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## In God We Trust: Faith Healing Subject to Liability

Lauren A. Greenberg

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## IN GOD WE TRUST: FAITH HEALING SUBJECT TO LIABILITY

Since ancient times, mankind has searched for spiritual, or faith, healing as an alternative to conventional methods of medicine.<sup>1</sup> Alternatives to conventional medicine ("alternative medicine") include a variety of techniques such as acupuncture,<sup>2</sup> therapeutic touch,<sup>3</sup> herbal medicine,<sup>4</sup> and faith healing.<sup>5</sup> Such techniques, despite having historic roots and wide acceptance by eighty percent of the world, only recently have gained credibility in the United States.<sup>6</sup> Alternative medicine, representing the holistic approach to medicine,<sup>7</sup> views health as the interaction between the environment; society; and a human being's body, mind, and spirit.<sup>8</sup> Disease is the imbalance of these overlapping forces.<sup>9</sup>

Various studies in the early 1990s indicate that, in one year, one-third<sup>10</sup>

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1. JAMES RANDI, *THE FAITH HEALERS* 13-14 (1987).

2. Acupuncture is a type of Chinese medicine whereby small needles are inserted into specified points on the body to stimulate the flow of a life energy. George Howe Colt, *See Me, Feel Me, Touch Me, Heal Me*, LIFE, Sept. 1996, at 39. Caryle Murphy, *Acupuncture Boom*, WASH. POST, Oct. 8, 1996 (Health), at 10. Acupuncture is defined medically as: a form of therapy, originated by the Chinese, that involves piercing specific peripheral nerves with needles to relieve the discomfort associated with painful disorders, to induce surgical anesthesia, and for therapeutic purposes. Recent studies have shown that the procedure may mitigate pain through the release of enkephalin, a naturally occurring endorphin that has potent opiatelike effects.

SAUNDERS DICTIONARY & ENCYCLOPEDIA OF LABORATORY MEDICINE AND TECHNOLOGY 25 (James L. Bennington, M.D., ed., 1984).

3. Therapeutic touch is a form of energy healing where the practitioner does not touch the patient at all but aids the healing process by changing the direction of air flowing around the patient in the belief that the patient's inner energy extends beyond his physical body to the air surrounding him. Colt, *supra* note 2, at 35.

4. *Id.* at 36, 46.

5. RANDI, *supra* note 1, at 13-14. Alternative medicine includes approximately 200 other techniques aside from acupuncture, therapeutic touch, herbal medicine, and faith healing. Murphy, *supra* note 2, at 10. Colt, *supra* note 2, at 47. Michael H. Cohen, *A Fixed Star in Health Care Reform: The Emerging Paradigm of Holistic Healing*, 27 ARIZ. ST. L.J. 79, 87 (1995).

6. Colt, *supra* note 2, at 36. This view, that 80% of the world practices alternative medicine, is expressed by Marc Micozzi, a Philadelphia physician. *Id.* Alissa J. Rubin, *Pills & Prayer*, WASH. POST, Jan. 11, 1998 (Magazine), at 14.

7. Cohen, *supra* note 5, at 88.

8. *Id.*

9. *Id.*

10. Colt, *supra* note 2, at 39. *See also, Dateline: Profile: Hands On* (NBC television

of Americans used some form of alternative medicine treatment and made 425 million visits to alternative medicine doctors, which exceed the number of visits to conventional medical doctors.<sup>11</sup> Americans also spent thirteen to fourteen billion dollars on alternative medicine treatment.<sup>12</sup> People who are coping with chronic or terminal illnesses,<sup>13</sup> who are seeking control over their healing,<sup>14</sup> or who are desiring emotional healing from their treatment<sup>15</sup> strongly favor alternative medicine over conventional medicine.

Not all patients are seeking alternative medicine treatment on their own initiative. More than half of the family physicians in the United States regularly prescribe some form of alternative treatment for their patients.<sup>16</sup> Furthermore, many medical schools are aware of the value and popularity of alternative medicine. About one-third of this country's medical schools, including Harvard, Yale, and Johns Hopkins, offer courses in alternative medicine.<sup>17</sup>

Federal and state legislatures, too, are aware of the increasing acceptance of alternative medicine. Under the National Institutes of Health Revitalization Act of 1993,<sup>18</sup> Congress established the Office of Alternative Medicine ("OAM") within the National Institutes of Health. OAM's purpose is to provide information to the public on alternative medicine treatments, encourage research in this area, and prepare periodic reports on its activities for inclusion in the biennial report of the National Insti-

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broadcast, June 25, 1996) at 3; *cf.*, *All Things Considered: NIH Alternative Medicine Chief Discusses Controversy* (National Public Radio radio broadcast, Jan. 31, 1993) at 1, which cites a study that indicates that one-tenth of American adults sought alternative medicine in 1992.

11. *Morning Edition: Study Shows Alternative Medicine Use Surprisingly High* (National Public Radio radio broadcast, Jan. 28, 1993) at 2.

12. *Id.* Colt, *supra* note 2, at 39.

13. Colt, *supra* note 2, at 36, 39.

14. *Id.* at 47. Cohen, *supra* note 5, at 138. *See also*, *All Things Considered: Physician Is Now Battling Cancer* (National Public Radio radio broadcast, Jan. 21, 1995) at 2. *See also*, *Dateline*, *supra* note 10, at 6.

15. Cohen, *supra* note 5, at 141-43.

16. Colt, *supra* note 2.

17. *Id.* Cohen, *supra* note 5, at 132. Columbia University recently sponsored a conference on herbal medicine where 58 physicians attended and participated in the alternative medicine treatment. Colt, *supra* note 2. In a short elective course at Wayne State University School of Medicine, students learn and apply alternative medicine procedures, such as the practice of chiropractic, yoga, meditation, biofeedback, hypnosis, therapeutic touch, and Buddhist breathing techniques. *Id.* Rubin, *supra* note 6, at 14.

18. National Institutes of Health Revitalization Act of 1993, Pub. L. No. 103-43, § 209, 107 Stat. 122, 149 (1993).

tutes of Health.<sup>19</sup> Specifically, OAM investigated faith healing as an alternative medicine treatment.<sup>20</sup> Various state legislatures have enacted Medical Practice Acts, exempting faith healers from state medical licensing requirements.<sup>21</sup>

As far back as the sixteenth century, various religions advocated faith healing as a means to eradicate illness.<sup>22</sup> One such religion, Christian Science, founded by Mary Baker Eddy in the mid-nineteenth century,<sup>23</sup> advocates faith healing as the only effective treatment to cure illness. A fundamental tenet of Christian Science is that conventional methods of medicine simply cannot treat the true source of human illness: mental weakness.<sup>24</sup> Consequently, Christian Scientists believe that faith healers, sanctioned by the church, can cure sick people through prayer.<sup>25</sup> However, faith healing sessions are not always successful. When reliance on faith healing turns sour, religious adherents, at times, seek retribution in the judicial system.<sup>26</sup>

Courts have grappled with the legal issues involved in faith healing for years, specifically the issue of whether faith healers are subject to liability for their services.<sup>27</sup> Faith healing has given rise to legal issues regarding liability in two distinct categories:<sup>28</sup> (1) by a parent who refuses all forms

19. *Id.*

20. *48 Hours: Profile: Leap of Faith* (CBS television broadcast, Jan. 12, 1995) at 3.

21. See ARK. CODE ANN. § 17-95-203 (4) (Michie 1987); DEL. CODE ANN. tit. 24, § 1703 (e)(6) (1997); IDAHO CODE § 54-1804 (1)(f) (1997); 225 ILL. COMP. STAT. ANN. 60/4 (West 1997); UTAH CODE ANN. § 58-67-305 (4) (1953); W. VA. CODE § 30-3-13 (b)(5) (1966).

22. RANDI, *supra* note 1, at 17. Rubin, *supra* note 6, at 14.

23. Danyll Foix, *From Exemptions of Christian Science Sanatoria to Persons Who Engage in Healing By Spiritual Means: Why Children's Healthcare v. Vladeck Necessitates Amending the Social Security Act*, 15 LAW & INEQ. 373, 377 (1997).

24. *Id.*

25. *Id.* at 378.

26. See cases discussed *infra* Parts I.B., I.C.

27. As early as 1904, the court addressed the issue of whether a Christian Science faith healer could be held liable for alleged negligent treatment of a patient. *Spead v. Tomlinson*, 59 A. 376 (N.H. 1904) (upholding jury verdict that faith healer was not negligent in treating complainant). See generally C. C. Cawley, *Criminal Liability in Faith Healing*, 39 MINN. L. REV. 48 (1954).

28. A related category of cases pertaining to religious freedom and medical treatment is the patient who believes in conventional medical treatment but refuses some medical treatment because of religious beliefs. This type of case usually involves a Jehovah's Witness who believes in conventional medicine but not in blood transfusions. See *State v. Perricone*, 181 A.2d 751 (N.J. 1962). Jehovah's Witnesses do not believe in blood transfusions because the Bible states that people must not eat blood since it is the life of people. WATCH TOWER BIBLE AND TRACT SOCIETY OF PENNSYLVANIA, *HOW CAN BLOOD SAVE YOUR LIFE?* 2, 3-4 (1990). Each individual's blood is sacred and provides the bond be-

of conventional medical treatment for his child, instead adhering strictly to faith healing for medical problems;<sup>29</sup> and (2) by an adult patient who refuses all forms of conventional medical treatment for himself, relying strictly on faith healing to cure illnesses.<sup>30</sup> This Comment focuses on liability imposed on Christian Science faith healing in the second category of cases: the adult patient who relies solely on faith healing for medical treatment.

Courts have sidestepped the issue of whether faith healers should be civilly liable for failing to inform their patients of medical alternatives to faith healing or for not fully disclosing the ramifications of choosing faith healing over other types of potential treatment. If faith healers are found not liable, why not? If they are liable, are they liable for medical malpractice or simple negligence? As a threshold issue, courts must determine whether faith healers are more similar to medical doctors, practicing without medical training or a license, or religious figures, merely exercising their First Amendment right to practice religion. Further complicating the issue is the court's duty to weigh the individual's right to free exercise of religion with the state's interest in ensuring the health, safety, and welfare of its citizens. Does the state's interest in protecting its citizens through use of its police powers outweigh a competent adult's free exercise of religion by seeking treatment from a faith healer rather than a conventional medical doctor or outweigh a competent adult's exercise of his right to privacy to choose or deny certain types of medical treatment?

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tween that individual and God. *Id.* at 4. To emphasize this importance of blood, in several different statements, God explicitly prohibited people from eating blood. *Id.* at 3-4. If they did, God would punish them. *Id.* Since the Bible made no mention of exceptions to this prohibition, for example, in emergency situations, Jehovah's Witnesses do not recognize any emergency exceptions to this prohibition either. *Id.* at 4. While patients do not orally ingest blood for blood transfusions, Jehovah's Witnesses believe that the prohibition applies equally to intravenous blood infusion because the same result of using another person's sacred blood, or lifeline, is achieved, which is precisely what is prohibited. *Id.* at 6.

29. Many law journal articles discuss the legal ramifications of parents' choice to seek faith healing for their children instead of conventional medicine. For in-depth analysis of this issue, see Ivy B. Dodes, Note, '*Suffer The Little Children . . .*': *Toward a Judicial Recognition of a Duty of Reasonable Care Owed Children By Religious Faith Healers*, 16 *HOFSTRA L. REV.* 165 (1987) (advocating holding a faith healer liable for negligent treatment of children for conduct that falls below a reasonable person standard of care); Henry J. Abraham, *Abraham, Isaac and the State: Faith-Healing and Legal Intervention*, 27 *U. RICH. L. REV.* 951 (1993); Anne D. Lederman, Note, *Understanding Faith: When Religious Parents Decline Conventional Medical Treatment for Their Children*, 45 *CASE W. RES. L. REV.* 891 (1995).

30. See *Lewis v. Califano*, 616 F.2d 73 (3d Cir. 1980); *Winters v. Miller*, 446 F.2d 65 (2d Cir. 1971); *In re Milton*, 505 N.E.2d 255 (Ohio 1987).

First, this Comment compares the practice of faith healing with conventional medicine. Second, it discusses the progression of the law in the cases where a competent adult refuses all conventional treatment because of adherence to Christian Science principles that advocate faith healing for medical ailments and denounce conventional medical treatments. Third, it analyzes an individual's right to seek treatment from faith healers rather than conventional medical doctors, and describes the background for legitimate faith healing sessions and a patient's informed consent to choose faith healing. Fourth, it outlines the role of faith healers, focusing on the lack of liability imposed on them. Fifth, it compares the liability imposed on other drugless practitioners with the lack of liability imposed on faith healers. Finally, this Comment proposes a framework for imposing tort liability on faith healers based on an applicable standard of care.

## I. DEFINITIONS OF FAITH HEALING AND CONVENTIONAL MEDICINE

### A. Faith Healing

Faith healing derives from "[t]he healing miracles, in which disease is cured by faith and prayer."<sup>31</sup> Faith healers profess to cure disease utilizing faith and prayer and denounce the use of conventional medicine.<sup>32</sup> The First Church of Christ, Scientist, ("Christian Science") adheres to faith healing.<sup>33</sup> It was founded in the 1860s by Mary Baker Eddy and currently has nearly three thousand congregations worldwide.<sup>34</sup> A primary belief of Christian Science is that disease occurs because of sin; therefore, only prayer can absolve the soul and cure the disease.<sup>35</sup> Although Christian Science does not mandate strict adherence to faith healing for physical healing, it is central to the religion. To encourage reliance on faith healing, the church does not teach that conventional medical treatment cures disease.<sup>36</sup>

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31. Cawley, *supra* note 27, at 48.

32. *Id.*

33. Foix, *supra* note 23, at 376-79.

34. *Id.* at 375. *See also* *Children's Healthcare v. Vladeck*, 938 F. Supp. 1466, 1469 (D. Minn. 1996).

35. Foix, *supra* note 23, at 377-78. *Children's Healthcare*, 938 F. Supp. at 1469.

36. Foix, *supra* note 23, at 376-79. *Children's Healthcare*, 938 F. Supp. at 1469. A quotation from Mary Baker Eddy, founder of the religion of Christian Science, best summarizes the religion's view on treatment of disease:

Why pray for the recovery of the sick, if you are without faith in God's willingness and ability to heal them? If you do believe in God, why do you substitute drugs for the Almighty's power, and employ means which lead only to material

### B. *Conventional Medicine*

According to conventional medicine, the body, like a machine, is the sum of its parts;<sup>37</sup> therefore, treating disease involves focusing on the affected body part or parts, without considering the whole body or the mind.<sup>38</sup> Disease traditionally is viewed as a series of biochemical changes in the body that can be detected, diagnosed and treated based on scientifically tested and proven technological means.<sup>39</sup> Conventional medicine is characterized not just by how an illness is perceived, but also by who is authorized to treat the illness.

Each state has medical licensing statutes which include, most, if not all, of the following factors in the definition of the conventional practice of medicine: (1) offering some form of diagnosis, treatment, or cure of disease;<sup>40</sup> (2) holding oneself out as a doctor capable of accurately diagnosing and curing disease;<sup>41</sup> (3) intending to receive compensation for services rendered;<sup>42</sup> (4) attaching a medical title to one's name;<sup>43</sup> (5) maintaining an office for the purpose of being a medical doctor;<sup>44</sup> (6) performing surgery;<sup>45</sup> and (7) writing prescriptions.<sup>46</sup> Consequently, if someone falls within this definition of practicing medicine, then he must be licensed with the state and is subject to liability as a medical doctor.

## II. FREEDOM OF RELIGION OR UNLICENSED PRACTICE OF MEDICINE

### A. *Freedom of Religion*

As early as 1917, the United States Supreme Court addressed the issue of whether faith healers must comply with state medical licensing statutes

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ways of obtaining help, instead of turning in time of need to God, divine Love, who is an ever-present help?

Treat a belief in sickness as you would sin, with sudden dismissal. Resist the temptation to believe in matter as intelligent, as having sensation or power.

RICHARD J. BRENNEMAN, *DEADLY BLESSINGS: FAITH HEALING ON TRIAL* 25 (1990).

37. Cohen, *supra* note 5, at 87.

38. *Id.*

39. *Id.* at 86.

40. *Id.* at 98.

41. *Id.* at 99.

42. *Id.* at 100.

43. *Id.* at 100-01.

44. *Id.* at 101.

45. *Id.*

46. *Id.* at 102. Cohen's article gives a complete analysis of various states' definitions of practicing medicine and an elaboration on the list of requirements that courts use to determine whether someone is considered to be practicing medicine. *Id.* at 102-03.

in *Crane v. Johnson*.<sup>47</sup> In its decision, the Court examined a California statute that exempted "treatment by prayer . . . [or] the practice of religion"<sup>48</sup> from the educational, certification, and licensing requirements for conventional medical doctors, drugless practitioners, and podiatrists.<sup>49</sup> Crane, a drugless practitioner using faith, hope, and mental suggestion as forms of medical treatment, did not fall within the religious exemption of the practicing medicine statute.<sup>50</sup> Crane complained that the exemption violated the Equal Protection Clause of the Fourteenth Amendment<sup>51</sup> because it discriminated against drugless practitioners in favor of Christian Science practitioners, as it placed greater burdens on drugless practitioners utilizing faith and hope, but not prayer, in their medical treatment.<sup>52</sup>

The Court rejected Crane's argument and affirmed the state court's ruling,<sup>53</sup> holding that treatment of a disease required special training and expertise, thus justifying the state's educational, certification, and licensing requirements.<sup>54</sup> In comparison, the Court classified treatment by prayer as the practice of religion, not medicine.<sup>55</sup> The court decided that such a distinction in the statute between faith healers, who practice religion but not medicine, and drugless practitioners, who practice medicine by virtue of extended studies and special skills, was not arbitrary nor beyond the state's police powers.<sup>56</sup>

This case set the legal precedent that faith healers, solely utilizing prayer, are not subject to medical licensing laws because they are not practicing medicine. Instead, they are exercising their right to religious freedom.<sup>57</sup>

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47. 242 U.S. 339 (1917).

48. *Id.* at 342.

49. *Id.* at 340-42.

50. *Id.* at 342.

51. U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment, in part, states that: [n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

52. *Crane*, 242 U.S. at 342-43.

53. *Id.* at 344.

54. *Id.* at 343-44.

55. *Id.* at 344.

56. *Id.*

57. *Id.* at 342-44.



### B. *Unlicensed Practice of Medicine*

A few months after the *Crane* decision, the New York Court of Appeals decided a factually similar case regarding whether a faith healer was subject to state medical licensing laws. In *People v. Vogelgesang*,<sup>58</sup> a spiritual healer recognized by the Spiritualist Church engaged in silent prayer while prescribing herbal medicine for internal use and applying a personally patented liniment for external therapy.<sup>59</sup> The statute at issue<sup>60</sup> prohibited the unlicensed practice of medicine exempting the practice of religion from its scope.<sup>61</sup> Writing for the court, Judge Cardozo found the most important fact to be that the practitioner combined patent medicine with faith.<sup>62</sup> The court held that a practitioner who engages in such a combination of healing exceeds the bounds of religious healing, infringes upon the practice of medicine,<sup>63</sup> and thus loses his immunity from the state licensing requirements.<sup>64</sup> Consequently, the court classified the faith healer as a medical doctor, requiring him to abide by the state licensing laws.<sup>65</sup> Non-compliance with the state licensing laws constituted the unlicensed practice of medicine.<sup>66</sup>

The court clarified the distinction between faith healers and medical doctors: faith healers utilize religious beliefs and prayer to cure illnesses, while doctors use learned skill, training, and instruments.<sup>67</sup> Conse-

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58. 221 N.Y. 290 (1917).

59. *Id.* at 292.

60. Public Health Law § 173 (McKinney 1909) (repealed 1927, re-enacted as N.Y. Educ. Law § 1262 (Consol. 1927)).

61. Section 161 of the Public Health Law provides that “[n]o person shall practice medicine, unless registered and legally authorized prior to September first, eighteen hundred and ninety-one, or unless licensed by the regents and registered as required by this article. . . .” Public Health Law § 161 (McKinney 1909) (repealed 1927, re-enacted as N.Y. Educ. Law § 1262 (Consol. 1927)). Section 173 identifies the application of Section 161 and states that “[t]his article shall not be construed to effect . . . the practice of the religious tenets of any church.” Public Health Law § 173 (McKinney 1909) (repealed 1927, re-enacted as N.Y. Educ. Law § 1262 (Consol. 1927)). *See also Vogelgesang*, 221 N.Y. at 292.

62. *Vogelgesang*, 221 N.Y. at 293.

63. *Id.*

64. *Id.*

65. *Id.* at 293.

66. *Id.* at 292.

67. *Id.* at 293. Judge Cardozo articulately specified this dividing line:

The profession and practice of the religion must be itself the cure. The sufferer's mind must be brought into submission to the infinite mind, and in this must be the healing. . . . While the healer inculcates the faith of the church as a method of healing, he is immune. When he goes beyond that, puts his spiritual agencies aside and takes up the agencies of the flesh, his immunity ceases. He is then competing with physicians on their own ground, using the same instrumentalities,

quently, as long as the faith healer used *only* the practice of religion, faith, and prayer to heal the patient, the faith healer fell within the statutory exemption contained in the medical licensing statute.<sup>68</sup> However, any deviation from this narrow interpretation of religious practices, including any form of diagnosis,<sup>69</sup> receipt of money,<sup>70</sup> or prescription,<sup>71</sup> even homemade, such as a personally patented liniment or herbal medicine,<sup>72</sup> placed the faith healer within the parameters of the statute. In such situations, the healer was no longer simply practicing his religion but was engaging in the unlicensed practice of medicine. As a result, the healer would be classified as a doctor, and would be required to meet the statutory medical licensing requirements.

Similar to the pronouncement by the Court of Appeals of New York that a healer's use of homemade prescriptions constituted the practice of medicine,<sup>73</sup> the Illinois Court of Appeals determined that a healer's use of homemade instruments amounted to the practice of medicine. In *People v. Estep*,<sup>74</sup> the defendants alleged that they were faith healers, using prayer and faith in God to heal their patients,<sup>75</sup> thereby exempting them from the licensing requirements of the Illinois Medical Practice Act.<sup>76</sup> However, in addition to prayer, they used homemade instruments to determine the chemical deficiency of the patient's body, which was believed to cause the illness.<sup>77</sup> Then they prescribed vitamins to stabilize the deficiency and used other homemade instruments to create a drink to immunize the patient from radiation from atomic bombs and to put carbon

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and arrogating to himself the right to pursue the same methods without the same training.

*Id.*

68. *Crane v. Johnson*, 242 U.S. 339, 342-44 (1917).

69. See discussion of *People v. Handzik*, 102 N.E.2d 340 (Ill. 1951) *infra* Part I.D.

70. See *Vogelgesang*, 221 N.Y. at 294; *Handzik*, 102 N.E.2d at 343.

71. *Vogelgesang*, 221 N.Y. at 293.

72. See *id.* at 292-93.

73. See generally, *id.*

74. 104 N.E.2d 562 (Ill. App. Ct. 1952).

75. *Id.* at 564.

76. 91 Ill. Rev. Stat. § 37 par. 16v (1951). Section 2 of the Illinois Medical Practice Act states that "[n]o person shall practice medicine, or any of its branches, or midwifery, or any system or method of treating human ailments without the use of drugs or medicine and without operative surgery, without a valid, existing license to do so." *Id.* § 2. Section 37, paragraph 16v states that "[t]his Act shall not apply to . . . persons treating human ailments by prayer or spiritual means as an exercise or enjoyment of religious freedom." *Id.* § 37, par. 16v. *Estep*, 104 N.E.2d at 564.

77. *Estep*, 104 N.E.2d at 564-65.

atoms into the body's cells.<sup>78</sup>

The court affirmed the jury's guilty verdict, finding that the defendants had violated the Medical Practice Act,<sup>79</sup> among other violations.<sup>80</sup> The court stated that whether a faith healer is legitimately exercising his right to practice religion freely or illegally engaging in the practice of medicine is one of fact to be determined case-by-case.<sup>81</sup> The court held that a faith healer may not use religion as a guise for his unlicensed medical practice.<sup>82</sup> Critical to the court's decision was the healers' use of homemade instruments in their treatment of the patients combined with the minimal religious influence in the healing session.<sup>83</sup>

It is important to resolve the issue whether faith healing is the unlicensed practice of medicine or the free exercise of religion, because the state has an interest in protecting the health of its citizens from the unlicensed practice of medicine. Consequently, a first step in understanding when a state may intervene to protect the health of its citizens is understanding that an individual has a right to refuse medical treatment.

### III. PATIENT'S RIGHT TO REFUSE MEDICAL TREATMENT

In *Lewis v. Califano*,<sup>84</sup> the plaintiff, a believer in faith healing, refused to undergo surgery for a massive uterine tumor.<sup>85</sup> The tumor adversely affected her health and prevented her from working.<sup>86</sup> A Department of Health, Education and Welfare ("HEW") administrative law judge summarily denied her application for disability benefits.<sup>87</sup> She appealed from the judge's decision that she was not disabled,<sup>88</sup> and from the district court's ruling that her religious beliefs did not constitute good cause to refuse surgery to remove the tumor.<sup>89</sup> In reviewing the decisions, the United States Court of Appeals for the Third Circuit placed substantial weight on a medical report by defendant's doctor, which stated that the

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78. *Id.* at 565.

79. 91 Ill. Rev. Stat. § 37, par. 16v (1951).

80. *Estep*, 104 N.E.2d at 563. The other allegations were charges of conspiracy to "perpetrate a confidence game . . . and to obtain money under false pretenses." *Id.*

81. *Estep*, 104 N.E.2d at 565.

82. *Id.*

83. *Id.* at 565.

84. 616 F.2d 73 (3d Cir. 1980).

85. *Id.* at 75.

86. *Id.*

87. *Id.* at 74.

88. *Id.*

89. *Id.*

plaintiff was unable to work because of her condition.<sup>90</sup> The court concluded that plaintiff had met her burden of establishing disability.<sup>91</sup>

Having met this preliminary burden, the burden of proof then shifted to the defendant, HEW, to prove non-disability.<sup>92</sup> HEW failed to satisfy this burden.<sup>93</sup> To be eligible for disability benefits, the claimant must have been undergoing treatment for a remediable impairment, which nonetheless continued to disable her.<sup>94</sup> Willful failure to undergo treatment voided her classification as disabled.<sup>95</sup> However, an exception to the willful failure finding existed for justifiable cause.<sup>96</sup> The court held that a claimant's refusal to follow prescribed medical treatment constituted justifiable cause if the claimant was acting on religious convictions.<sup>97</sup>

The *Lewis* court relied on the Supreme Court case of *Sherbert v. Verner*<sup>98</sup> and a Social Security Administration ruling<sup>99</sup> interpreting *Sherbert*. In *Sherbert*, a Seventh Day Adventist was entitled to unemployment benefits because her religious beliefs prevented her from working on Saturday, her religion's Sabbath, and the only jobs she could secure required work on Saturday.<sup>100</sup> The Supreme Court held that the state could not deny the claimant unemployment benefits because the claimant chose to follow her religious belief which required that she not work on the Sabbath.<sup>101</sup> In essence, the Supreme Court ruled that religious convictions qualify as "good cause" for a worker's refusal to accept available employment offered to her.<sup>102</sup>

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90. *Id.* at 76.

91. *Id.*

92. *Id.*

93. *Id.* at 77.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 81.

98. 374 U.S. 398 (1963).

99. SSR 67-61, C.B. 1967 cited with approval in *Lewis*, 616 F.2d at 78.

100. *Sherbert*, 374 U.S. at 399.

101. *Id.* at 410.

102. The South Carolina Unemployment Compensation Act ("Act"), at issue in this case, states that "[a]n unemployed insured worker shall be eligible to receive benefits with respect to any week only if the Commission finds that: . . . (3) He is able to work and is available to work . . ." S.C. CODE ANN. 41, § 41-35-110 (1952). The Act disqualifies workers for benefits "[i]f the Commission finds that he has failed, without good cause, . . . to accept available suitable work when offered him by the employment office or the employer. . . ." *Id.* § 41-35-120. The Supreme Court ruled that the state statute could not burden the worker's free exercise of religion. *Sherbert*, 374 U.S. at 404. Implicitly, the Supreme Court stated that if the statute did burden the worker's religious freedom, as in

Similar to the Supreme Court ruling, the Social Security Administration held that it must give disability benefits to a Christian Scientist suffering from curable cataracts because his religious convictions did not allow him to seek conventional medical treatment, only faith healing.<sup>103</sup> In this context, faith healing constituted justifiable cause not to seek conventional medical treatment for the remediable ailment.<sup>104</sup>

In *Lewis*, the court held that the plaintiff's belief in faith healing as her sole medical remedy constituted justifiable cause, even though refusal to submit to conventional medical treatment was not an essential tenet of her religion. The court allowed this exception provided the person's religious convictions were sincere.<sup>105</sup>

Thus, to qualify for government-subsidized benefits, like unemployment,<sup>106</sup> social security,<sup>107</sup> and disability,<sup>108</sup> it appears that courts will honor an adult's refusal to undergo conventional treatments for curable ailments and the adult's choice to adhere to faith healing if the patient's religious beliefs are sincere.

In contrast to the denial of benefits cases, the plaintiff in *Winters v. Miller*<sup>109</sup> sued for civil damages alleging that her constitutional rights were violated.<sup>110</sup> The plaintiff in *Winters* was a fifty-nine-year-old female Christian Scientist, who had been receiving welfare benefits.<sup>111</sup> She was admitted involuntarily to the hospital for mental illness after she had refused to change hotel rooms, which were entirely subsidized by welfare,

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this case, the worker's choice to follow her religion constituted good cause to reject available employment. *Id.* at 404, 409-10. To solidify this point, the Supreme Court cited another case for the proposition that "no State may 'exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.'" *Id.* at 410 (citing *Everson v. Board of Education*, 330 U.S. 1, 16 (1947)). Additionally, the United States Court of Appeals for the Third Circuit, in *Lewis*, agreed with this implicit reading of *Sherbert*, summarizing the *Sherbert* holding by stating that "the religious belief of the claimant was a justifiable cause for her willful refusal to accept employment." *Lewis*, 616 F.2d at 77.

103. *Id.* at 78.

104. *Id.*

105. *Id.* at 81. The court then remanded the case to determine whether plaintiff's religious convictions were sincere.

106. *Sherbert*, 374 U.S. at 410.

107. SSR 67-61, C.B. 1967 cited with approval in *Lewis*, 616 F.2d at 78.

108. *Lewis*, 616 F.2d at 81.

109. 446 F.2d 65 (2d Cir. 1971). The court reversed the lower court's summary judgment ruling for the state and remanded the case for a trial proceeding. *Id.*

110. *Id.* at 67-68.

111. *Id.* at 67.

upon the management's request.<sup>112</sup> At the hospital, she repeatedly expressed to the medical staff her adherence to faith healing and refused all medical treatment, even the taking of her blood pressure.<sup>113</sup> Despite her objection to medical treatment on religious grounds, the hospital staff regularly gave her medication, predominantly tranquilizers, for the approximate month and a half that she remained in the hospital.<sup>114</sup>

The precise issue that the United States Court of Appeals for the Second Circuit addressed was whether the state constitutionally could compel the plaintiff to submit to conventional medical treatment, such as taking medications, in violation of her religious belief in faith healing as her only means of medical treatment.<sup>115</sup> Relying on Supreme Court precedent,<sup>116</sup> the court stated that "freedom of speech and of the press, of assembly, and of worship may not be infringed on such slender grounds [as rational basis inquiry]. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect."<sup>117</sup> The court dismissed the state's argument that its interest in caring for people suffering from mental illness,<sup>118</sup> and in protecting the mental health of the state,<sup>119</sup> outweighed appellant's freedom of religion rights.<sup>120</sup> In doing so, the court stated that by "forcing the unwanted medication on Miss Winters[,] the state was in [no] way protecting the interest of society or even a third party."<sup>121</sup>

A similar case regarding the violation of a plaintiff's constitutional right to religious freedom to reject life-saving medical treatment arose in Ohio in *In re Milton*.<sup>122</sup> A fifty-three-year-old woman believed in faith healing as her sole means of medical treatment.<sup>123</sup> The plaintiff's competency was questioned because she had delusions that she was married to a locally well-known faith healer, who, she believed, would cure her.<sup>124</sup> However, the court dismissed these questions of incompetence quickly

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112. *Id.*

113. *Id.* at 68.

114. *Id.*

115. *Id.* at 67-69.

116. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

117. *Winters*, 446 F.2d at 69.

118. *Id.* at 70.

119. *Id.* at 69.

120. *Id.*

121. *Id.* at 70.

122. 505 N.E.2d 255 (Ohio 1987).

123. *Id.* at 256.

124. *Id.*

because the plaintiff was never legally declared to be incompetent<sup>125</sup> due, in large part, to at least one doctor who testified that her belief in faith healing was long-standing<sup>126</sup> and genuine.<sup>127</sup> The Ohio Supreme Court held that the competent adult ultimately would decide medical treatment decisions.<sup>128</sup> More importantly, the court held that the state's interest in enforcing its police powers does not outweigh a competent adult's decision to adhere to faith healing, despite the availability of a recognized medical remedy.<sup>129</sup>

Taken together, these cases demonstrate that an individual's right to freedom of religion is of paramount importance, and only will be considered secondary if a legitimate state interest exists. The Supreme Court applies a balancing test<sup>130</sup> to determine whether the state's interest outweighs the individual's right to freedom of religion. The standard to be applied is whether the restriction on religious freedom "prevent[s] grave and immediate danger to interests which the state may lawfully protect."<sup>131</sup> The lawful state interests that have qualified to tip the balance in favor of restricting religious freedom are protection of society or a third person.<sup>132</sup>

#### IV. DISTINCTIONS BETWEEN FAITH HEALING AND CONVENTIONAL MEDICINE

The courts have attempted to keep the distinction between a faith healer and a medical doctor as clear as possible. The faith healer uses religious prayer and faith to cure an ailing person, while the medical doctor uses a learned skill to diagnose and prescribe medicine to cure the ailment. The medical doctor expects compensation for his services, in contrast to the faith healer, who does not.

However, when a faith healer offers a diagnosis by way of explaining what the ailment may be, offers a method of cure or prevention, and receives compensation for his services, then the faith healer has crossed the line between faith healing and practicing medicine. For example, in *Peo-*

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125. *Id.* at 257.

126. *Id.* at 258, 258 n.6.

127. *Id.*

128. *Id.* at 260.

129. *Id.*

130. See *Winters v. Miller*, 446 F.2d 65, 69 (2d Cir. 1971). See also *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943).

131. *Winters*, 446 F.2d at 69. In re *Milton*, 505 N.E.2d 255, 258 (Ohio 1987).

132. *Winters*, 446 F.2d at 70.

*ple v. Handzik*,<sup>133</sup> the defendant, a recognized faith healer of her church, was convicted of violating Illinois' medical licensing requirements.<sup>134</sup> Her violation occurred when she recommended to a patient to breathe in and out rapidly, drink two cups of water a day, and make a donation to her church.<sup>135</sup> The Court found that this treatment regime — diagnosis, prescription, compensation — exceeded the parameters of faith healing and constituted the practice of medicine.<sup>136</sup>

## V. REIMBURSEMENT FOR FAITH HEALING TREATMENT

In addition to reimbursement for conventional medical treatment, government-subsidized as well as private health insurance programs provide benefits to patients who seek faith healers for illnesses.<sup>137</sup> Specifically in its definition of hospital and post-hospital care, the Federal Medicare Act<sup>138</sup> provides health insurance reimbursement for Christian Science sanatorium and skilled nursing facilities, deeming them health care institutions.<sup>139</sup> Additionally, the Internal Revenue Service ("IRS") allows patients to take a medical expense deduction on their income tax forms for their faith-healing visits.<sup>140</sup> Consequently, Congress, through its enactment of these statutes, explicitly considered faith healers to be health care providers.

In *Children's Healthcare v. Vladeck*,<sup>141</sup> the United States District Court for the District of Minnesota recently analyzed the constitutionality of

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133. 102 N.E.2d 340 (Ill. 1951). *Handzik* is a companion case to *People v. Estep*, 104 N.E.2d 562 (Ill. App. Ct. 1952). The defendants in both cases were ministers of the same church and provided the same healing services, utilizing the same homemade instruments and theories. *Handzik* was decided before *Estep*.

134. *Handzik*, 102 N.E.2d at 343.

135. *Id.*

136. *Id.*

137. See *Dodes*, *supra* note 29, at 177-78.

138. 42 U.S.C. § 1395c (1994).

139. *Id.* Under the Federal Medicare Act, hospital is defined as:  
providing, by or under the supervision of physicians, to inpatients . . . diagnostic services and therapeutic services for medical diagnosis, treatment, and care of injured, disabled, or sick persons. . . .

.....  
The term "hospital" also includes a Christian Science sanatorium operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Massachusetts, but only with respect to items and services ordinarily furnished by such institution to inpatients. . . .

*Id.* § 1395x(e).

140. 26 U.S.C. § 213. See also *Dodes*, *supra* note 29, at 178, 178 n.72.

141. 938 F. Supp. 1466 (D. Minn. 1996).



these Medicare provisions, and similar Medicaid provisions.<sup>142</sup> The court held that these provisions were unconstitutional because they violated the Establishment Clause of the First Amendment.<sup>143</sup> Moreover, these provisions were unconstitutional because they explicitly preferred one religion, Christian Science, over others.<sup>144</sup> On appeal, the court remanded the case with orders to vacate the judgment and dismiss the underlying case. Without a full disposition on appeal, the court did not adequately address the constitutional arguments concerning the religious preference in the Medicare and Medicaid Acts.<sup>145</sup>

Other jurisdictions have not yet had the opportunity to examine the constitutionality of these Medicare and Medicaid provisions. The Medicare provisions, which grant health care benefits to Christian Science facilities, still control in the majority of the districts in the United States.<sup>146</sup>

## VI. LEGAL DUALISM REGARDING FAITH HEALERS

### A. *Patient's Choice of Health Care Providers*

Several courts have held that an individual has the First Amendment right to free exercise of religion by electing faith healing instead of conventional medicine.<sup>147</sup> Furthermore, under the *Lewis* rule, the Third Circuit permits individuals who opt for faith healing to be eligible for welfare benefits based on a disability, even if they do not strictly adhere to the requirements of qualifying for welfare benefits.<sup>148</sup> In *Lewis*, the patient was allowed to choose a faith healer instead of selecting a conventional medical doctor, as the statute required.<sup>149</sup> The court honored the plaintiff's selection of a faith healer as satisfying the statutory provision requiring the patient to follow a prescribed course of medical treatment and allowed her to receive welfare benefits based on her disability.<sup>150</sup> *Lewis* is an important decision because the court likened faith healing to

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142. *Id.* at 1468.

143. *Id.* at 1485. U.S. CONST. amend. I. The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." *Id.*

144. *Children's Healthcare*, 938 F. Supp. at 1485.

145. *Children's Healthcare v. Vladeck*, Docket Nos. 96-3936, 96-3938 (8th Cir. 1997).

146. *See Dodes*, *supra* note 29, at 177-78.

147. *Winters v. Miller*, 446 F.2d 65, 69 (2d Cir. 1971). *In re Milton*, 505 N.E.2d 255, 258 (Ohio 1987). *See* discussion of cases *supra* Part I.C.

148. *Lewis*, 616 F.2d at 77.

149. *Id.* at 81.

150. *Id.* at 76, 81.

a legitimate medical treatment although it is not regulated as a medical practice.

The court's analogy — that faith healers are health care providers — coincides with the perspective of Medicare, private health insurance companies and the IRS. Viewed in this light, faith healers escape medical licensing requirements, and more importantly, medical malpractice liability. Meanwhile, in the Medicare context, the patients of faith healers reap the benefits of government subsidies, despite their noncompliance with rules promulgated by the government agencies. Similarly, in the context of private health insurance companies and the IRS, patients who visit faith healers reap the benefits of health insurance coverage and medical expense deductions for these visits, despite the fact that faith healers are not deemed medical care providers.

A patient's choice in deciding what medical services to seek should be the result of informed decision-making. As such, the faith healer should be obligated to disclose all material facts<sup>151</sup> to the patient to ensure that the patient's choice is an informed one. This is particularly important when, as in Christian Science, the religion does not mandate, but strongly encourages, the use of faith healing instead of conventional medicine.<sup>152</sup>

### B. *Faith Healing as Medical Treatment*

Several courts have recognized a faith healer's right to pray for a patient's health without this action being considered practicing medicine so long as the faith healer does not combine any type of diagnosis,<sup>153</sup> prescription,<sup>154</sup> use of instruments,<sup>155</sup> or compensation<sup>156</sup> to the faith-healing session.<sup>157</sup> However, the Medicare Act<sup>158</sup> alters almost all of these factors that the courts have used to distinguish the practice of religion from the practice of medicine.

The diagnosis, treatment, and compensation requirements that define the art of practicing medicine are implicitly renounced in the Medicare Act because it allows Christian Science faith healers to be eligible for benefits. Because the Medicare Act defines Christian Science sanato-

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151. See discussion *infra* part III.B.1.b. and accompanying notes. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 190-91 (5th ed. 1984).

152. See, Foix, *supra* note 23, at 375-79.

153. People v. Handzik, 102 N.E.2d 340, 343 (Ill. 1951).

154. People v. Vogelgesang, 221 N.Y. 290, 292-93 (1917).

155. People v. Estep, 104 N.E.2d 562, 565 (Ill. App. Ct. 1952).

156. Handzik, 102 N.E.2d at 343.

157. Crane v. Johnson, 242 U.S. 339, 342-44 (1917).

158. 42 U.S.C. § 1395 (1994).

rium<sup>159</sup> and Christian Science skilled nursing facilities<sup>160</sup> as medical institutions eligible for Medicare reimbursement, it, in essence, deems faith healing to be reimbursable medical treatment. Furthermore, the Medicare Act's definition of a hospital<sup>161</sup> disregards the case law precedent's customary position of not allowing faith healers to engage in any form of diagnosis,<sup>162</sup> treatment aimed at curing the sick person,<sup>163</sup> or compensation for services,<sup>164</sup> but solely to utilize prayer to cure.<sup>165</sup>

Additionally, the Medicare Act directly contradicts the traditional classification of faith healers as non-doctors. Faith healers do not operate under the "supervision of physicians"<sup>166</sup> or under the "care of a physician,"<sup>167</sup> as the Medicare provisions require. Instead they operate solely under the supervision of God.<sup>168</sup> Nonetheless, faith healers and Christian Science faith healing facilities are eligible for Medicare benefits.<sup>169</sup> Thus, to satisfy these Medicare provisions, faith healers must be considered physicians, despite not being licensed.

The holding in *Handzik*<sup>170</sup> provides that if the faith healer received remuneration for services, then the faith healer was no longer exercising his right to freedom of religion, but, instead, was practicing medicine, thus mandating that he satisfy the medical licensing and regulatory laws.<sup>171</sup> The fact that Christian Science facilities are receiving Medicare benefits indicates that Christian Science faith healers are receiving compensation for their services. Thus, applying the *Handzik* rule, the Christian Science faith healers are practicing medicine.

A court has yet to challenge the analysis that faith healers are considered health care providers eligible to receive Medicare benefits. In *Children's Healthcare*, counsel for the defendants argued that the First Church of Christ, Scientist, was a "religious group . . . with a network of health care facilities standing as an alternative to traditional medical

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159. 42 U.S.C. § 1395x(e) (1994).

160. 42 U.S.C. § 1395x(y)(1) (1994).

161. 42 U.S.C. § 1395x(e)(1) (1994). For the definition of hospital from the Federal Medicare Act, see *supra* note 139.

162. *People v. Handzik*, 102 N.E.2d 340, 344 (Ill. 1951).

163. *People v. Vogelgesang*, 221 N.Y. 290, 293 (1917).

164. *Handzik*, 102 N.E.2d at 344.

165. *Vogelgesang*, 221 N.Y. at 292-93.

166. 42 U.S.C. § 1395x(e)(1) (1994).

167. *Id.* § 1395x(e)(4).

168. See, Foix, *supra* note 23, at 376-79.

169. 42 U.S.C. § 1395x(e) & (y)(1) (1994).

170. *Handzik*, 102 N.E.2d at 340.

171. *Id.* at 344.

care.”<sup>172</sup> This language elucidates the contradiction: faith healing is the exercise of religion and the practice of medicine. The First Church of Christ, Scientist, is a “religious group”<sup>173</sup> so it should be exempt from medical licensing and regulatory laws, but it also provides a “network of health care facilities standing as an alternative to traditional medical care,”<sup>174</sup> so it should be required to comply with the medical licensing and regulatory laws.

This is where the law is unclear. By allowing Christian Science faith healers to receive Medicare benefits, Congress, through its enactment of the Medicare Act, viewed the patient’s visit primarily as a medical one, not a religious one, or arguably both. If faith healers, Christian Science sanatorium, or skilled nursing centers are going to receive Medicare benefits, and are thereby treated as health care providers under the law, then they also should be held accountable under the medical licensing laws, be regulated under the provisions regarding health care providers, and be liable for medical malpractice for negligence. The consistency in the legal treatment of faith healers and medical doctors serves the public policy interest of promoting safe and healthful treatment of people through regulating health care providers’ practices, benefits, and conduct. If, under the law, faith healers are going to be considered people who are exercising their right to freedom of religion and exempt from regulatory and licensing laws, then they should not receive Medicare compensation for their services, private health insurance benefits, or medical expense deductions from the IRS.

## VII. NEGLIGENCE

People are expected to act towards each other with due care under the circumstances.<sup>175</sup> Negligence is defined as conduct which falls below that standard of care.<sup>176</sup> To make a successful negligence claim, there must be

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172. *Id.* at 1480 (emphasis added).

173. *Id.*

174. *Id.*

175. W. PAGE KEETON ET AL., *supra* note 151, at 169.

176. *Id.* at 170 (footnote number omitted). Specifically, negligence is defined as: conduct which falls below a standard established by the law for the protection of others against unreasonable risk of harm. The idea of risk in this context necessarily involves a recognizable danger, based upon some knowledge of the existing facts, and some reasonable belief that harm may possibly follow. Risk, for this purpose, may then be defined as a danger which is apparent, or should be apparent, to one in the position of the actor. The actor’s conduct must be judged in the light of the possibilities apparent to him at the time, and not by looking backward with the wisdom born of the event.

a (1) legally recognized duty to act towards others according to a specific standard of care;<sup>177</sup> (2) a breach of that duty;<sup>178</sup> (3) resulting in actual injury;<sup>179</sup> and (4) proximate cause, or a causal connection between the breach of duty and the resulting injury to the claimant.<sup>180</sup>

In the context of faith healing, the question is which legally recognized duty should attach: the reasonable person standard or medical custom. Whichever standard applies, a claimant has a legitimate negligence action if he proves that the faith healer breached that standard, that he suffered injury because of the faith healer's action, and that the faith healing is the proximate cause of the injury. The claimant may easily show actual injury if the faith healer does not cure the patient's ailment, particularly if the ailment is remediable with conventional medicine. The claimant may also prove proximate cause because a causal connection generally exists between the faith healer's inability to cure the claimant and the exacerbation of the medical problem.

#### A. *Reasonable Person Standard*

The reasonable person standard is used to judge the conduct of people interacting with one another.<sup>181</sup> Since all people are expected to act with due care under the circumstances, the reasonable person standard judges an action to determine whether it is prudent and careful given the circumstances.<sup>182</sup> The reasonable person has the same physical attributes, mental capacity, and knowledge of the situation as the claimant.<sup>183</sup> The reasonable person determines whether the actor's conduct fell below the standard of care — here, due care under the circumstances — taking into account the actor's assessment of risk.<sup>184</sup>

#### B. *Medical Custom Standard*

The standard of care of medical custom is higher than the reasonable

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*Id.*

177. *Id.* at 164.

178. *Id.*

179. *Id.* at 165.

180. *Id.*

181. *Id.* at 173-75.

182. *Id.* at 175.

183. *Id.* at 175-85.

184. The evaluation of risk is an important factor in determining a reasonable person's standard of care. *See supra* note 195.

person standard.<sup>185</sup> While the reasonable person standard presupposes an average, ordinary, reasonable person in the defendant's situation, medical custom requires that doctors "have and use the knowledge, skill and care ordinarily possessed and employed by members of the profession in good standing."<sup>186</sup> The medical field sets its own standard of care based on the knowledge, expertise, advances, and resources of that particular medical specialty.<sup>187</sup> Furthermore, doctors have a duty to disclose all material facts to a patient before the patient is considered to have given informed consent.<sup>188</sup> The determination of what constitutes a material fact that must be disclosed often is based on the customary practice in the physician's specified field or the reasonable patient's probable assessment of the importance of the fact.<sup>189</sup>

## VIII. LIABILITY OF ALTERNATIVE MEDICINE PROVIDERS

### A. Other Drugless Practitioners

Practitioners of alternative medicine, or drugless practitioners, such as chiropractors,<sup>190</sup> sanipractors,<sup>191</sup> homeopaths,<sup>192</sup> and osteopaths,<sup>193</sup> are

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185. The reasonable person standard is the minimum standard of care expected of people when interacting with others. However:

if a person in fact has knowledge, skill, or even intelligence superior to that of the ordinary person, the law will demand of that person conduct consistent with it. . . . [D]octors must . . . use care which is reasonable in light of their superior learning and experience, and any special skills, knowledge or training they may personally have over and above what is normally possessed by persons in the field.

W. PAGE KEETON ET AL., *supra* note 151, at 185.

186. *Id.* at 187.

187. *Id.*

188. *Id.* at 190-91.

189. *Id.* at 191 (footnotes omitted).

190. See *McCurdy v. Ault*, 654 So.2d 716 (La. Ct. App. 1995) (affirming dismissal of negligent claim against chiropractor because chiropractor treated patient's sinus infection using the proper standard of care). The standard of care assessed to chiropractors is "the degree of care and skill ordinarily exercised by other chiropractors in a similar community." *Id.* at 720.

191. A sanipractor is a drugless practitioner, licensed to perform treatments such as "hydrotherapy, dietetics, electrotherapy, and psychotherapy." *Wilcox v. Carroll*, 219 P. 34, 35 (Wash. 1923) (holding a sanipractor liable for negligence in treating a child suffering from appendicitis because his treatment did not meet the standards of other sanipractors).

192. Homeopathy is "a system of therapeutics . . . in which diseases are treated by drugs which are capable of producing in healthy persons symptoms like those of the disease to be treated, the drug being administered in minute doses." *THE SLOAN-DORLAND ANNOTATED MEDICAL-LEGAL DICTIONARY* 347 (West 1987).

193. Osteopathy is "a branch of medicine that utilizes a system of therapy based on accepted medical practices and emphasizes the importance of normal body mechanisms

liable for medical malpractice for their negligent conduct.<sup>194</sup> They are held to the standard of care of medical custom, which means that they are compared to other drugless practitioners in their field to determine whether their conduct falls below a prescribed standard of care used within their specialty.<sup>195</sup> If the drugless practitioner does not belong to a recognized school of thought or performs medical activities outside the realm of the alternative treatment practice, and invades the field of conventional medicine, the drugless practitioner will be judged by the standard of care used by the physician in that area of specialty.<sup>196</sup>

### B. *Christian Science Faith Healers*

As early as 1904, the Supreme Court of New Hampshire in *Spead v. Tomlinson*,<sup>197</sup> confronted the issue of what standard of liability should be imposed on a Christian Science faith healer for his allegedly damaging treatment of a patient.<sup>198</sup> In *Spead*, the plaintiff sought a Christian Science faith healer to treat her appendicitis.<sup>199</sup> After her condition deteriorated under the faith healer's guidance, she sought conventional medical care and was treated successfully.<sup>200</sup> The patient later brought a charge of negligence against the faith healer, but the jury determined that the faith healer was not negligent.<sup>201</sup> On appeal, the question presented was whether the faith healer was negligent in practicing his religion.<sup>202</sup> The court determined that "the defendant . . . is to be judged by the standard of care, skill, and knowledge of the ordinary Christian Scientist, in so far as he confined himself to those methods."<sup>203</sup> Importantly, the court applied a reasonable faith healer standard to determine whether or not the faith healer treated patients negligently.<sup>204</sup>

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and manipulations to detect and treat disease." SAUNDERS DICTIONARY & ENCYCLOPEDIA OF LABORATORY MEDICINE AND TECHNOLOGY 1118 (James L. Bennington, M.D., ed., 1984).

194. 77 A.L.R.4th 273 § 2 (1990).

195. *Id.* §§ 2, 3 (1990). The criteria with which courts measure the conduct of drugless practitioners is the "same degree of care, diligence, and skill in the treatment of their patients that is possessed and used by prudent, skillful, and careful practitioners of the same school . . . and not that of a medical doctor or specialist." *Id.*

196. *Id.* §§ 2, 4.

197. 59 A. 376 (N.H. 1904)(upholding the jury's findings of non-negligence).

198. *Id.* at 377.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 378.

203. *Id.*

204. *Id.*

Consistent with the analysis in *Spead*, faith healers should incur liability for their negligent treatment of patients for their medical illnesses based on standards similar to those established for other drugless practitioners.<sup>205</sup> Additionally, liability imposed on faith healers should be consistent, which could be accomplished by Congress' enactment of a uniform federal law regarding the standards of care to which faith healers should be held. Since faith healing may be characterized as the exercise of religious freedom, the practice of medicine, or some combination, the dividing lines should be distinct and the extent of legal liability imposed under each situation should be clear. For example, if, on the one hand, the faith healer is merely practicing his religion, for liability purposes, he should be held to the *Spead* standard of the reasonable Christian Science faith healer.<sup>206</sup> On the other hand, if the faith healer receives Medicare reimbursement for services, then the law is treating the faith healer as a health care provider, and he should be held to the higher standard of medical custom. Ultimately, since faith healing services are being compensated currently as medical ones, despite being considered religious practices, faith healers should be held to the higher standard of medical custom as opposed to the standard of the reasonable faith healer.

### 1. Reasonable Person Standard

Applying the reasonable person standard to the context of faith healing, the faith healer knows that the claimant is suffering from some illness. Sometimes the faith healer knows the extent of that illness, but this is not always the situation. In addition, the faith healer knows the risk involved in solely utilizing prayer. According to the faith healer, it is entirely in God's hands whether the ailing person will be healed or not.<sup>207</sup> A more precise calculation does not exist. The faith healer also knows the risk in not pursuing conventional medicine: potential death.<sup>208</sup>

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205. See *supra* Part III.A.

206. The reasonable faith healer standard was originally argued in *Spead v. Tomlinson*, 59 A. 376 (N.H. 1904) (articulating the standard by which a faith healer's conduct should be judged as the reasonable faith healer). The court stated that "the defendant . . . is to be judged by the standard of care, skill, and knowledge of the ordinary Christian Scientist, in so far as he confined himself to those methods." *Id.* at 378. Additionally, use of the reasonable faith healer standard has been discussed in a law review article in which the author proposed that this standard be applied to faith healers treating children. See Dodes, *supra* note 29.

207. See Foix, *supra* note 23, at 277.

208. Rubin, *supra* note 6, at 15. Comparing the effects of faith healing to conventional medicine, Deputy Editor of the *New England Journal of Medicine* stated, "I don't think



Given the faith healer's knowledge of the risks inherent in pursuing faith healing instead of conventional medicine, the law should require that the faith healer fully disclose these risks to the individual before agreeing to pray for her recovery. This disclosure should be included in the standard of care for faith healing situations. Therefore, due care in faith healing should require the faith healer to fully disclose the risks and consequences of pursuing faith healing in lieu of conventional medical treatment.

## 2. Medical Custom Standard

Applying the medical custom standard to the context of faith healing would require faith healers to have a certain level of knowledge and skill to qualify as a faith healer.<sup>209</sup> The faith healer would have to be a licensed and educated priest or religious leader to be legally qualified to engage in faith healing.<sup>210</sup> Additionally, the faith healer would have to receive informed consent before proceeding with prayer for the patient.

To obtain informed consent, the faith healer would have the duty to disclose all material facts to the patient. The determination of materiality of fact would be similar to the standard used by doctors: either what is customarily disclosed by faith healers or what the reasonable patient would likely assess as being important to know. Such material facts should include the inability to assess the probability of success in using faith healing; the alternatives to faith healing, namely conventional medi-

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serious people maintain that prayer or faith is going to cure disease the way an antibiotic or a surgical procedure would." *Id.*

209. Currently, to become a Christian Science faith healer and to learn the faith, the candidate must attend an intensive, ten-day training session, taught by a Christian Science religious scholar. See BRENNEMAN, *supra* note 36, at 44.

210. Practitioners who are certified to be Christian Science faith healers are listed in the *Christian Science Journal*. Baumgartner v. First Church of Christ, Scientist, 490 N.E.2d 1319, 1321 (Ill. App. Ct. 1986). Additionally, a believer may attend the Massachusetts Metaphysical College where Christian Science beliefs are taught. The believer then may receive a degree in Christian Science called a Bachelor of Christian Science, or C.S.B. See BRENNEMAN, *supra* note 36, at 45.

Christian Science faith healers should be held to the standard of medical custom because courts have compared faith healers to others within the field of Christian Science in determining whether Christian Science faith healers should be liable for failing to operate on the patient. Annotation, *Liability of Chiropractors and Other Drugless Practitioners for Medical Malpractice*, 77 A.L.R.4th 273, 379 (1990). Only physicians enjoy this internal comparison, that is, being compared with other physicians within their specialty field. See W. PAGE KEETON ET AL., *supra* note 151. Other professions are compared to the reasonable person. *Id.*

cal treatment, other forms of alternative medical treatment,<sup>211</sup> or a combination of alternative medical treatment and conventional medical treatment; and, the probable success of conventional medical treatment. Additionally, faith healers would be required to use care ordinarily possessed by other legitimate faith healers.<sup>212</sup> This requisite care must include the faith healer's ability to know when to suggest seeking conventional medical treatment in addition to faith healing, particularly when the tenets of the religion do not prohibit the use of conventional medical treatment, as is the case in Christian Science.

### IX. CONCLUSION

Case law precedents and statutes treat faith healing inconsistently in determining whether it is the practice of religion or the practice of medicine. Furthermore, a complete assessment of liability in the practice of faith healing is lacking. The case law establishes, on the one hand, that faith healers, using only prayer and faith in aiding the sick, are merely practicing their religion.<sup>213</sup> On the other hand, faith healers, using anything more than mere prayer and faith, are practicing medicine.<sup>214</sup> The statutory law, however, embodied in the long-established Medicare Act, provides medical reimbursement for Christian Science faith-healing facilities.<sup>215</sup> The act of reimbursement likens faith healing to practicing medicine. Additionally, the IRS allowance of medical expense deductions on income tax filings for faith healing visits, as well as private health insurance companies providing benefits for faith healing visits, contribute to the legal perception that faith healers practice medicine. This contradiction blurs the distinct line drawn by the case law between when faith

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211. Other available forms of alternative medicine treatment that the faith healer could recommend to the patient include acupuncture, herbal medicine, chiropractic and therapeutic touch. See *supra* notes 2-5 and accompanying text.

212. *Spead v. Tomlinson*, 59 A. 376, 378 (N.H. 1904). See *Dodes*, *supra* note 29, at 177-78. See also Annotation, *Liability of Chiropractors and Other Drugless Practitioners for Medical Malpractice*, 77 A.L.R.4th 273, 379 (1990). For a contrary opinion of applying a liability standard to faith healers, see *Baumgartner v. First Church of Christ, Scientist*, 490 N.E.2d 1319, 1322-23, 1325-26 (Ill. App. Ct. 1986). For an assessment of the problems associated with applying a liability standard to Christian Science faith healers, see John E. Kerley, Note, 13 S. ILL. U. L.J. 411 (1989).

213. *Spead v. Tomlinson*, 59 A. 376 (N.H. 1904); *Crane v. Johnson*, 242 U.S. 339 (1917); *People v. Handzik*, 102 N.E.2d 340 (Ill. 1951); *People v. Vogelgesang*, 221 N.Y. 290 (1917); *People v. Estep*, 104 N.E.2d 562 (Ill. App. Ct. 1952).

214. *Spead v. Tomlinson*, 59 A. 376 (N.H. 1904); *Crane v. Johnson*, 242 U.S. 339 (1917); *People v. Handzik*, 102 N.E.2d 340 (Ill. 1951); *People v. Vogelgesang*, 221 N.Y. 290 (1917); *People v. Estep*, 104 N.E.2d 562 (Ill. App. Ct. 1952).

215. 42 U.S.C. § 1395 (1994).

healers are practicing their religion and when they are practicing medicine. Even though Congress may override judicial precedent, it is restricted in its powers to not enact laws that are unconstitutional or that interfere with states' police powers. Allowing faith healers to escape liability opposes public policy interests in maintaining the health, welfare, and safety of individuals who seek faith healers.

Generally, courts have been remiss in providing a basis for recovery for liability in faith healing. They only have imposed liability in the enforcement of medical licensing statutes when the faith healer has been judicially determined to be practicing medicine due to the inclusion of some form of diagnosis, treatment, or receipt of compensation during the faith healing session. Regardless of whether the faith healer is practicing religion or medicine, the faith healer should be liable for negligence if his conduct falls below the requisite standard of care. Either faith healers should be analogous to medical doctors, who are liable for medical malpractice, or they should have to meet the same standard as other drugless practitioners, who incur liability for negligent conduct as determined by comparing them with other drugless practitioners from the same school of thought.

Since faith healers currently receive health care reimbursement from Medicare and private health insurance companies, they should be held to the standard of medical custom and should be required to comply with state licensing statutes appropriate to faith healers. If Congress ever changes the classification of faith healers from health care providers to religious advocates by excluding them from medical care reimbursement altogether, then faith healers should be held to the standard of the reasonable person. But, until then, faith healers should not be able to reap the benefits of limited liability and full medical care reimbursement.

At a minimum, the faith healer should have the duty to disclose the risks, material facts, and probability of success inherent in seeking faith healing as the sole means of medical treatment. He must also disclose the consequences of not pursuing conventional medical treatment, as well as the risks and probability of success in seeking conventional medical treatment. Regardless of how faith healers are ultimately and consistently classified under the law, they should be liable for negligence if they perform their duties below the requisite legal standard.

*Lauren A. Greenberg*