 406 U.S. 205, 218-19 (1972). See also *supra* notes 68-70 and accompanying text.

170. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1516 (1990) (investigating the historical underpinnings of the free exercise clause to substantiate the propriety of religious exemption).

sumptions may be made that the majority way of life is "right" or the minority "wrong;" the government may not condemn a "way of life that is odd or even erratic but interferes with no rights or interest of others."¹⁷¹ A democracy cannot tolerate disrespect for the views of a religious minority which do not affect the private rights of others or public safety. The commitment to protecting religious liberty renders totalitarian tyranny a "philosophical impossibility,"¹⁷² as diversity of religious belief splits the allegiance of citizens among factions.¹⁷³ Upholding the rights of religious minorities under the free exercise clause enhances the security of every member of a democratic society.

B. Faith's Impact on the Effectiveness of Punishment

The nature of the parents' religious experience and identity renders legal punishment of limited effectiveness as a means of furthering the states' asserted interest in child welfare. The justification for holding parents liable for their failure to obtain conventional medical care rests on a state's general authority to protect the welfare of children.¹⁷⁴ However, the *Walker* court's acknowledgment that the state is unlikely to learn of a child's illness in time to take protective measures¹⁷⁵ implicitly concedes that the legislative scheme enforced against the parents cannot advance the asserted end in all cases. If a state's professed interest is in the particular child whose life is threatened by parental reliance on spiritual treatment, punishing the parent after the child is already dead fails to meet that purpose. If the state's interest is more deterrent in nature, that interest conflicts with the state's admittedly constitutionally commanded noninterference policy.¹⁷⁶

A state's reliance on the deterrent effect of actions against parents assumes the superiority of its authority over the sacred or *other* power imposed by the parents' religious identity. Even where the religious doctrine advocates compliance with secular laws,¹⁷⁷

171. *Yoder*, 406 U.S. at 223-24.

172. McConnell, *supra* note 170, at 1516.

173. CARTER, *supra* note 33, at 37.

174. See *supra* notes 13-23 and accompanying text.

175. See *supra* note 43 and accompanying text.

176. See *supra* notes 24-44 and accompanying text (chronicling the states' and courts' unwillingness to interfere in parental decision making unless the child's life is seriously endangered).

177. See, e.g., Thomas C. Johnsen, *Christian Scientists and the Medical Profession: A Historical Perspective*, in CHRISTIAN SCIENCE: A SOURCEBOOK OF CONTEMPORARY MATE-

this assumption may be unfounded. As James Madison perceived, "that the Civil Magistrate is a competent Judge of Religious truth . . . is an arrogant pretension."¹⁷⁸ Under the theory of free exercise, the government legitimately uses its power to correct humans errors in earthly judgments, such as economics and natural morals. However, the government must defer when the scope of the individual's judgment lies outside the government's arena.¹⁷⁹ The claims of the "universal sovereign" precede the claims of civil rule, both in time and in authority.¹⁸⁰ And if a nonbeliever accepts the existential benefits religious faith provides, the elevation of religious authority over secular authority seems understandable.

Accepting this rationale is potentially dangerous. Claims of the superiority of religious authority might be appropriated to refute the deterrent value of any exercise of state authority over religious believers, rendering the state powerless against any citizen whose religious beliefs conflicted with a civil law. However, deterrence seems especially nonsensical where parents have relied on faith throughout a child's grave illness. The persistence of their faith evidences the force and preeminence of the *other* power in the parents' decisions concerning the child. In circumstances that less dramatically invoke religion's ultimate function, civil authority may take priority without coercing the individual's religious assimilation.

The idea that the parents' health care choice results from submission to a higher authority exposes the inequality of penalizing religious parents for the child's failure to recover. Common law accepts completely the fact that patients may not fully grasp the information necessary to make an "intelligent" health care decision;¹⁸¹ ordinarily, an individual "has only his physician to whom he can look for enlightenment."¹⁸² Despite their lack of medical understanding and their inability to control the outcome, parents

RIALS, *supra* note 1, at 167, 169 (Christian Science Publishing Society ed., 1990) (citing Mary Baker Eddy's position that the Church must not attempt to set aside laws which promote the general good of any community, and the group's record of cooperation with public health authorities).

178. McConnell, *supra* note 170, at 1498 (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments*, in 2 THE WRITINGS OF JAMES MADISON 183, 187 (G. Hunt ed., 1901)).

179. *Id.*

180. *Id.* at 1512 (arguing that this premise is the theoretical foundation of the free exercise clause).

181. See *Canterbury v. Spence*, 464 F.2d 772, 780 (D.C. Cir.) (defining the scope of informed consent in health care decision-making), *cert. denied*, 409 U.S. 1064 (1972).

182. *Id.*

selecting conventional treatment options, like parents withholding medical treatment for religious reasons,¹⁸³ no doubt believe their decision is in the best interest of the child. Yet, they are not penalized when medical treatment fails. Without trivializing the parents' religious faith, a court cannot distinguish this total deference to a physician from submission to a higher authority inherent in religious belief.

The sincere intent of religious parents to promote the child's well-being also limits the deterrent effect of the threat of legal punishment. For the believer in spiritual healing, the choice is not between the child's health and the individual's selfish desire to act on his religious belief. Rather, the reliance on spiritual treatment stems from an honest feeling that it is the most effective way of caring for oneself and one's child.¹⁸⁴ Attesting to the sincerity of the Christian Scientist position that spiritual treatment most effectively promotes the child's well-being, the Manager of the Christian Science Church's Committee on Publication, Nathan A. Talbot, explains that "[if] the only two options for care *were* medical treatment or no treatment, Christian Scientists like others would undoubtedly choose medical treatment."¹⁸⁵

Enhancing the child's welfare motivates the parent's religiously influenced decision, not avoiding legal culpability or obtaining any tangible benefits from the state. Because the religious directives embody the power of the sacred, the parent who unquestioningly

183. See *supra* notes 10-11 and accompanying text (affirming the religious parents' intent to benefit the child).

184. See *Statement for Atlanta Centers for Disease Control*, in *FREEDOM AND RESPONSIBILITY: CHRISTIAN SCIENCE HEALING FOR CHILDREN 3* (Christian Science Publishing Society ed., 1989) (summarizing the Christian Science views on health care); Worden, *supra* note 11, at 50-51 (a nurse's testament that meeting with Jehovah's Witness parents helped caregivers accept them as loving and caring parents who believe they act in the child's best interest by withholding medical treatments).

185. Nathan A. Talbot, *Government Should Not Interfere With Personal Beliefs*, in *FREEDOM AND RESPONSIBILITY: CHRISTIAN SCIENCE HEALING FOR CHILDREN*, *supra* note 184, at 7. Christian Science attempts to distinguish its practices from "faith" healers, those who believe in miracles or beseech God for an exception from suffering. They do not argue that their form of spiritual healing should be accommodated by the courts on First Amendment grounds alone. Rather, they promote, as evidence, numerous accounts of healing over the last century that are published in Christian Science media. I have chosen generally to ignore the "scientific" arguments posed by the movement, for the application of scientific analysis to their claims defeats the universal significance of their nonrational faith. The content of the religious system is investigated only to show how a religious system answers an individual's questions of her role and destiny in the universe, not to assess whose reliance on faith healing is more valid or reasonable.

relies on faith and spiritual healing perceives much greater harm to the child in deviating from those tenets than in the threat of prosecution from the state. To the extent a state hopes to deter those parents who waver in their religious sincerity as to the reliability of spiritual treatment, the fear of losing the seriously ill child would seem to preclude the need to threaten these parents with legal action.¹⁸⁶

IV. CONCLUSION

The controversy involving religious parents who decline conventional medical treatment for their children reflects the conflict resulting from the shared authority of religion and medicine in the arena of death. While both religion and medicine contend with the helplessness of humans against death, medicine defends us by attempting to forestall death's arrival. In contrast, religion ultimately attempts to transcend the insignificance of life implied by death's sure arrival. The election of the religious approach over the scientific is incomprehensible to many members of modern society. To this majority, the state's interest in protecting the child who cannot choose for himself is an obvious justification for punishing the parent who foregoes medicine to treat the child's life-threatening illness. But before a court mechanically adopts the justification to impose criminal or civil penalties upon the parent, it must acknowledge the nature of the infringement upon religious liberty.

Health care decision-making implicates people's fundamental conceptions of the value and meaning of life which frequently take shape within a religious framework.¹⁸⁷ However, health care

186. The fear of losing a child also seems to be a natural deterrent against nonreligious parents feigning religious devotion to excuse them from liability for foregoing needed medical treatment for their children, reducing the persuasiveness of the general objection to free exercise exemption based on the fear of "strategic behavior." *See supra* note 88. The religious conduct itself produces what appears to most observers to be the most severe harm: the child's death. A parent would have to have allowed his child to die before he became "eligible" for exemption from the generally applicable criminal or wrongful death penalties that attach to his failure to obtain medical treatment. As evidenced by the decisions which aver the religious parents' beneficent intent toward their children, *see supra* note 10 and accompanying text, courts are capable of assessing the intent of religious parents as they do other defendants. While it may be possible that criminally or civilly negligent parents might attempt to claim the exemption, their ability to establish the claims as legitimate seems unlikely.

The grave harm that parents would have to suffer before the religious exemption from punishment would benefit them also assuages the concerns over governmental favoritism toward or establishment of religious groups. *See supra* note 88.

187. A medical doctor conveys the interrelationship between health care and religion by

choices that are influenced by secular values may also implicate the same existential needs and beliefs as traditionally religious decisions. Several current phenomena contradict the notion that traditional medical science is the "religion" of modern society, capable of satisfying people's health needs. "Conventional" medicine now incorporates life-saving technologies many individuals wish to forego, as shown by the increasing prevalence of living wills or medical directives,¹⁸⁸ do-not-resuscitate orders,¹⁸⁹ and comfort-care hospices.¹⁹⁰ Alternative theories of medicine, including Eastern and holistic attitudes toward health care, now compete with the scientific tradition.¹⁹¹

Simply by their prevalence, these trends increase the likelihood that parents may wish to make parallel decisions to forego life-

positing three "religious" questions that tend to be asked by patients facing a medical crisis, such as the diagnosis of a fatal or debilitating illness. "Why did this happen to me? What can I learn about life and about myself from this experience? For what may I hope?" Daniel W. Foster, *Religion and Medicine: The Physician's Perspective*, in *HEALTH/MEDICINE AND THE FAITH TRADITIONS: AN INQUIRY INTO RELIGION AND MEDICINE* 245, 255 (Martin E. Marty & Kenneth L. Vaux eds., 1982). Further, religion and medicine share authority in the same facets of human life: birth, diet, crises, and death.

188. See generally ALAN MEISEL, *THE RIGHT TO DIE* § 10 (1989) (describing living wills as part of a more general text on the development of the right to die); Abe Brown, *The Living Will and Durable Power of Attorney: Decisions About Dying*, 17 *CURRENT HEALTH* 18 (1991); Martha Henderson, *Beyond the Living Will*, 30 *GERONTOLOGIST* 480 (1990) (studying the effect of living wills on patients' anxiety about death).

189. See generally Cynthia B. Cohen & Peter J. Cohen, *Required Reconsideration of "Do-Not-Resuscitate" Orders in the Operating Room and Certain Other Treatment Settings*, 20 *LAW, MEDICINE AND HEALTH CARE* 354 (1992) (advocating the tailoring of DNR orders to the needs, goals and values of individual patients); Council on Ethical and Judicial Affairs, American Medical Association, *Guidelines for the Appropriate Use of Do-Not Resuscitate Orders*, 265 *JAMA* 1868 (1991) (detailing the American Medical Association guidelines for the use of cardiopulmonary resuscitation).

190. See generally ANNE MUNLEY, *THE HOSPICE ALTERNATIVE: A NEW CONTEXT FOR DEATH AND DYING* (1983) (discussing the need for hospices); *PSYCHOSOCIAL CARE OF THE DYING PATIENT* (C. A. Garfield ed., 1978) (containing essays discussing terminal patient care guidelines in relation to comfort care only).

191. See generally KRISTINE BEYERMAN ALSTER, *THE HOLISTIC HEALTH MOVEMENT* (1989) (analyzing the holistic health movement); FRED M. FROHOCK, *HEALING POWERS: ALTERNATIVE MEDICINE, SPIRITUAL COMMUNITIES, AND THE STATE* (1992) (discussing the social impact of alternative medicine); JUNE S. LOWENBERG, *CARING AND RESPONSIBILITY: THE CROSSROADS BETWEEN HOLISTIC PRACTICE AND TRADITIONAL MEDICINE* (1989) (describing differences between holistic and traditional approaches); Maryanne Garon, *Contributions of Martha Rogers to the Development of Nursing Knowledge*, 40 *NURSING OUTLOOK* 67 (1992) (questioning prevailing scientific models and praising the contribution of alternative paradigms such as existentialism and Eastern philosophy to the nursing profession); Pedro E. Ponce, *Eastern Medicine Collides with Western Regulations at Mass. Acupuncture School*, 40 *CHRONICLE OF HIGHER EDUCATION* A32 (1993) (discussing the debate over how states regulate alternative medical education).

saving conventional treatment for their children.¹⁹² Admittedly, exempting from punishment those whose decisions can be traced to formal religious doctrine while punishing the rest evinces an unacceptable inequality. However, the absence of religious conviction, the absence of the sense of identity with the sacred, *other* power, in nonreligious decisions may allow parents to pursue available conventional treatments in extreme circumstances, circumventing the problem of unevenly awarded exemptions.

Moreover, even if no resolution exists for the moment, the problem of religious versus secular inequality at least ought to force the state to rethink its view of the proper scope of its interference in parental health care decision-making for children. If the state concludes that the current scheme, under which parents may be punished for declining life-saving treatment for their children, is the appropriate balance among its own and parents' interests, the state must confront the nature and significance of the decisions in which it intervenes. "Freedom in its highest form is the power to sustain continuity in the face of death—not to eliminate death."¹⁹³

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192. The issues surrounding DNR orders already include their use in pediatric care. See Kim Lewis, *Should Schools Honor Do-Not-Resuscitate Orders?*, 13 NEA TODAY 59 (1994) (presenting the debate over the use of DNR orders for children in school versus hospital settings). Reliance on hospice care for children is also a current issue. See HOSPICE APPROACHES TO PEDIATRIC CARE (Charles A. Corr & Donna M. Corr eds., 1985).

193. CARSE, *supra* note 111, at 9.