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Commonwealth v. Twitchell: Who Owns the Child?

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COMMONWEALTH V. TWITCHELL:[1] WHO OWNS THE CHILD?[2]

Since 1980,[3] there have been seven cases[4] brought against Christian Scientist parents whose children died because the parents practiced faith healing and shunned conventional medical treatment.[5] On July 4, 1990, Christian

1. Commonwealth v. Twitchell, No. 89-210 (Mass. Super. Ct. May 23, 1989).

2. *See* R. SUTTON, WHO OWNS THE FAMILY? GOD OR THE STATE? (1986). In discussing family relationships, Sutton states: "Parents have the authority to *educate* and *punish* the children God has entrusted to them. Parents are simply *trustees* of what belongs to God. Their children do not belong to them, nor do they belong to the State. [The children] belong to God." *Id.* at 24 (emphasis in original).

3. *Couple Given Probation in Son's Death: Regular Health Checkups Ordered for Other Children*, Wash. Post, July 7, 1990, at A2, col. 5-6 [hereinafter *Couple Given Probation*].

4. *See* State v. King, No. CR88-87284 (Ariz. Sup. Ct. sentenced Sept. 26, 1989) (parents received three years probation in plea bargain involving death of twelve year-old daughter from cancer); Walker v. Superior Court, 47 Cal. 3d 112, 763 P.2d 852, 253 Cal. Rptr. 1 (1988) (mother found guilty of involuntary manslaughter in death of four-year-old daughter by meningitis), *cert. denied*, 109 S. Ct. 3186 (1989); State v. Glaser, No. A-753942 (Cal. Super. Ct. judgment of acquittal granted Feb. 16, 1990) (seventeen-month-old son died of spinal meningitis); State v. Rippberger, No. 13301-C (Cal. Super. Ct. Aug. 4, 1989) (parents convicted of child endangerment but acquitted of involuntary manslaughter in death of eight-month-old child by meningitis) (cited in Clark, *Religious Accommodation and Criminal Liability*, 17 FLA. ST. U.L. REV. 559, 560 n.3 (1990)); Hermanson v. State, 570 So. 2d 322 (Fla. Dist. Ct. App. 1990) (parents convicted of felony child abuse and third-degree murder in death of seven-year-old daughter, who died of complications arising from juvenile diabetes); Brown v. Laitner, 432 Mich. 861, 435 N.W.2d 1 (fifteen-month-old boy died of spinal meningitis), *cert. denied*, 110 S. Ct. 326 (1989); State v. McKown, 461 N.W.2d 720 (Minn. Ct. App. 1990) (eleven-year-old boy died of complications from diabetes).

5. *See, e.g.*, Hirsley, *Beliefs Can Take Some Into Court*, Chi. Tribune, Jan. 5, 1990, § 2, at 8, col. 1. Five of these prosecutions have resulted in convictions, one has resulted in an acquittal, and one case was dismissed. *Couple Given Probation*, *supra* note 3, at A2, col. 6. For citations to these cases, see *supra* note 4. In stark contrast to these prosecutions and convictions is "the Delaware Christian Science couple [that] won the right to treat their 3 year old son's cancer through spiritual healing instead of chemotherapy." *Christian Science Care Upheld in Court*, Christian Sci. Monitor, Oct. 1, 1990, at 8, col. 1.

Children's Healthcare Is a Legal Duty, Inc. (CHILD), an anti-Christian Scientist group, has alleged that during the last ten years there have been at least twelve deaths of Christian Science children that medical treatment could have saved. Firestone, *Undeterred in their Faith*, Newsday, July 3, 1990, Part II, at 4, col. 1; Margolick, *In Child Deaths, A Test for Christian Science*, N.Y. Times, Aug. 6, 1990, at A1, col. 2 [hereinafter Margolick]. One news report estimates that in the past 15 years, more than 140 children have died because of the parents' belief in faith healing. Colen, *Religious Freedom or Child Neglect*, Newsday, June 19, 1990, at 13, col. 1. Prosecutors have secured convictions in 19 of 29 criminal cases brought against parents whose children have died because of their reliance on spiritual healing rather than conventional medical care. Neuffer, *Spiritual Healing: A Debate of Rights, Critics Demand Accountability for Child Deaths*, Boston Globe, May 22, 1990, at A1, col. 4, at 70, col. 2.

Scientists David and Ginger Twitchell were convicted of manslaughter in the death of their two-year-old son Robyn.[6] The Twitchells relied solely on prayer to heal their ailing son, believing this to be in his best interest and believing themselves exempt from criminal prosecution.[7] The Twitchells were sentenced to ten years probation[8] and their other children were ordered

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Recently two Jehovah's Witnesses refused to allow their daughter suffering from leukemia to receive a blood transfusion. Le Fanu, *Second Opinion College Fails the Healing Test*, The Independent, July 29, 1990, at 51, col. 3. In spite of these reports,

> [s]tatistics on child deaths from treatable illnesses where parents relied on faith healing alone are not readily available; a lack of centralized data on child deaths has prompted Congress to establish a national clearinghouse for such data. *See* 42 U.S.C.A. § 5104 (West Supp. 1989). This clearinghouse, the National Center on Child Abuse and Neglect, was established in 1988 by Pub. L. No. 100-294, the "Child Abuse Prevention, Adoption, and Family Services Act of 1988." *Id.* Congress hopes that the availability of uniform data on youth deaths will dispel the notion that these deaths are merely 'isolated incidents' and will enable officials to coordinate programs more effectively. 133 CONG. REC. S11,718 (daily ed. Aug. 7, 1987) (statement of Senator Dodd).

Comment, *When Rights Clash: The Conflict Between a Parent's Right to Free Exercise of Religion Versus His Child's Right to Life*, 19 CUMB. L. REV. 585, 585 n.1 (1989) [hereinafter Comment, *When Rights Clash*].

6. *Boston Jury Convicts 2 Christian Scientists in Death of a Son*, N.Y. Times, July 5, 1990, at A12, col. 3 [hereinafter *Jury Convicts*]. Defense lawyers have moved for a new trial, based upon a letter by the forewoman of the *Twitchell* jury, acting in an individual capacity, to the Chief Justice of the Suffolk Superior Court, criticizing trial Judge Sandra Hamlin's handling of the case. Goodrich, *Twitchell Attorneys To Seek New Trial*, Christian Sci. Monitor, Aug. 13, 1990, at 7, col. 4. While this letter may be incorporated in the Twitchells' appeal, filed on July 5, it will not alter the conviction. Wong, *Juror's Claim of Biased Judge Spurs No Action*, Boston Globe, Aug. 11, 1990, at 29, col. 3 (noting that the Supreme Judicial Court of Massachusetts has previously ruled that convictions may not be overturned based upon a juror's dissent after the verdict has been affirmed and officially recorded); *Couple Given Probation*, *supra* note 3, at A2, col. 5 (same). The defense has listed several grounds for appeal: Lack of due process, based upon the state law exemption allowing parents to rely solely on spiritual healing; improper instructions to the jury; erroneous evidentiary rulings; and unconstitutional theological questioning of Christian Science witnesses. Goodrich, *Appeals Process Gets Under Way in Twitchell Manslaughter Case As Defense Seeks Stay of Sentence*, Christian Sci. Monitor, July 9, 1990, at 9, col. 3.

7. Chambers, *Deliberating Faith, Law and a Life*, Nat'l L.J., July 2, 1990, at 13, col. 4 [hereinafter Chambers]. "A 1975 opinion by the [Massachusetts] attorney general interpret[ed] the 'spiritual exemption' statute as precluding criminal prosecution of parents for their failure to 'provide medical care because of religious beliefs.'" *Id.* The Massachusetts law states: "A child shall not be deemed to be neglected or lack proper physical care for the sole reason that he is being provided remedial treatment by spiritual means alone in accordance with the tenets and practice of a recognized church . . . ." MASS. GEN. LAWS. ANN. ch. 273, § 1 (West Supp. 1989).

8. *Couple Given Probation*, *supra* note 3, at A2, col. 5. The Twitchells' lawyer had asked for four years of probation. *Christian Scientists Are Given Probation for Death of Child*, N.Y. Times, July 7, 1990, at 8, col. 5 [hereinafter *Christian Scientists Given Probation*]. Even critics agreed that a jail sentence would not "serve the ends of justice. They have already lost a child." Ciolli, *Christian Scientists Will Get Probation*, Newsday, July 6, 1990, at 2, col. 2.

to undergo periodic medical examinations.[9]

Some mistakenly praise *Commonwealth v. Twitchell* as a victory for children's rights.[10] An examination of *Twitchell* and similar cases, however, reveals that the issue litigated is not children's rights; rather, these cases test who has the right to determine the child's best interest—the state or the parents.[11] *Twitchell* may set a dangerous precedent. If a court determines that the state has a compelling interest[12] in the health and welfare of an endangered child,[13] the state can force parents, such as the Twitchells, to

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"Although parents who belong to other denominations . . . have gone to jail for failing to provide their sick children with medical care, no Christian Scientist has thus far." Margolick, *supra* note 5, at A11, col. 3.

9. *Couple Given Probation*, *supra* note 3, at A2, col. 5. The Twitchells have three other children: Elias, 9 months, Brian, 2 years, and Jeremy, 8 years. *Id.*

10. *See, e.g.*, *Couple Given Probation*, *supra* note 3, at A2, col. 5-6. "Medical experts applauded the verdict, saying it would protect children. 'No religion is going to be allowed to be a defense against abuse and neglect,' said Michael Grodin, a pediatrician and medical ethicist at Boston University. 'The bottom line is we have to have standards for protecting children.' " *Id.*; *see also* English, *Wronged Rights a Tougher Case*, Boston Globe, June 25, 1990, at 17, col. 1 ("But the case is larger than one couple[—]there's a public policy issue here, and that is how to protect children, who are virtual chattels.").

11. Even the *Twitchell* prosecutor recognized this issue, as evidenced by his remark during closing argument: "What religion was the baby?" Daly, *Trial on Death of Todler, Faith Healing Goes to Jury*, Wash. Post, July 3, 1990, at A3, col. 5 [hereinafter *Trial on Death*]. In addition, the defense attorney argued that "the second issue is whether we will permit or tolerate the commonwealth to place itself in a very special relationship between a parent and child and to substitute its own judgment for the parents' judgment." Botsford, *They Loved Their Child; They Also Loved God*, The Independent, May 30, 1990, at 18, col. 1 [hereinafter Botsford]. Like other cases involving faith healing, this prosecution "represent[s] a clash of apparent absolutes: [O]f religious liberty and parental autonomy on the one hand and the right of the states to protect children—and the rights of the children themselves—on the other." Margolick, *supra* note 5, at A1, col. 3; *see also supra* note 2 (children belong to God, not to the parents or the state).

12. In Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595 (1990), the Supreme Court recently held that the state's interest need not always be compelling. *See infra* notes 87-108 and accompanying text.

13. A state's interest in the welfare of a child may allow intervention not only when the child's life is endangered, but even when the child needs ordinary medical attention. *See, e.g.*, State *ex rel.* Juvenile Dep't v. Jensen, 54 Or. App. 1, 3, 8, 633 P.2d 1302, 1303, 1306 (court ordered child to be separated from parents because child needed treatment for hydrocephalus, a condition possibly resulting in mental retardation if left untreated despite plea for spiritual treatment when child's life not threatened), *review denied*, 291 Or. 662, 639 P.2d 1280 (1981); *see also* Crouse-Irving Memorial Hosp. v. Paddock, 127 Misc. 2d 101, 102-03, 485 N.Y.S.2d 443, 444 (Sup. Ct. 1985) (hospital entitled to provide blood transfusion for baby over parent's religious-based objections because of state's "vital interest in child's welfare"); *In re* Cabrera, 381 Pa. Super. 100, 107, 552 A.2d 1114, 1121 (1989) (court granted hospital's petition for appointment of special guardian to consent to blood transfusion for child suffering from sickle cell anemia when Jehovah's Witness parents refused to consent to the transfusions because of their religious beliefs); Commonwealth v. Barnhart, 345 Pa. Super. 10, 25, 497 A.2d 616, 624 (1985) (when medical conditions threaten a child's life, the duty to seek medical assistance

administer conventional medical treatment[14] against their religious beliefs—without violating either the free exercise clause[15] or the establishment clause[16] of the Constitution—then the state could also theoretically dictate to parents of varied religious backgrounds in other areas concerning the upbringing of their children.

The role of religion, or of a particular religion, was disputed throughout *Twitchell*. Special Prosecutor Kiernan, however, has consistently denied that the Twitchells were prosecuted for their religious affiliation.[17] A spokesman for the church disagreed, maintaining that the *Twitchell* verdict "reveals a double standard. Although many children die while in conventional medical care . . . criminal charges are brought any time a child dies in

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overrides the religious beliefs of the parents), *appeal denied*, 517 Pa. 620, 538 A.2d 874, *cert. denied*, 488 U.S. 817 (1988).

14. Though beyond the scope of this Commentary, an important question remains: Who defines the term conventional medical treatment? Would parents who turned to experimental treatment be prosecuted? *See generally* Prillaman, *A Physician's Duty to Inform of Newly Developed Therapy*, 6 J. CONTEMP. HEALTH L. & POL'Y 43 (1990) (professional standard of care necessary to determine the range of medically acceptable alternative treatments).

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

16. Though most often characterized as free exercise cases, these faith healing cases could also be viewed as establishment clause cases. The important additional danger is that an "exception from a general obligation of citizenship on religious grounds," Wisconsin v. Yoder, 406 U.S. 205, 220-21 (1972), while in line with the free exercise clause, may violate the establishment clause of the Constitution. However, the state could also be seen as violating the establishment clause if they do not grant an exception. If a state does not permit the parents to direct a child's religious upbringing, the state must, by default, do so in apparent violation of the establishment clause. The Court in *Yoder* addressed this concern directly, stating that "if the State is empowered, as parens patriae, to 'save' a child from himself or his Amish parents by requiring an additional two years of compulsory formal high school education, *the State will in large measure influence, if not determine, the religious future of the child.*" *Id.* at 232. (emphasis supplied). This argument, no less valid in the *Twitchell* case, only serves to further emphasize the tension that exists between the free exercise clause and the establishment clause. Under current first amendment construction, a court is caught in the ultimate paradox; it loses no matter what course it takes. However, if an interpretation of the original intent of the framers of the Constitution is considered, no tension between the two religion clauses of the first amendment would exist. *See generally* Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955 (1989) (advocating a historical perspective to gain consistency between the establishment and free exercise clauses); Smith, *Getting Off On the Wrong Foot and Back on Again: A Reexamination of the History of the Framing of the Religion Clauses of the First Amendment and a Critique of the Reynolds and Everson Decisions*, 20 WAKE FOREST L. REV. 569 (1984) (similar treatment).

17. Daly, *Parents Who Relied on Faith Healing Are Convicted in Son's Death*, Wash. Post, July 5, 1990, at A4, col. 1 [hereinafter *Parents Who Relied*]; *cf. Jury Convicts*, *supra* note 6, at A12, col. 3 ("We don't contest the right to believe as one sees fit . . . but we do contest the right to practice those beliefs when it affects a two-year-old little boy." (statement of John Kiernan)).

a Christian Scientist's care."[18]

This Commentary will provide a brief background on the formation of the Christian Science Church, the laws designed to exempt spiritual healing from criminal prosecution, and the facts of the *Twitchell* case. This Commentary will then analyze the constitutional implications of *Twitchell*. Regardless of religious beliefs, it appears that parents may be prosecuted whenever a child's death results from delayed medical treatment.[19] Finally, this Commentary will conclude that the free exercise clause of the Constitution[20] should protect parents like the Twitchells from prosecution.[21]

I. HISTORY OF THE CHRISTIAN SCIENCE CHURCH

Mary Baker Eddy founded the Christian Science Church in 1879.[22] She began the religion after choosing to concentrate on prayer rather than conventional medicine to effectuate her own healing following a fall that knocked her unconscious.[23] Three days after the fall she "had a revelation about the 'divine principle of scientific mental healing' and subsequently

18. *Parents Who Relied, supra* note 17, at A12, col. 3.

19. *See Children, Compassion, Morality, and the Law*, Christian Sci. Monitor, May 19, 1989, at 20, col. 1 (editorial); *see also Parents Who Relied, supra* note 17, at A4, col. 2 (stating that the *Twitchell* verdict is "important because it makes clear that 'every parent has the same obligation,' regardless of religious beliefs." (statement of John Kiernan)).

20. *See generally* McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990). Professor McConnell argues that the debate regarding the grant of exemptions under the free exercise clause

> has largely proceeded in an ahistorical fashion and has ignored the unique American conception of religious freedom from which the free exercise clause emerged . . . . After discussing early nineteenth-century judicial interpretation, Professor McConnell concludes that an interpretation of the free exercise clause that mandates religious exemptions was both within the contemplation of the framers and consonant with popular notions of religious liberty and limited government that existed at the time of the framing.

Id. at 1409; *cf.* Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357 (1990) (arguing that granting a free exercise exemption from neutral laws creates a number of constitutional problems and analyzing the arguments advanced in support of, and against, free exercise exemptions).

21. This Commentary does not address all of the current limits to religious freedom. *See, e.g.*, Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595, 1606 (1990) (holding that Indians cannot smoke peyote, a religious practice that predates white man's arrival); Reynolds v. United States, 98 U.S. 145, 165 (1879) (Mormons may not practice bigamy); Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 723 F. Supp. 1467, 1488 (S.D. Fla. 1989) (Santeria followers may not make animal sacrifices); Whyte v. United States, 471 A.2d 1018, 1019 (D.C. 1984) (Rastafarians not permitted to smoke marijuana in pursuit of their religious beliefs).

22. Chambers, *supra* note 7, at 13, col. 3.

23. Boeri, *Parents Convicted: Christian Science Guilty in Son's Death*, Newsday, July 5, 1990, at N3, col. 3.

wrote a book called 'Science and Health.' "[24] The basic premise of the book is that by drawing closer to God, one can overcome what Eddy considered manifestations of the mind, including sin, sickness, and disease.[25]

Despite this foundational principle of the church, officials of the Christian Science church maintain that their members are free to choose conventional medical care without suffering any negative repercussions from church authorities.[26] In *Twitchell*, however, the prosecution and defense differed sharply on this issue of church orthodoxy.[27] Some members of the religion have said privately that the church "makes them feel as though they have failed if they [choose conventional medical care.]"[28]

There are approximately 2,000 Christian Science churches in the United States,[29] though the church's leaders say they do not keep a record of members since they consider the number unimportant.[30] It appears, however, that the number of members is declining.[31] Church officials, however, state that the *Twitchell* case has "unexpectedly 'revitalized' interest in Christian Science teachings, as measured by visits to Christian Science reading rooms and telephone requests for Christian Science practitioners."[32] Stephen Gottschalk, an author of encyclopedic entries on Christian Science, believes that "while people may be thinking more about Christian Science now[,] what they are thinking may be more hostile than helpful to the movement."[33]

Out of all the members of the church, there are an estimated 3,000 practitioners[34] who "devote themselves full time to a healing ministry after they have shown the church evidence of effective healing, good character and a readiness to meet the challenge[s encountered in faith healing]."[35] Christian Scientists believe:

> [S]piritual healing doesn't happen automatically. There have been failures like the death of Robyn Twitchell. When failures for chil-

24. *Id.*
25. *Id.*
26. *Parents Who Relied*, *supra* note 17, at A4, col. 5.
27. *Trial on Death*, *supra* note 11.
28. Higgins, *Trial Spotlight Catches Christian Science in a State of Flux*, Boston Globe, July 22, 1990, at 30, cols. 1 & 4.
29. *Id.* (There are another 700 Christian Science churches outside of the United States).
30. Boeri, *supra* note 23, at N3, col. 2.
31. Botsford, *supra* note 11, at 18, col. 6. Andrew Hartsook, a Christian Scientist facing excommunication for publishing a newsletter critical of the church hierarchy, reported that "120 Christian Science churches have closed in the United States since February 1987, leaving a total of 1,863 American churches." Higgins, *supra* note 28, at 30, col. 2. Hartsook also reported that 12 new churches were added during that period. *Id.*
32. Higgins, *supra* note 28, at 30, col. 1.
33. *Id.*
34. *Id.*
35. Boeri, *supra* note 23, at N3, col. 2.

> dren occur, that makes news. But the *real* news—that consistent spiritual healing goes on happening—is news you don't hear much about, though the cumulative evidence for it is enormous.[36]

Independent research, however, may not support this optimism. A mathematician, comparing the life expectancy of Kansas State alumni with the life expectancy of Principia College alumni, the main institute of higher education for Christian Scientists, found the life expectancy of Christian Scientists to be shorter than that of their secular counterparts.[37] This research shows that from the classes of 1934 to 1948, the graduates of Principia College had a consistently higher death rate: 73% were alive, compared to 80% of Kansas State University graduates.[38] However, another comparison between Christian Scientists and the general population reported the following figures of deaths per year: 23 per 100,000 for Christian Scientists and 53 per 100,000 for the population in general.[39] Whatever the effectiveness of Christian Science faith healing, the medical costs of enlisting the services of a Christian Science practitioner are nevertheless tacitly acknowledged through reimbursement by Medicare and insurance companies, and are deductible from federal income tax.[40]

Forty-one states have enacted medical practice acts[41] that regulate the

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36. Gottschalk, *Speaking Out: Should Government Rule when Faith, Science Clash?; Con: Critics Ignore Important Evidence of Spiritual Healing*, L.A. Times, July 14, 1990, at F16, col. 5 (emphasis in original).

37. Le Fanu, *supra* note 5, at 51, col. 3.

38. *Id.* These percentages are faulted for underestimating the benefits of modern medicine, since Christian Scientists "would have been non-smokers and teetotallers—and would therefore have the advantage of being protected from the two major causes of early death in our society." *Id.* The study cannot be considered dispositive, though, since the fact that Christian Scientists do not seek medical treatment does not demonstrate any causation between their abstinence from medical treatment and annual mortality.

39. Jones, *Prayers, Parental Duty: Child Deaths Put Faith on Trial*, L.A. Times, June 27, 1989, at 1, col. 1, at 16, col. 3.

40. Larrabee, *Christian Scientists Contend "Prayer Is Being Prosecuted,"* USA Today, July 5, 1990, at A3, col. 3. *See generally Parents' Faith, Children's Lives*, Wash. Post, July 7, 1990, at A22, col. 1. "Many state Medicaid programs and most large insurers reimburse Christian Science Practitioners as they do doctors. Private payments to practitioners are deductible as medical expenses under state and federal income tax, and Medicare makes payments to Christian Science 'sanitoriums' as if they were hospitals." *Id.* at A22, col. 2.

41. *See, e.g.*, ALA. CODE §§ 34-24-50 to -406 (1985 & Supp. 1990); ALASKA STAT. §§ 08-.64.010-.380 (1962 & Supp. 1990); ARIZ. REV. STAT. ANN. §§ 32-1401 to -1455 (1956 & Supp. 1989); ARK. STAT. ANN. §§ 17-80-101 to -98-312 (1987 & Supp. 1989); CAL. BUS. & PROF. CODE §§ 2000-2515 (West 1990); COLO. REV. STAT. §§ 12-36-101 to -136 (1985 & Supp. 1990); CONN. GEN. STAT. ANN. §§ 20-8 to -14K (West 1958 & Supp. 1990); DEL. CODE ANN. tit. 24, §§ 1701-1795 (1987 & Supp. 1988); FLA. STAT. ANN. §§ 458.301-.349 (West 1981 & Supp. 1990); GA. CODE ANN. §§ 43-34-1 to -46 (1988 & Supp. 1990); HAW. REV. STAT. §§ 453-1 to -33 (1988 & Supp. 1990); IDAHO CODE §§ 54-1801 to -1841 (1988 & Supp. 1990); IOWA CODE ANN. §§ 148.1-.13 (West 1989 & Supp. 1990); KAN. STAT. ANN. §§ 65-2801 to -

medical profession by providing criminal penalties for the unauthorized practice of medicine. However, religious healers have been exempted from regulation under most of these acts.[42] In *Twitchell*, the prosecution contended that there was a distinction between regulating the practice of Christian Science medicine and investigating and prosecuting deaths that result from such practice.[43]

II. SPIRITUAL HEALING EXEMPTION LAWS

Forty-seven states and the District of Columbia have laws exempting Christian Scientists and other faith-healing sects from criminal liability.[44]

2890 (1985 & Supp. 1989); LA. REV. STAT. ANN. §§ 37:1261-1301 (West 1988 & Supp. 1990); ME. REV. STAT. ANN. tit. 32, §§ 3263-3299 (1964 & Supp 1990); MASS. GEN. L. ANN. ch. 112, § 2-12X (West 1984 & Supp. 1990); MISS. CODE ANN. §§ 73-25-1 to -95 (1972 & Supp. 1990); MO. ANN. STAT. §§ 334.010-.265 (Vernon 1989 & Supp. 1990); MONT. CODE ANN. §§ 37-3-101 to -405 (1989); NEB. REV. STAT. §§ 71-101 to -1, 136.09 (1990); N.H. REV. STAT. ANN. §§ 329:1-30 (1984 & Supp. 1989); N.J. STAT. ANN. §§ 45:9-1 to -27.9 (West 1978 & Supp. 1990); N.M. STAT. ANN. §§ 61-6-1 to -35 (1978); N.Y. PUB. HEALTH LAW § 230 (Consol. 1987 & Supp. 1989); N.C. GEN. STAT. §§ 90-1 to -21 (1989); N.D. CENT. CODE §§ 43-17-01 to -41 (1978 & Supp. 1989); OHIO REV. CODE ANN. §§ 4731.01-.50 (Anderson 1953 & Supp. 1989); OKLA. STAT. ANN. tit. 59, §§ 481-518 (West 1981 & Supp. 1991); OR. REV. STAT. §§ 677.010-490 (1989); PA. STAT. ANN. tit. 63, §§ 422.1-45 (Purdon 1968 & Supp. 1990); S.C. CODE ANN. §§ 40-47-15 to -270 (Law. Co-op. 1976 & Supp. 1989); S.D. CODIFIED LAWS ANN. §§ 36-4-1 to -36 (1986 & Supp. 1990); TEX. REV. CIV. STAT. ANN. art. 4495-4512 (Vernon 1976 & Supp. 1990); UTAH CODE ANN. §§ 58-12-26 to -43 (1990); VT. STAT. ANN. tit. 26, §§ 1311-1400 (1975 & Supp. 1989); VA. CODE ANN. §§ 54.1-2500 to -2510 (1988 & Supp. 1990); W. VA. CODE §§ 30-3-1 to -15 (1986 & Supp. 1990); WIS. STAT. ANN. §§ 448.01-.40 (West 1988 & Supp. 1990); WYO. STAT. §§ 33-26-101 to -410 (1977 & Supp. 1990).

42. Thirty-seven states specifically exempt spiritual or religious healers from liability by statute, reasoning that the Medical Practice Act should not interfere with the practice of religion. Iowa, Mississippi, Missouri, and Ohio are the only states that do not list religious healers under the exemption clause. For a list of the state statues, see *supra* note 41.

43. This issue, as stated by the Twitchells' defense attorney, is "[w]hether the Constitution permits parents to be subject to criminal prosecution if there is a statute that explicitly allows for the care and treatment of a child through spiritual healing." Botsford, *supra* note 11, at 18, col. 8 (quoting Rikki Klieman, counsel for the Twitchells). The prosecution contended that the exemption provided immunity only for child abuse or neglect, not death or serious harm to a child. In another Christian Science case, Walker v. Superior Court, 47 Cal. 3d 112, 122, 763 P.2d 852, 873, 253 Cal. Rptr. 1, 22 (1988), *cert. denied*, 109 S. Ct. 3186 (1989), the court held that the faith healing exemption at issue did preclude liability for misdemeanor child neglect, but also held that the exemption did not extend to prosecutions under involuntary manslaughter and felony child neglect statutes since the objectives of these statutes differed from the misdemeanor child neglect statutes. For a more thorough analysis of the *Walker* opinion, see Comment, *When Rights Clash*, *supra* note 5, at 598-602.

44. ALA. CODE § 13A-13-6(b) (1982); ALASKA STAT. § 47.17.020(d) (1990); ARK. STAT. ANN. § 12-12-502(3) (1987); CAL. PENAL CODE § 270 (West 1988); COLO. REV. STAT. § 14-6-101 (1987); CONN. GEN. STAT. ANN. § 17-38d (West 1988); DEL. CODE ANN. tit. 11, § 1104 (1987); D.C. CODE ANN. § 2-1356 (1988); FLA. STAT. ANN. § 415.503(8)(f) (West Supp. 1989); HAW. REV. STAT. § 350-4 (1988); IDAHO CODE § 16-1602(S)(1) (Supp. 1990);

These exemptions, however, may not be "deeply entrenched in the common law,"[45] and in some states the statutory exemption is only a few years old.[46] Most often these exemptions were enacted after Christian Scientists, among others, lobbied state assemblies.[47] Exemptions usually cover a variety of religious groups, such as the Jehovah's Witnesses.[48] Most of the criminal liability exemptions were based upon a 1983 federal law, since repealed, requiring states to incorporate religious immunity provisions into their child abuse laws.[49] This 1983 law was apparently steered through Congress by two Christian Scientists.[50]

Despite repeal of the federal statute, most state exemptions remain, even in the face of criticism. The medical community,[51] children's advocacy

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ILL. ANN. STAT. ch. 23, para. 2054 (Smith-Hurd 1988); IND. CODE ANN. § 35-46-1-4(a) (Burns 1985); IOWA CODE ANN. §§ 232.68(2)(c), 726.6(1)(d) (West Supp. 1990); KAN. STAT. ANN. § 21-3608(1)(c) (1988); KY. REV. STAT. ANN. § 600.020(1) (Baldwin 1990); LA. REV. STAT. ANN. § 14:403(B)(5) (West Supp. 1990); ME. REV. STAT. ANN. tit. 22, § 4010 (Supp. 1989); MD. FAM. LAW CODE ANN. § 5-701(n)(2) (Supp. 1990); MASS. GEN. LAWS ANN. ch. 273, § 1(4) (West Supp. 1990); MICH. COMP. LAWS ANN. § 722.634 (West Supp. 1990); MINN. STAT. ANN. § 626.556(2)(c) (West Supp. 1990); MISS. CODE ANN. §§ 43-21-105(*l*)(i), -105(m) (Supp. 1990); MO. ANN. STAT. § 210.115(3) (Vernon 1983); NEV. REV. STAT. ANN. § 200.5085 (Michie 1986); N.H. REV. STAT. ANN. § 169-C:3(XIX)(c) (Supp. 1989); N.J. STAT. ANN. § 9:6-1.1 (West 1976); N.M. STAT. ANN. §§ 32-1-3(L)(5), -3(M)(4) (Supp. 1989); N.Y. PENAL LAW § 260.15 (McKinney 1989); N.D. CENT. CODE § 50-25.1-05.1(2) (1989); OHIO REV. CODE ANN. §§ 2151.421(A)(1), 2919.22(A) (Anderson 1990 & Supp. 1989); OKLA. STAT. ANN. tit. 21, §§ 846A, 852A (West Supp. 1990); OR. REV. STAT. § 418.740(1)(e) (Supp. 1990); 11 PA. CONS. STAT. ANN. § 2203 (Purdon Supp. 1990); R.I. GEN. LAWS § 40-11-15 (1988); S.C. CODE ANN. § 20-7-490(C)(3) (Law. Co-op. 1985); TENN. CODE ANN. § 37-1-157(c) (1984); UTAH CODE ANN. § 78-3a-19.5 (1987); VT. STAT. ANN. tit. 33, § 682(3)(C) (Supp. 1989); VA. CODE ANN. § 18.2-314, -371.1B (1989 & 1990); WASH. REV. CODE ANN. § 26.44.020(3) (Supp. 1990); WIS. STAT. ANN. § 48.981(3)(c)(4) (West 1987); WYO. STAT. § 14-3-202(a)(vii) (1990). Five of the above states—Maryland, Montana, Nevada, North Carolina, and Tennessee—do not refer specifically to prayer treatment in the statute, but permit alternative remedial care if that form of treatment is recognized by state law.

45. Chambers, *supra* note 7, at 13, col. 3, at 14, col. 4.

46. *Id.*

47. *Id.*

48. Neuffer, *supra* note 5, at A1, col. 4, at 70, col. 1.

49. *Id.* One commentator reports that nationwide adoption of these exemptions coincided with Congress' enactment of the Child Abuse Prevention and Treatment Act of 1974. The Department of Health, Education, and Welfare (HEW) construed the Act to require an exemption for faith healers, thereby linking the adoption of such exemptions to state eligibility for federal funds for child protection programs. In 1983 the Department of Health and Human Services (successor to HEW) removed the religious exemption requirement. Comment, *When Rights Clash*, *supra* note 5, at 591-92.

50. Botsford, *supra* note 11, at 18, col. 5.

51. *See* Larabee, *supra* note 40, at A3, col. 4; *see also* Chambers, *supra* note 7, at 14, col. 4 (stating that both the American Academy of Pediatrics and individual practitioners tried to change the laws).

groups,[52] and others are now actively lobbying state legislatures to remove or revise the existing exemptions.[53] While they hope that the conviction in *Twitchell* will be a catalyst for their cause,[54] only one state, South Dakota, has revised its laws since the federal statute was repealed.[55] Efforts to revise or remove the exemptions have mostly been unsuccessful. Actually, some states have strengthened the laws protecting spiritual healing.[56] Two reasons support the continued existence of the exemptions. First, criminalizing spiritual healing would make Christian Science parents guilty even if the children were, in fact, healed through faith healing.[57] Second, most of the statutes are worded to prevent their use as "a haven for anyone who abuses or neglects children,"[58] thus addressing the concerns of child advocacy groups.

Those seeking to revise or remove the faith healing exemptions must provide answers to the difficult questions that will arise as a consequence of the repeal of existing law. For example, if a state repeals the exemption it is unclear who will pay for expensive medical treatment for a child of a religious objector when the state compels treatment against the parents' will. It is also uncertain who will be held responsible if a child dies as a result of the imposed conventional medical treatment. Most importantly, it is unknown who will decide when a particular treatment is necessary—the parent or the state.[59]

The *Twitchell* case is the first of its kind to be tried in Massachusetts since 1971,[60] when the state's Child Abuse and Neglect law was amended to exempt spiritual healing.[61] Since 1971, Massachusetts has not changed its spir-

52. *See* Wong, *Christian Science Couple Convicted in Son's Death*, Boston Globe, July 5, 1990, at 1, col. 1, at 14, col. 2.

53. Neuffer, *supra* note 5, at A1, col. 4.

54. Hirsley, *Boston Trial Could Affect Illinois Law*, Chi. Tribune, Apr. 18, 1990, at C1, col. 1.

55. Neuffer, *supra* note 5, at 70, col. 2. South Dakota's statute now provides: "[I]f a child is under treatment solely by spiritual means, the court may . . . order that medical treatment be provided for the child." S.D. CODIFIED LAWS ANN. § 26-10-1.1 (Supp. 1990).

56. *See, e.g.*, Neuffer, *supra* note 5, at 70, col. 2 (Texas strengthened laws protecting spiritual healing).

57. Hirsley, *supra* note 5, § 2, at 8, col. 1.

58. *Id.*

59. Loth, *Faith, Science Clash on Child Neglect Proposal*, Boston Globe, Apr. 12, 1990, at 1, col. 3. This particular concern was voiced by David Twitchell after the judge pronounced the Twitchells' sentence. *Christian Scientists Given Probation*, *supra* note 8, at 8, col. 5.

60. Several theories have been advanced to describe the motivations of the decision to prosecute in this case. *See* Botsford, *supra* note 11, at 18, col. 2.

61. Neuffer, *Verdict Seen as Fueling National Debate*, Boston Globe, July 5, 1990, at 1, col. 1, at 14, col. 5. Before the 1971 amendment was passed, "jurors in Barnstable, Mass., [(in 1967)] held Dorothy Sheridan, a Christian Scientist, criminally responsible for the death from

itual healing laws, despite lengthy debate.[62] As the legislators in Massachusetts gathered in April 1990 to discuss the fate of their faith healing exemption, some cautioned that removal of the exemption would take "the choice away from the parent and [have] a chilling effect on the practice of Christian Science."[63] One state representative suggested that it might be " 'chauvinistic' for medical science to declare its methods more effective than prayer."[64]

III. FACTS OF THE TWITCHELL CASE

Robyn Twitchell died on April 8, 1986 of a bowel obstruction.[65] When Robyn first became ill five days before his death, his parents called a Christian Science practitioner who prayed with the Twitchells for Robyn's recovery.[66] A church nurse also attended Robyn during his illness through prayer.[67] An inquest report by a district court judge stated that both the practitioner and the nurse, as well as Nathan Talbot, a spokesman for the church, had "contributed" to Robyn's death by discouraging David and Ginger Twitchell from seeking conventional medical treatment.[68]

The visible condition of Robyn's illness was a central issue in the case because the court needed to determine whether the Twitchells should have acted differently.[69] Extensive trial testimony[70] provided conflicting evidence of Robyn's condition during the days before his death.[71] Testimony revealed that "the child showed symptoms of serious illness—he was not eating, he was 'moaning in pain' and, at one point, vomited a foul substance that may

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pneumonia of her 5-year-old daughter because conventional medical care was not sought." *Religion Rejected as Murder Defense*, N.Y. Times, April 20, 1989, at A17, col. 1.

62. Hirsley, *supra* note 5, § 2, at 8, col. 1.

63. *Id.*

64. *Id.* at 12, col. 2 (statement of Rep. McIntyre).

65. *Trial on Death*, *supra* note 11, at A3, col. 1.

66. *Parents' Faith, Children's Lives*, Wash. Post, July 7, 1990, at A22, col. 1 (editorial).

67. Goodrich, *Twitchell Case: Experts, Eyewitnesses Testify*, Christian Sci. Monitor, May 21, 1990, at 8, col. 2.

68. Higgins, *supra* note 28, at 30, col. 3. One juror "believe[d] church leaders should have been found liable in Robyn's death, too." English, *A Juror's View of the Twitchells*, Boston Globe, July 18, 1990, at 17, col. 1 [hereinafter *A Juror's View*]. For a discussion of imposing liability on religious faith healers as a deterrent effect, see 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, 169 (1987).

69. *Jury Convicts*, *supra* note 6, at A12, col. 4.

70. Estimates of the cost of the trial transcripts were $30,000 to $40,000. Telephone interview with Clerk of Court, Massachusetts Superior Court, Boston, Massachusetts (Sept. 17, 1990).

71. *Parents Who Relied*, *supra* note 17, at A4, col. 4.

have been his feces."[72] Abrasions on his lips and chin were probably due to acid in his vomit.[73] "His scrotum and about 15 inches of his bowel were jet black because the blood supply had been cut off. He was so dehydrated that his skin stayed up when pinched. A surgeon testified for the prosecution that Robyn's screams must have been ear-splitting."[74] However, "other witnesses, including the Christian Science 'practitioner' who cared for the boy, said his condition was alternately better and worse and that he appeared to be much better on the last day of his life, shortly before he died in his father's arms."[75] David and Ginger Twitchell also testified that although Robyn was feverish and lethargic, they believed he was recovering. The Twitchells, however, admitted that Robyn went into convulsions the night he died.[76] Prosecution and defense experts disagreed about when the bowel obstruction occurred. Experts for the prosecution maintained that the obstruction occurred several days before Robyn's death,[77] while the defense experts testified that the obstruction occurred less than twenty-four hours before death.[78]

David Twitchell's testimony was considered the most dramatic in the trial. When he was called, Robyn's father stated: "[I]f medicine could have saved him, I wish I had turned to it."[79] He further testified that despite his faith in the healing power of prayer, he would have taken Robyn to a hospital if Robyn had shown life-threatening symptoms.[80] "If I try a method of care I think is working . . . I will stick with that. If I think it's not working, I will try something else."[81] David Twitchell's testimony might also have

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72. *Id.*

73. Swan, *Speaking Out: Should Government Rule When Faith, Science Clash?*, L.A. Times, July 14, 1990, at F16, col. 1.

74. *Id.* The Christian Science nurse stated that she had never heard Robyn scream or express pain. Goodrich, *supra* note 67, at 8, col. 2; Goodrich, *Prosecution Cross-Examines David Twitchell on Care Chosen for Son Who Died*, Christian Sci. Monitor, June 11, 1990, at 9, cols. 3-4 (neighbors stating "that they heard no moaning, screaming, or crying during the time that [Robyn] was sick."). *But see* Goodrich, *Prosecution Likely to Rest Case Today in Twitchell Trial*, Christian Sci. Monitor, May 29, 1990, at 7, col. 4 (neighbors testified that the weekend before Robyn's death the moaning and screaming was so loud that they had to close their window to sleep).

75. *Parents Who Relied*, *supra* note 17, at A4, col. 5.

76. Botsford, *supra* note 11.

77. Goodrich, *Prosecution Plans Rebuttal as Twitchell Trial Continues*, Christian Sci. Monitor, June 18, 1990, at 9, col. 3.

78. *Id.* Defense expert Dr. Edward Sussman, chief of pathology at Worcester City Hospital in Massachusetts, had "obtained a history of Robyn's illness from the parents, which prosecution medical experts did not do." He added that "an accurate history is one of the most important factors in correctly interpreting autopsy findings." *Id.*

79. *Jury Convicts*, *supra* note 6, at A12, col. 4.

80. *Id.*

81. *Id.*

been the most damaging to his case. One juror stated that "when David Twitchell said that on the fifth day of the illness, he was scared because he'd never seen his son vomit so violently, that's when we all believed a reasonable person would have taken him to a doctor."[82]

Another central issue in the case was whether conventional medical care could have saved Robyn. The defense argued that "a bowel obstruction is an elusive medical problem presenting symptoms that can fool even experienced doctors."[83] Yet, the defense was likely undermined by evidence showing that both David and Ginger Twitchell had previously consulted doctors for their own ailments. David Twitchell admitted that he had consulted a dentist in 1983 when prayer did not alleviate a toothache; the dentist performed a root canal and administered Novocain.[84] The evidence also showed that Ginger Twitchell had received pain-killing medication during childbirth.[85] The prosecutor capitalized on these facts during his closing argument, asking, "[w]hat allows them to use a doctor for themselves and not for their boy . . . ? Where do they justify that? No one can justify that."[86]

IV. FREE EXERCISE CLAIM ANALYSIS

A. Parents' Free Exercise Claim

Prior to its April 1990 decision in *Employment Div., Dep't of Human Resources v. Smith*,[87] the Supreme Court of the United States had consistently held that the free exercise clause could be a valid defense to laws generally applicable to the public.[88] This was recognized in a 1972 decision, *Wisconsin v. Yoder*,[89] where the Court stated that "there are areas of conduct protected

82. *A Juror's View*, *supra* note 68.

83. *Trial on Death*, *supra* note 11, at A3, col. 5. One news report stated: "No one in the court has suggested that conventional medicine would have saved Robyn; no one can." Botsford, *supra* note 11, at 18, col. 8.

84. *Trial on Death*, *supra* note 11, at A3, col. 6.

85. *Id.*

86. *Id.* Christian Scientists customarily consult physicians in "gray areas," such as receiving dental treatment, setting broken bones, getting eyeglasses, and having a doctor or midwife attend childbirth. Sege, *Overcoming a Test of Faith*, Boston Globe, Aug. 8, 1990, at 1, col. 2, at 16, col. 6. This was exactly the argument of the *Twitchell* prosecutor.

87. 110 S. Ct. 1595 (1990).

88. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963) (invalidating unemployment compensation statute as applied to member of Seventh Day Adventist church who would not accept employment that required her to work on her sabbath, Saturday); Wisconsin v. Yoder, 406 U.S. 205 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school); Thomas v. Review Bd. Ind. Empl. Sec. Div., 450 U.S. 707 (1981) (invalidating unemployment compensation statutes as applied to member of Jehovah's Witness who would not accept transfer to department which produced fabricated turrets for military tanks).

89. 406 U.S. 205 (1972).

by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability."[90] Consistent with this principle, in 1981 the Court required the Government in *Thomas v. Review Bd. Ind. Empl. Sec. Div.*[91] to justify a substantial burden on religiously motivated conduct by means narrowly tailored to achieve a compelling state interest.[92] In other actions, the Court has refused to allow the state to assert a vague or speculative interest,[93] since, if the competing interests are not compared "on the same plane," the issue may be decided in advance by the way the question is stated.[94] Against this backdrop of applying strict scrutiny to laws implicating the free exercise clause, the Court's decision in *Smith* signals a retreat from traditional free exercise analysis.[95]

The respondents in *Smith* were dismissed by a private drug rehabilitation organization because they ingested peyote as part of the religious ceremonies

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90. *Yoder*, 406 U.S. at 219-20.

91. 450 U.S. 707 (1981).

92. *Thomas*, 450 U.S. at 718-19 ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."); *Yoder*, 406 U.S. at 215 ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."); *Sherbert*, 374 U.S. at 406 (The question is "whether some compelling state interest . . . justifies the substantial infringement of appellant's First Amendment right."); *see also* Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 141 (1987) (commenting that "such infringements must be subjected to strict scrutiny and could be justified only by proof by the State of a compelling interest."); Bowen v. Roy, 476 U.S. 693, 732 (1986) (noting that prior decisions have required a showing of a compelling state interest before refusing to grant religions exemptions); United States v. Lee, 455 U.S. 252, 257-58 (1982) ("The State may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding interest.").

93. *See Thomas*, 450 U.S. at 719 (no evidence in record to support government's alleged interest); *Yoder*, 406 U.S. at 221 (state's interest must be specific as applied to the case; general yet otherwise valid interests are insufficient); *Sherbert*, 374 U.S. at 407 (no evidence in record to support government's alleged interest).

94. Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 2 (1943). It has been suggested that

> [t]he purpose of almost any law can be traced back to one or another of the fundamental concerns of government: public health and safety, public peace and order, defense, revenue. To measure an individual interest directly against one of these rarified values inevitably makes the individual interest appear the less significant.

Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 330-31 (1969).

95. This retreat from the free exercise clause analysis as discussed above was foreshadowed by other recent Supreme Court cases. *See generally* Gillette v. United States, 401 U.S. 437 (1971) (Court held the exemption in the Military Secret Service Act was valid only if all wars were against person's religious beliefs, not if just one particular war violated those beliefs); United States v. Lee, 455 U.S. 252 (1982) (Court held that Amish were required to pay social security taxes notwithstanding their religious convictions against it).

at a Native American church.[96] They were subsequently denied unemployment compensation under a state law disqualifying employees discharged for work-related misconduct.[97] After distinguishing previous precedent,[98] the Court held that when the free exercise clause is implicated by itself, a religious belief may not excuse breaches of generally applicable and even-handedly applied criminal statutes.[99] By distinguishing previous decisions, the *Smith* Court did not completely abandon its traditional analysis, noting that there were "hybrid" situations in which the free exercise clause would continue to bar application of a neutral, generally applicable law.[100] The majority reasoned that while "a non-discriminatory religious-practice exemption is *permitted*, or even desired, is not to say that it is constitutionally *required*."[101] Thus, as with other recent Supreme Court decisions,[102] the states may determine for themselves whether to enact an exemption for Native Americans, so that use of peyote in religious ceremonies will not result in criminal prosecution.[103]

The *Smith* decision may be seen as creating two standards for free exercise analysis. Under the first standard, the state may, if it chooses and if *only* the

96. Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595, 1597-98 (1990).

97. *Id.* at 1598.

98. Previous cases were distinguished on two grounds. First, those cases involved protection under the free exercise clause in conjunction with other constitutional protection. *Id.* at 1601. Second, unlike the "generally applicable prohibitions" in the case at hand, the balancing test used in Sherbert v. Verner, 374 U.S. 398, 402-03 (1963), was "developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct." *Smith*, 110 S. Ct. at 1603.

99. *Smith*, 110 S. Ct. at 1603.

100. *See id.* at 1602. Justice Blackmun dissented, stating that the majority decision "effectuate[d] a wholesale overturning of settled law concerning" the free exercise clause. *Id.* at 1616 (Blackmun, Brennan, Marshall, J.J., dissenting).

101. *Id.* at 1606 (emphasis supplied).

102. *See, e.g.*, Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841, 2855-56 (1990) (states may allow substituted judgment to determine whether life sustaining elements will be withdrawn); Hodgson v. Minnesota, 110 S. Ct. 2926, 2944 (1990) (states may require parental consent for minors to obtain abortions). In addition, when the Department of Health and Human Services removed the religious exemption requirement (originally resulting in exemptions for faith healers), it stated that no policy shift was intended. HHS merely intended to allow states to determine whether faith healing constituted neglect. Comment, *When Rights Clash*, *supra* note 5, at 592-93. For further discussion of the religious exemptions, see *supra* notes 44-64 and accompanying text.

103. "In fact, the federal government and 23 states have exempted religious use of peyote from criminal prohibitions. . . ." Fein & Reynolds, *On Faith and Law: Secular Encyclical*, Legal Times, June 18, 1990, at 18, col. 1, at 20, col. 1 (editorial); *see also Smith*, 110 S. Ct. at 1606 ("It is therefore not surprising that a number of States have made an exception to their drug laws for sacramental peyote use.").

free exercise clause is implicated, exempt from criminal prosecution those who practice spiritual healing.

Under the second standard, a hybrid situation would bar the application of a neutral, generally applicable law. The hybrid analysis is triggered when the free exercise right is implicated in conjunction with another constitutional right.[104] Providing examples of possible hybrid situations, Justice Scalia, writing for the *Smith* majority, stated, in dicta:

> The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or *parental right*. . . . There being no contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the *raising of one's children in those beliefs* . . . .[105]

Furthermore, in the context of the rights of parents to direct the education of their children,[106] Justice Scalia stated:

> The Court's holding in *Pierce* [*v. Society of Sisters*,[107]] stands as a charter of the *rights of parents to direct the religious upbringing of their children*. And, when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirements under the First Amendment.[108]

As the *Twitchell* appeal[109] is considered in the post-*Smith* environment, it is possible for the Twitchells to argue that their case presents a hybrid situation. The Twitchells may contend that they have a parental interest in directing their child's religious upbringing and that this interest is especially

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104. Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595, 1601-02 (1990).

105. *Id.* at 1602 (emphasis supplied).

106. *See* Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.").

107. 268 U.S. 510 (1925).

108. *Smith*, 110 S. Ct. at 1601 n.1 (emphasis supplied) (quoting Wisconsin v. Yoder, 403 U.S. 205, 233 (1972), where the Court invalidated a compulsory school attendance law as it applied to Amish parents, refusing on religious grounds, to send their children to school).

109. Whether the *Twitchell* case itself will reach the Supreme Court remains to be seen. However, it is interesting to note that the Supreme Court let stand a dismissal by the Michigan Court of Appeals in a similar case involving Christian Scientists by denying a writ of certiorari. Brown v. Laitner, 432 Mich. 861, 435 N.W.2d 1, *cert. denied*, 110 S. Ct. 326 (1989); *see also* Walker v. Superior Court, 47 Cal. 3d 112, 763 P.2d 852, 253 Cal. Rptr. 1 (1988), *cert. denied*, 109 S. Ct. 3186 (1989). And, in a recent decision in another Christian Science case, the Second District Court of Appeals in Florida did not find the *Smith* hybrid analysis to be controlling. Hermanson v. State, 570 So. 2d 322 (Fla. Dist. Ct. App. 1990).

valid during a child's early and formative years.[110] By administering faith healing to their son during his illness, the Twitchells may argue that they were "directing the religious upbringing of their children" and "raising their children in those beliefs." Thus, by asserting both their parental right to direct the upbringing of their children and their first amendment right to exercise freely their religion, the Twitchells may satisfy the *Smith* hybrid requirement. From this, the Twitchells can argue that they should be exempt from prosecution.

The success of a Twitchell hybrid argument, however, may be limited by their parental right claim. In *Wisconsin v. Yoder*,[111] the Court indicated that "the power of the parent, even when linked to a free exercise claim, may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child."[112] This statement could restrict the Twitchells' use of the hybrid analysis since there can be no doubt that the health or safety of Robyn Twitchell was jeopardized by his parents' acts or omissions.

Yoder's qualification of protected parental rights may weaken the claims of Christian Science parents like the Twitchells. Likewise, the facts of *Yoder* present a more compelling scenario than *Twitchell*. The Amish parents in *Yoder*, for example, believed that they would both "expose themselves to the danger of the censure of the church community" and "endanger their own salvation and that of their children."[113] In contrast, David and Ginger Twitchell, according to news reports, did not believe they would have been censured by their church if they had resorted to conventional medical treatment for their son,[114] nor is there any indication that they believed their salvation, or their child's, was jeopardized.[115]

Yet, despite these differences, *Yoder* and *Twitchell* implicate similar principles. The Court in *Yoder* was concerned with the "impact that compulsory high school attendance could have on the continued survival of Amish communities."[116] This survival argument could also be made for Christian Scientists: They vehemently assert that without faith healing there is no Christian Science religion.[117] In addition, the underlying law in *Yoder* and in *Twitchell*, by threatening parents with criminal sanctions, affirmatively

110. Wisconsin v. Yoder, 406 U.S. 205, 213-14 (1972) (the critical question is who determines the limitations on parents—the legislature or the judiciary).

111. 406 U.S. 205 (1972).

112. *Id.* at 233-34.

113. *Id.* at 209.

114. *See supra* notes 26-28 and accompanying text.

115. *Id.*

116. *Yoder*, 406 U.S. at 209.

117. *Trial on Death*, *supra* note 11.

compels both sects "to perform acts undeniably at odds with fundamental tenets of their religious beliefs."[118]

B. Child's Free Exercise Claim

On appeal, the Twitchells assert that their oldest child Jeremy's free exercise of religion is being hindered. "[I]t's as much his choice now as it is ours, and this infringes on his choice, because he's a minor under us, so he's bound by the judge's decision. He wasn't on trial."[119] In a recently decided Florida case,[120] the convicted Christian Science parents stated the same concern to a friend paying a condolence visit: The child "fully knew that the choice was hers, whether to live or die . . . . [She] glimpsed something from the other world, and she wanted that more than she wanted this world."[121] Even the prosecution in *Twitchell*, by asking "What religion [is] the baby?,"[122] has recognized this issue.

According to the *Yoder* dicta,[123] the child's religion is presumptively the parents' religion because the parents are entitled to "direct the religious upbringing of their children."[124] Furthermore, it is axiomatic that parents will raise their child in their own beliefs. This parental guidance and control is not unusual: Parents make many decisions for their children until they are able to make decisions for themselves, or until the law, by declaring the child emancipated, removes the parents' legal ability to make decisions for their children. Accordingly, the state is placed in a precarious position because if the parents are not allowed to "direct the religious upbringing of their children,"[125] then the state is de facto doing so and is thus violating the child's right to exercise freely his religion.[126] The majority in *Yoder* touched on this issue only peripherally.[127] The dissent in *Yoder* argued that "if an Amish child desires to attend high school, and is mature enough to have that desire

118. *Yoder*, 406 U.S. at 218.

119. Marks, *Couple Keeps the Faith; Christian Scientist to Honor God—and Court*, Newsday, Aug. 5, 1990, at 6, col. 2.

120. Hermanson v. State, 570 So. 2d 322 (Fla. Dist. Ct. App. 1990).

121. Dolnick, *When Faith and Medicine Collide*, Wash. Post, Sept. 25, 1990, at Z14, col. 1.

122. *Trial on Death*, *supra* note 11, at A3, col. 5.

123. *See supra* text accompanying note 108.

124. Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595, 1601 n.1 (quoting Wisconsin v. Yoder, 403 U.S. 205, 233 (1972)).

125. *Id.*

126. However, by classifying the child's interests in faith healing not as protecting the child's *rights* (which are not coequal to an adult's, except in limited circumstances) but as protecting the child's *welfare*, the state can justify restricting a child's free choice, even when the child chooses to assert his free exercise right. Comment, *When Rights Clash*, *supra* note 5, at 606. In addition, the court could be violating the establishment clause. *See supra* note 16.

127. *Yoder*, 406 U.S. at 231.

respected, the State may well be able to override the parents' religiously motivated objections."[128] The majority, however, did not consider that point, as it was not at issue in that case.[129] Neither was the issue reached in *Twitchell*; since Robyn was only two years old and, even assuming he would have wanted to receive conventional medical care, he could not have expressed that desire.

V. CONCLUSION

Commonwealth v. Twitchell extends the parens patriae power of the state further than ever before. The case is also reported and promoted as a case asserting children's rights.[130] This assertion, however, is not entirely accurate since it does not address the fundamental principle at stake: Who "owns" the child and who will determine what (including religion) is in the child's best interest. Will it be the state or the parents? One report stated that Americans were "being asked to judge between David and Ginger as parents and the state as guardians of any future children such as Robyn."[131]

Because of the death of Robyn Twitchell, some may be reluctant to recognize that *Twitchell* threatens both parental rights and religious freedom. Yet, allowing the state to usurp the exercise of parental responsibility is not the answer. Whether parents choose to forego conventional medical treatment for either religious or non-religious reasons, their wishes should be honored, just as parental decisions are honored in many other areas. Parenting offers no guarantees. Parents make choices daily that will influence their children for better or worse. Sometimes parents make the wrong choice. When that happens, no one suffers more than the parents themselves. Because the choices are complex and difficult, "shouldn't we ask whether the [*Twitchell*] result is a more free and loving society or another step toward an authoritarian state?"[132]

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128. *Id.* at 242.

129. *Id.* at 231. The Court continued by stating:

> Our holding in no way determines the proper resolution of possible competing interests of parents, children, and the State in an appropriate state court proceeding in which the power of the State is asserted on the theory that Amish parents are preventing their minor children from attending high school despite their expressed desires to the contrary. Recognition of the claim of the state in such a proceeding would, of course, call into question traditional concepts of parental control over the religious upbringing and education of their minor children recognized in this Court's past decisions.

Id.

130. *Jury Convicts*, *supra* note 6.

131. Botsford, *supra* note 11, at 18, col. 8.

132. Johnsen, *Twitchell Case Reflections*, Christian Sci. Monitor, Aug. 15, 1990, at 19, col. 3.