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CHILD NEGLECT IN THE EXERCISE OF RELIGIOUS FREEDOM

Robert Keith Larson*

NEWSPAPER COLUMNS have recently provided reports of two shocking instances wherein parents have refused to furnish, or permit others to furnish, medical aid to their children. In one of these cases, an eight-day old baby boy died before Illinois welfare authorities could lawfully obtain custody of him for the purpose of administering a blood transfusion which might have saved his life.¹ In the other case, an eight-year old girl remained in critical condition in a Canadian hospital while her parents refused to permit a blood transfusion.² In both cases, the parents, members of the religious sect known as Jehovah's Witnesses, based their refusal to permit medical aid upon their religious conviction that the Bible forbids the use of blood for food. They expressed the belief that, if the child should die, the result would be a manifestation of divine purpose. As a consequence, not one of the parents concerned would be likely to suffer from any feeling of guilt, but the existence of these stories serves as a sharp reminder of a serious and recurring legal problem for which a satisfactory and sufficiently comprehensive answer is yet to be found.

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¹ Chicago Daily News, Jan. 14, 1954, p. 3, cols. 1, 2 and 3; Chicago Daily Tribune, Jan. 14, 1954, Part 1, p. 1, col. 7; Chicago Daily Tribune, Jan. 15, 1954, Part 1, p. 6, cols. 2 and 3.

² Chicago Daily News, Jan. 25, 1954, p. 7, cols. 2 and 3.

The first of the cases mentioned received newspaper treatment for two days; formed the basis for an editorial comment; and then disappeared from the public consciousness. In the single report concerning the second, it appeared that the Crown Attorney threatened to place a charge of manslaughter against the parents in the event the child should die, but no further report of the case has been observed. A moment's reflection should be sufficient to enable most lawyers to guess the probable reason for the dropping of the matters. Proof that lack of a blood transfusion was an actual and operative cause of death would be difficult to establish in any event. Even if proof were easy, a prosecution might well be regarded as an unpopular one because of religious overtones and hampering doubts as to what the law is or should be. It is, therefore, the purpose of this comment to point up the fact that public welfare authorities ought to be provided with adequate legal remedies under which they would be clearly entitled to act promptly so as to safeguard the health of the child in an emergency case. It also serves to point out the need for a comprehensive solution to the entire problem of child neglect as well as to note some of the basic considerations which ought to go into the drafting of such a solution.

I. CURRENT STATE OF THE LAW

On common law principles, a parent who neglects to supply his child with necessary medical aid, thereby causing death, would be guilty of manslaughter. Any religious belief in the righteousness of the action would fail if offered by way of justification.³ This rule is clearly applicable when the parent is intelligent and informed enough to be aware of modern medical remedies and of their usually accepted effect. There are indications, however, in some of the cases that, in the absence of a medical practice act, quackery resulting in death is not felonious homicide if practiced by one who has a bona fide belief in the effectiveness of his remedies, provided these remedies are not practiced rashly or

³ *Rex v. Brooks* [1902], 22 C. L. T. 105, 9 B. C. R. 13; *Reg. v. Senior*, 1 Q. B. Div. 233, 19 Cox C. C. 219 (1898); *Reg. v. Downes*, 1 Q. B. Div. 25, 13 Cox C. C. 111 (1875).

wantonly.⁴ Strangely enough, although the basic rule for imposing liability for manslaughter has been recognized in English decisions and in American dicta,⁵ there is, nevertheless, no report of an American case in which a parent has actually been convicted for manslaughter in this situation and the existence of several acquittals⁶ may serve to indicate a degree of popular sympathy for the believer whose religious convictions have been so strong.

Statute law, by contrast, does not deal with the effect to be given to a parent's religious belief in cases of this nature but there are several kinds of statutes dealing with the obligation of the parent to care for the child, usually directed toward limiting parental rights of custody. For example, many states have statutes designed to punish the criminal neglect of a child, usually making the offense no more than a misdemeanor.⁷ Such a statute might be used to serve as the foundation for a manslaughter prosecution on the theory that any unlawful act or omission which results in a death is adequate to raise the crime to the equivalent of manslaughter. Although this so-called "misdemeanor-manslaughter" rule is in some disrepute as a matter of theory,⁸ its application here could probably be justified since the unlawful act which provides a basis for the application would be the act of criminal neglect, one sufficient in itself to support a manslaughter conviction without the aid of the unlawful act doctrine.

While there is some suggestion that, occasionally, such a statute would not require the furnishing of medical aid as a "necessary,"⁹ nevertheless courts have usually interpreted the

⁴ *State v. Schulz*, 55 Iowa 628, 8 N. W. 469 (1881); *Commonwealth v. Thompson*, 6 Mass. 134 (1809); *Rice v. State*, 8 Mo. 561 (1844).

⁵ See, for example, *State v. Chenoweth*, 163 Ind. 94, 71 N. E. 197 (1904).

⁶ *Reg. v. Morby*, 8 Q. B. Div. 571, 15 Cox C. C. 35 (1882); *State v. Chenoweth*, 163 Ind. 94, 71 N. E. 197 (1904); and *Westrup v. Commonwealth*, 123 Ky. 95, 93 S. W. 646 (1906), where the neglect was directed against the defendant's wife. In each of the foregoing cases, the prosecution failed to establish causation. See also, *Beck v. State*, 29 Okla. Cr. 240, 233 P. 495 (1925), where the defendant was acquitted of the charge of violating a child-neglect statute because of his honest mistake concerning the gravity of the child's affliction.

⁷ Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 95, and Ch. 68, § 24, will serve as illustrations.

⁸ Moreland, *Law of Homicide* (Bobbs-Merrill Co., Indianapolis, 1952), p. 194.

⁹ The case of *Regina v. Beer*, 32 Can. L. J. 416 (1896), supplies this inference.

term "necessary," as used in such a statute, to include the giving of such aid.¹⁰ It is believed, therefore, to the extent criminal sanctions are of utility in these matters, that the common law and statutory provisions may be regarded as roughly adequate to deal with the parent who, for religious or other reasons, has denied medical aid for his ailing child when otherwise able to furnish, or to secure the furnishing of, the same. If anything is required, it might be a sharpening up of statutory definitions to make certain that the consequence of child neglect could lead to conviction for manslaughter.

Prevention of harm being here, as elsewhere, more desirable than punishment after harm has been inflicted, it is important to notice that a second type of statute bearing on the matter tends to indicate the extent of the state's interest in its minor children, particularly those who are dependent, neglected or delinquent. Common, in this class, is the provision that all persons under a stated age are declared to be wards of the state,¹¹ with an added provision to the effect that the state may take custody over such a child, when found neglected or delinquent, by means of the appointment of a guardian for him.¹² Judicial decisions make it clear that legislation of this character involves no unconstitutional deprivation of the parental right to the free exercise of religious belief for this right does not include a liberty to expose either the community or the child to ill-health or to the possibility of death.¹³ These statutes then, to some degree, make it possible to safeguard the welfare of the child.

It was under such a provision that Illinois authorities ineffectively sought to obtain custody of the suffering child in the first

¹⁰ *Reg. v. Senior*, 1 Q. B. Div. 283, 19 Cox C. C. 219 (1898); *Reg. v. Downes*, 1 Q. B. Div. 25, 13 Cox C. C. 111 (1875); *Rex v. Botha* [1918], T. P. D. 133 (South Africa); *People v. Pierson*, 176 N. Y. 201, 68 N. E. 243 (1903); *Owens v. State*, 6 Okla. Cr. 110, 116 P. 345 (1911).

¹¹ See, for example, Ill. Rev. Stat. 1953, Vol. 1, Ch. 23, § 190.

¹² *Ibid.*, Ch. 23, § 196.

¹³ *People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 104 N. E. (2d) 769 (1952), cert. den. 344 U. S. 824, 73 S. Ct. 24, 97 L. Ed. 642 (1952). Similar indications appear in *Morrison v. State*, 252 S. W. (2d) 97 (Mo. App., 1952), and in *Mitchell v. Davis*, 205 S. W. (2d) 812 (Tex. Civ. App., 1947), but the constitutional question was not properly raised in these cases.

of the neglect cases mentioned above. The attempt was rendered useless by the death of the child during normal procedural delays deemed incident to the processes established by law. Although the Illinois statute provided that the summons to the parent should be issued and made returnable "at any time" within twenty days,¹⁴ it appeared that a hearing could not lawfully be held that same evening and, since the parents would not waive their apparent right to delay until the following day,¹⁵ there was no alternative but to wait. Presumably, the objection to an immediate hearing was that due process required that the parents be given a reasonable opportunity to prepare and present their side of the case. If this was the reason for the objection, it would seem to have been an entirely unsuitable one in a case where the parents were clearly ready with their reply.

In any event, it may be seriously questioned whether due process requires such a delay for, in analogous emergency situations, certain extraordinary proceedings have been authorized by law. For example, the Habeas Corpus Act provides that the writ shall issue "forthwith,"¹⁶ commanding the jailor to bring the prisoner before the judge "immediately."¹⁷ In much the same way, the Mental Health Code provides that, on presentation of a petition and doctor's certificate, a judge may order that a writ shall issue commanding the sheriff to take charge of a mentally ill person and transport him to a mental hospital,¹⁸ leaving the hearing on the petition to come up later so long as it is held within five days after the detention.¹⁹ If liberty and safety can be protected in this summary fashion, it is difficult to understand why

¹⁴ Ill. Rev. Stat. 1953, Vol. 1, Ch. 23, § 194.

¹⁵ The newspaper report of the case indicated that a summons was issued on January 13th to compel appearance by the parents on January 14th. It was there stated that the law did not permit a hearing immediately on the evening of January 13th without the parents' consent, which was refused: Chicago Daily Tribune, Jan. 14, 1954, Part 1, p. 1, col. 7. If, by this statement, it was meant that a hearing could not be had or judgment pronounced, without consent of the parties, prior to the return date, the statement would be sound law: *Culver v. Phelps*, 130 Ill. 217, 22 N. E. 809 (1889).

¹⁶ Ill. Rev. Stat. 1953, Vol. 1, Ch. 65, § 5.

¹⁷ *Ibid.*, Ch. 65, § 6.

¹⁸ Ill. Rev. Stat. 1953, Vol. 2, Ch. 91½, § 6—3.

¹⁹ *Ibid.*, Ch. 91½, § 6—4.

life itself could not be protected without the need for suffering those delays which cause no untoward harm in less urgent matters.

Aside from parental punishment or interference with parental custody, there is the matter of the criminal responsibility of the spiritual adviser who has counselled a parent to rely solely upon faith as a means of healing. The problem here is one less clear than that relating to the parent. Although it would seem, on general principles of criminal law, that such a person ought to be considered as accessory before the fact to the crime of manslaughter,²⁰ attempts at prosecution on this theory have failed in every instance.²¹ This apparent inconsistency in the law has drawn bitter criticism from a recent novelist,²² but one possible explanation may lie in the fact that an insufficient number of cases have been considered to round out a balanced pattern of acquittals and convictions.²³ Another possible explanation could be that juries simply do not like to push the application of criminal sanctions so far as to convict one whose only wrong lies in the giving of spiritual encouragement.

Statutes do not deal directly with the criminal responsibility of a spiritual adviser who has counselled a parent to rely solely upon faith as a means of healing his child. They do, however, very generally govern medical practice and prescribe the qualifications one must show before he can obtain a license. The question may arise, then, whether a minister who encourages faith healing is guilty of some form of illegal practice of medicine within the

²⁰ Miller, *Handbook of Criminal Law* (West Publishing Co., St. Paul, 1934), p. 236.

²¹ In *Reg. v. Beer*, 32 Can. L. J. 416 (1896), the accused was acquitted at the trial. In *Rex v. Elder*, 35 Man. Rep. 161 (1925), the conviction was reversed. See also *State v. Sandford*, 99 Me. 441, 59 A. 597 (1907), where the conviction of a leader in control of a group was reversed.

²² C. C. Cawley, *Fool's Haven* (House of Edinboro, Boston, 1953).

²³ While this seems to be true of criminal prosecutions for felonious homicide, some sects have not been reticent about provoking legal battles in which to test their religious rights. See Waite, "The Debt of Constitutional Law to Jehovah's Witnesses," 28 Minn. L. Rev. 209 (1944). Christian Scientists, on the other hand, apparently prefer to avoid litigation, depending rather on legislative reform designed to place their practices on a sound legal basis. See Steinhardt, "Christian Science: Religious Freedom and State Control," 7 Miami L. Q. 358 at 366 (1953), and Bangs, "Christian Science Practice—Legality," 25 J. Crim. Law and Criminology 271 (1934).

meaning of such a statute. Most statutes provide for an exemption in favor of those persons who minister to the sick by purely spiritual means, without prescribing any drugs or undertaking medical treatment of any other sort.²⁴ Hence, in most cases, the question litigated has been whether the spiritual adviser is a person coming within the exception. A number of convictions have been reported,²⁵ but none touching directly on the point at hand.

It should be apparent, then, without regard to the interpretation to be put upon the foregoing decisions, that the present framework of statutory and common law is not entirely adequate to protect the neglected child in an emergency case. Under the present Illinois law, for example, the remedial pattern would seem to be that welfare authorities may be able to obtain custody and to minister to the needs of the child but may have to wait a day or more, when waiting may mean the difference between death and survival. If the child dies before society is able to act, local officials may prosecute the parent on charges of manslaughter, or on charges of violating a child-neglect statute, with some chance of obtaining a conviction, at least on the latter charge, but with the realization that a conviction would probably serve to make the accused parent appear to be a martyr, at least to himself and to others of the same religious persuasion. The same local officials may prosecute, probably unsuccessfully, the spiritual adviser as accessory before the fact to the crime of manslaughter; or they may prosecute him, with possible success, for violation of a medical practice act. If, however, he has confined his action to spiritual ministrations alone, he must be acquitted under a statutory exception which Illinois, like many other states, has provided, even though he is the person who furnished the theory and nourished the practice of faith healing. In short, if it can

²⁴ See, for example, Ill. Rev. Stat. 1953, Vol. 2, Ch. 91, § 16v.

²⁵ *Smith v. People*, 51 Colo. 270, 117 P. 612 (1911); *People v. Estep*, 346 Ill. App. 132, 104 N. E. (2d) 562 (1952), appeal transferred 409 Ill. 125, 97 N. E. (2d) 823 (1952); *People v. Handzik*, 410 Ill. 295, 102 N. E. (2d) 340 (1951), cert. den. 343 U. S. 927, 72 S. Ct. 760, 96 L. Ed. 1337 (1952); *State v. Buswell*, 40 Neb. 158, 58 N. W. 728 (1894); *People v. Vogelgesang*, 221 N. Y. 290, 116 N. E. 977 (1917); *State v. Miller*, 59 N. D. 286, 229 N. W. 569 (1930).

be assumed that the objectives of the law are to protect the child as well as to deter the parent from neglecting him, then neither objective is, at present, being effectively accomplished.

II. ELEMENTS OF THE SOLUTION

In searching for remedies appropriately designed to provide a comprehensive solution for the child neglect problem, answers must first be supplied to a number of pertinent questions. It would be necessary, first, to determine the limitations, if any, imposed by federal and state constitutions. Next, as a matter of policy, an analysis of the desirability of exercising constitutional power to the limit would be in order. In that connection, there would be a subordinate question concerning the extent to which the state is interested in the welfare of its children as well as the extent to which such children are endangered by the exercise of religious freedom of the kind here under consideration. These points, in turn, would force a resolution of doubt over the purpose to be accomplished, from which it would then be possible to formulate the remedy, or remedies, which might effectively accomplish the desired purpose.

On the first of these points, one dealing with the nature of constitutional limitations, it might be sufficient to note that many cases have indicated that the imposition of criminal penalties against one who, by neglect, has caused the death of an infant, would not violate the legitimate exercise of religious beliefs as protected by the First Amendment or any of its counterparts in state constitutions.²⁶ Analogy, for this purpose, may be made to the case of *Reynolds v. United States*,²⁷ wherein the United States Supreme Court established the principle that while legislative fiat may not control private opinions and beliefs it may, none the less, control actions "in violation of social duties or subversive

²⁶ See the cases cited in notes 3, 10, and 25, ante.

²⁷ 98 U. S. 145, 25 L. Ed. 244 (1878). The defendant had there unsuccessfully challenged a bigamy indictment on the ground that it violated his right to pursue his religious belief in polygamy. Although the Mormons had renounced polygamy years ago, at least one "outlaw" cult had not given up the fight as of last year: Jessop, "Why I Have Five Wives," *Colliers*, Vol. 132, p. 27 (Nov. 13, 1953).

of good order.'²⁸ Similarly, as mentioned above, legislative action may constitutionally authorize state officials to take protective custody over a delinquent or neglected child whose parents are unfit to care for him without violating any parental right to the free exercise of the latter's religious beliefs.²⁹

Issues with regard to blood transfusion would, in this respect, appear to be no different than those underlying other public health measures which have drawn attack from certain religious sects on the ground they interfered with the right of the believer to a life free from the influence of modern medical techniques to which his religion was opposed. Thus, the practice of vaccination,³⁰ of fluoridation of public water supplies,³¹ and concerning the teaching of hygiene in public schools³² have provoked considerable controversy. As it would seem that the constitutionality of such public health measures is closely connected with the constitutionality of remedies for solving the problem of child neglect, the constitutional law doctrines there invoked ought to be considered in connection with the latter problem.

Assuming, for the purpose, that no constitutional bar exists to prevent state action, further study of the problem could conceivably indicate that it might be most practical to tolerate certain practices, or to refrain from punishing those who engage in them, even though the state possessed an unquestionable prohibitory

²⁸ 98 U. S. 145 at 164, 25 L. Ed. 244 at 250.

²⁹ See cases cited in note 13, ante.

³⁰ While the United States Supreme Court, in *Jacobson v. Massachusetts*, 197 U. S. 11, 25 S. Ct. 358, 49 L. Ed. 643 (1905), held that the Fourteenth Amendment did not bar a state from requiring its citizens to submit to vaccination, the case did not decide the question from the standpoint of religious objections for none were made. State courts, however, have usually sustained similar legislation over the objection that it would violate the guarantee of religious freedom, citing the *Jacobson* case as authority. See cases collected in Steinhardt, "Christian Science: Religious Freedom and State Control," 7 *Miami L. Q.* 358 at 363 (1953).

³¹ The cases of *DeAryan v. Butler*, 119 Cal. App. (2d) 674, 260 P. (2d) 98 (1953), and *Kraus v. City of Cleveland*, 116 N. E. (2d) 779 (Ohio Com. Pleas, 1953), both uphold public fluoridation of water supplies over religious objections. See also, Dietz, "Fluoridation and Domestic Water Supplies in California," 4 *Hastings L. J.* 1 (1952), and Thompson, "Fluoridation of Public Water Supplies," 3 *Hastings L. J.* 123 (1952).

³² No case deals with this question, but a number of states exempt from such courses those students whose religious beliefs conflict with the teaching of the subject matter: Steinhardt, "Christian Science: Religious Freedom and State Control," 7 *Miami L. Q.* 358 (1953).

power. An illustration of this principle is to be found in the federal law which exempts conscientious objectors from universal military training.³³ It is clear that this exemption is not one founded on constitutional right but rests merely on statutory exception.³⁴ Numerous reasons for the exception probably exist, including among them the American heritage of great religious freedom and tolerance, the danger of forging a weak disciplinary link into the military chain, where a break at the wrong moment could result in a debacle, and the fact that a threat of criminal liability would probably not deter the conscientious objector from violating a law which was contrary to his scruples. Similar reasoning may be applied to the instant problem for, in devising a solution, it ought to be remembered that the law should be designed so as to provide some compliance-producing incentive.

Interest in, or concern for, the parent should not, of course, be permitted to outweigh the state's interest in the child. Despite the normal tendency to allow the natural parent to have a relatively free hand in the rearing of his offspring, certain limitations on the parental right to custody have long been evidenced in the form of compulsory education laws,³⁵ and in the state's power to regulate the occupations of minor children.³⁶ Over and above these limitations, it seems clear that the state has such an interest in its children that, as against the parent's *prima facie* right to custody, the state may curtail the free exercise of religion insofar as it may bring physical³⁷ or psychological³⁸ harm to the child.

This right of the state to take custody over the child in the interest of its medical well-being was upheld in the recent decision

³³ 50 U. S. C. A. § 456(j).

³⁴ *United States v. Alvies*, 112 F. Supp. 618 (1953).

³⁵ See, for example, Ill. Rev. Stat. 1953, Vol. 2, Ch. 122, § 26—1, and, in general, *Pierce v. Society of Sisters*, 268 U. S. 510, 45 S. Ct. 571, 69 L. Ed. 1070, 39 A. L. R. 468 (1925).

³⁶ *Prince v. Massachusetts*, 321 U. S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944).

³⁷ See cases cited in note 13, ante.

³⁸ A New York court recently interfered with parental custody, over certain non-religious objections of the parent described by the court to be "philosophical" in character, in order to persuade a child to submit to a surgical correction of a deformity in the interest of enhancing the child's psychological well-being: *In re Seiferth*, — Misc. —, 127 N. Y. S. (2d) 63 (1954).

in *People ex rel. Wallace v. Labrenz*³⁹ where the appointment of a guardian to give consent to a needed blood transfusion was sustained despite religious objections offered by the parents. No interference with a free exercise of religious rights, as protected by the constitution, was there involved for the parents were left to believe as they pleased. The child, on the other hand, too young to have formed any sort of belief, was denied nothing except custodial care by parents who had been adjudged unfit for the purpose. The position so taken might be said to be buttressed by the view that the taking of custody was not a final and permanent determination of the parental right⁴⁰ for the decree finding the child to be "neglected" or "delinquent" was one which could be vacated, at a subsequent date, on a proceeding which the parents might see fit to institute.⁴¹

To offset any claim that action of the kind there taken would constitute an arbitrary interference with parental rights it should be noted that, under such statutes, limitations do exist on the state's power to take custody. For example, although the Illinois statute provides that all persons under the age of twenty-one shall be considered to be wards of the state,⁴² the procedures there authorized apply only to those who can be said to be "neglected," or "dependent," or "delinquent" children. The mere fact that a parent is a follower of an exotic religion would not, in itself, warrant a finding that he is unfit or that the child is "neglected" or the like. In the absence of a further showing of unfitness, therefore, the state would have no power, under the statute, to take custody of the child from the parent.⁴³ In much the same way, while the words of the statute would indicate that a finding that the child is "delinquent" should be sufficient to justify a decree placing custody in the state, there is much by way of dicta and at least one decision to the contrary effect where the parent has

³⁹ 411 Ill. 618, 104 N. E. (2d) 769 (1952), cert. den. 344 U. S. 824, 73 S. Ct. 24, 97 L. Ed. 642 (1952).

⁴⁰ *Farnham v. Pierce*, 141 Mass. 203, 6 N. E. 830 (1886).

⁴¹ Ill. Rev. Stat. 1953, Vol. 1, Ch. 23, § 201. See also the case of *In re Tilton*, 286 Ill. App. 388, 3 N. E. (2d) 716 (1936).

⁴² *Ibid.*, Ch. 23, § 190.

⁴³ *Lindsay v. Lindsay*, 257 Ill. 328, 100 N. E. 892 (1913).

remained a fit custodian.⁴⁴ To these safeguards, others could be added. There must, typically, be a definite charge in the petition under which custody is sought;⁴⁵ due process will require that customary rules of evidence be followed;⁴⁶ and reasonable notice and opportunity to be heard would be jurisdictional to the successful maintenance of any proceeding.⁴⁷

Supposing the machinery, present or prospective, to be adequate, there is still a question as to the extent to which the safety and health of a child would be endangered by permitting its parents to continue in the exercise of their religious freedoms. Actually, the question is one of two-fold character, *i. e.*, does the faith healing practice actually threaten the safety of any person, and, if so, how many persons are so threatened? As to the first, the faith healer appears to consider the divine remedy as the most efficacious one available. To his own way of thinking, he is not negligent in relying on faith, but rather, has acted to minimize the danger to his child. Conceivably, a clear showing of such an attitude could operate to exonerate the faith healer on the ground that a bona fide belief in the value of his remedy, or an honest mistake as to the seriousness of the child's affliction, would be a defense.⁴⁸ It is notable that, while courts have convicted some persons of criminal neglect in cases of this type, they have consistently refused to evaluate the divine remedy as a matter of law,⁴⁹ for to do so would violate the First Amendment. Thus it

⁴⁴ See Madden, *Handbook of the Law of Persons and Domestic Relations* (West Publishing Co., St. Paul, 1931), p. 381, note 59. The question has, apparently, not yet reached an Illinois reviewing court.

⁴⁵ *People v. Lewis*, 260 N. Y. 171, 183 N. E. 353, 86 A. L. R. 1008 (1932), cert. den. 289 U. S. 709, 53 S. Ct. 786, 77 L. Ed. 1464 (1932).

⁴⁶ *In re Coyle*, 122 Ind. App. 217, 101 N. E. (2d) 192 (1951), rehearing denied 101 N. E. (2d) 819 (1951); *People v. Lewis*, 260 N. Y. 171, 183 N. E. 353, 86 A. L. R. 1008 (1932), cert. den. 289 U. S. 709, 53 S. Ct. 786, 77 L. Ed. 1464 (1932).

⁴⁷ *People v. Lynch*, 223 Ill. 346, 79 N. E. 70 (1906). As in any other case, the right to notice may be waived by a voluntary appearance: *People ex rel. Houghland v. Leonard*, 415 Ill. 135, 112 N. E. (2d) 697 (1953). See also *Harris v. Souder*, — Ind. —, 119 N. E. (2d) 8 (1954), for an intimation that, unless the record shows a lack of jurisdiction in the form of an affirmative statement that no summons was served, the reviewing court will presume that jurisdiction was properly acquired in custody cases.

⁴⁸ See cases listed in notes 4 and 6, *ante*.

⁴⁹ *United States v. Ballard*, 322 U. S. 78, 64 S. Ct. 882, 88 L. Ed. 1148 (1944). Mr. Justice Douglas, writing for the majority, there said: "If one could be sent to jail because a jury of hostile environment found those teaching false, little indeed

is clear that the law neither accepts nor denies the sufficiency of the divine remedy. In spite of this well-established principle, the state may yet require that the ailing child be furnished with a particular kind of remedy, *i. e.*, medical attention, without denying the quality of alternatives.

Assuming that the faith healer would be guilty of "criminal neglect" in failing to provide "necessaries" in the commonly accepted sense of that term, it might then be interesting to discover the number of persons likely to be endangered by this neglect. While exact statistics are not readily available,⁵⁰ it is apparent that the threat offered by the faith healer is different from that offered by the ordinary criminal. The latter may act indiscriminately against the general public; the danger from the former extends only to those born into or included within the faith healing sect and the zone ends with the family circle. There is no wantonness or negligence touching others, as is the case of the common public enemy. Hence, while it is true that the laws of the state should protect each individual in order to retain the respect of the people at large against what the majority considers to be a real danger, the limited scope of the danger, and the absence of wantonness, may be important considerations in devising protective legal tools.⁵¹

Probably no single answer which could be given to a question as to the purpose to be accomplished would gain general accept-

would be left of religious freedom. . . . The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect." See 322 U. S. 78 at 87, 64 S. Ct. 882, 88 L. Ed. 1148 at 1154. In accord with this principle are the decisions in *State v. Sandford*, 99 Me. 441, 59 A. 597 (1905), and in *People v. Pierson*, 176 N. Y. 201, 68 N. E. 243 (1903). See also Brown, "Plural Values and the Neutral State: The American Doctrine of the Free Conscience," 5 *Syracuse L. Rev.* 28 at 29 (1953).

⁵⁰ According to one source, neither the sect known as Jehovah's Witnesses nor the Christian Scientist group publish any data concerning their membership: United States Bureau of Census, *Statistical Abstract of the United States, 1953* (U. S. Government Printing Office, Washington, 1953), 74th Ed., p. 57.

⁵¹ It must be noted that, if the law is to make any distinction between the parent who is simply neglectful and the one who acts from religious motivation, it would seem that a careful definition of religious motivation would have to be made, difficult though that may be. See *In re Seifert*, — Misc. —, 127 N. Y. S. (2d) 63 (1954), where the court distinguished "religious" from "philosophical" reasons.

ance, but a few matters would probably be agreed upon by most people, and these may form a basis for clarifying an objective or policy with respect to the problem. First, most persons would agree that the child ought to be protected, in health and life, at least until he became possessed of sufficient discretion to heed his own conscience in religious matters. Second, it would probably be agreed that the extent of parental liability, both civil and criminal, ought to be clarified in the interest of certainty. In that connection, provision for the punishment of parents would scarcely be an objective of primary importance for punishment would neither restore life nor effectively deter "neglectful" religious action in the future. Third, there would also be agreement on the point that existing doubts as to a possible degree of culpability on the part of the spiritual adviser should be set to rest.

Once these objectives have been agreed upon, the problem of devising adequate remedies should not be too difficult for solution. Patently, legislative clarification of the law might take any one of three forms: (1) a hands-off policy; (2) a policy of preventive action, aimed solely at protection of the child; or (3) a strict policy of enforcement of all civil and criminal actions against the parent and the spiritual adviser. The first hardly seems to represent an adequate discharge of the state's responsibility. The last, while within constitutional bounds, could seem harsh and ineffectual to many persons. They would be inclined to argue that, as the nation has long found it profitable to encourage individual initiative in commerce, invention, and in the arts, it should, by the same token, encourage or at least not act to prevent individual initiative in matters of faith, such as the invocation of divine agency for healing purposes.

The second policy, in one form or another, would probably encounter the least opposition. Here it is that the law ought clearly to provide, at least in the life-and-death cases, for that same swift response such as is provided under the habeas corpus writ. Provision for a temporary emergency custody, obtainable immediately on petition from a local health officer after a hearing on both sides, might be one possible answer. So long as care is

taken to preserve due process consonant with the emergency, such a proceeding would contain no objectionable aspects not already in the present law. If necessary to counteract the possibility of officious intermeddling, a companion measure might be framed to outline the responsibility of the public official who improperly exercised the power so vested.⁵²

There can be little doubt that a comprehensive, intelligent clarification of the law relating to child neglect arising from religious motivation ought to be accomplished. It is recognized that the selection of effective remedies should be based upon careful studies of the constitutional and sociological aspects of the entire problem, studies which yet remain to be made. In the meantime, however, since existing rules controlling custody proceedings appear to be too slow in operation to give adequate protection to the neglected child in an emergency case, such rules should be worked over and perfected at once so as to prevent the possibility of unnecessary deaths while the processes of the law are being put in motion.

⁵² A note in 32 CHICAGO-KENT LAW REVIEW 152 on the Kentucky case of *Tabor v. Scobee*, — Ky. —, 254 S. W. (2d) 474 (1953), discusses the liability which could attach to the physician or surgeon who furnished medical aid, or performed an operation, without the consent of the parents or another acting on behalf of a minor patient.