

1993

Abraham, Isaac, and the State: Faith-Healing and Legal Intervention

Henry J. Abraham

Follow this and additional works at: <http://scholarship.richmond.edu/lawreview>



Part of the [Religion Law Commons](#)

Recommended Citation

Henry J. Abraham, *Abraham, Isaac, and the State: Faith-Healing and Legal Intervention*, 27 U. Rich. L. Rev. 951 (1993).

Available at: <http://scholarship.richmond.edu/lawreview/vol27/iss5/2>

This Article is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

ARTICLES

ABRAHAM, ISAAC AND THE STATE: FAITH-HEALING AND LEGAL INTERVENTION*

*Henry J. Abraham***

I. INTRODUCTION

As a Cambridge magistrate in the England of 1960, Lady Rothschild doubtless considered herself an unlikely candidate for participation in a biblical drama reenactment. Nonetheless, on October 21, 1960,¹ she willingly played the role of the last-minute angel of mercy in a virtual reenactment of the story of Abraham and Isaac²—a story which, with unfortunate variations in the outcome for the child, seems destined to be repeated frequently in the future.

* The author gratefully acknowledges the invaluable aid of his research assistant, Edward Francis Kelly, J.D., M.A., and Ph.D. Candidate, University of Virginia, 1992-93.

** Henry J. Abraham is the James Hart Professor of Government and Foreign Affairs at the University of Virginia.

1. *Court Edict Saves British Baby's Life; Parents Overruled*, N.Y. TIMES, Oct. 22, 1960, at 25 [hereinafter *Court Edict*]. See also Henry J. Abraham, *Religion, Medicine, and the State: Reflections on Some Contemporary Issues*, 22 J. CHURCH & ST. 423 (1980).

2. *Genesis* 22: 1-14. Obedient but not understanding why the life of his only son Isaac should be forfeited, Abraham was at the point of sacrificing his son when an angel of the Lord called out to him and stayed his hand. The Lord rewarded Abraham's faith and did not require the sacrifice of his son. See *id.*

On the occasion in question here, a day-old boy in a Cambridge hospital was at the point of death or at least severe brain damage.³ Doctors had concluded that only an immediate and complete change of blood would save him. However, the child's parents were devout Jehovah's Witnesses and refused to consent to a blood transfusion because their religious beliefs forbade it.⁴

Apprised of the crisis by a county welfare officer, Lady Rothschild immediately convened an emergency court at the hospital, compelling the baby's father to appear promptly before the court. He continued to refuse to consent to the treatment, explaining, "[m]y wife and I are dedicated servants of God, and the decisions we are making are on His word. If we take a course of action which might prolong life now, everlasting life will be cut off."⁵ Undeterred, Lady Rothschild inquired whether the father would take the child into his home if she ordered the transfusion. When the father confessed his love for the child, and answered in the affirmative, Magistrate Rothschild immediately committed the baby into the temporary care of the welfare officer.⁶ The officer provided the necessary legal consent and the transfusion operation commenced a few minutes later. Within twenty-four hours, the child was out of danger and legal custody was returned to the parents.⁷

The above scenario is as old as Genesis, but the outcome is not always as happy as the angel of the Lord and Lady Rothschild were able to make it. This article will examine those modern occasions on which the law is called upon to intervene in a family's decisionmaking process, or to sit in judgment of that process after-the-fact, when faith, medicine, and the law collide.

3. *Court Edict*, *supra* note 1, at 25.

4. *Id.* Jehovah's Witnesses interpret passages from Leviticus and the Acts of the Apostles as forbidding blood transfusions. *Acts* 15:20 ("abstain . . . from blood"); *Leviticus* 17:10 ("any man . . . who eats any sort of blood, I shall certainly set my face against . . . and I shall indeed cut him off from among his people"). See *Washington v. King County Hosp.*, 278 F. Supp. 488, 502 n.8 (W.D. Wash. 1967).

5. Abraham, *supra* note 1, at 435; *Court Edict supra* note 1, at 25.

6. *Court Edict*, *supra* note 1, at 25.

7. *Id.*

II. PARAMETERS OF THE DECISIONMAKING PROBLEM

The clash between medical indications and personal decisionmaking presents a variety of unresolved legal issues that could not have been foreseen by our political and judicial forbears. In an age of advancing medical technology, each generation is presented with new questions and hard choices, and sometimes the old principles clash with one another instead of providing answers.

One time-honored value, which still provides some guidance, is personal self-determination. The Supreme Court expressed this principle in 1891, stating that every individual is entitled to "possession and control of his own person, free from all restraint or interference from others, unless by clear and unquestionable authority of law."⁸ Thus, in the situation where a competent adult refuses to undergo "necessary" medical treatment, the legal difficulties are almost always resolved in favor of the adult's freedom to decide for himself. This includes the situation where a fully conscious and competent adult requests withdrawal of life-sustaining treatment.⁹ Whatever the gravity of the consequences to his own person, courts have nearly always deferred to a competent individual's right to decide his destiny unencumbered by the state.¹⁰

8. *Union Pac. R.R. v. Botsford*, 141 U.S. 250, 251 (1891).

9. *See, e.g., Tune v. Walter Reed Army Medical Hosp.*, 602 F. Supp 1452, 1455 n.8 (D.C. 1985) (noting that society's concern in prevention of suicide is not involved when permission is being sought, not to terminate a healthy life by artificial, self-induced means, but merely to allow nature to take its course).

10. Commentator Ivy B. Dodes has cited four state-court cases to this effect, including *In re Brown*, 478 So.2d 1033 (Miss. 1985), in which the court held that the state's interest in keeping a murder witness alive to testify at trial did not override the individual's right to refuse a blood transfusion consistent with the free exercise of his faith as a Jehovah's Witness. Ivy B. Dodes, Note, '*Suffer the Little Children . . . : Toward a Judicial Recognition of a Duty of Reasonable Care Owed Children By Faith Healers*', 16 *HOFSTRA L. REV.* 165, 184 n.107 (1987).

But a problem arises, in the case of an adult, when there is a question as to whether the person is in fact "competent" and able to appreciate the consequences of the choice at hand. *But see Court Rejects Pleas of Woman Facing Amputation of Feet*, WASH. POST, Feb. 23, 1978 (reporting a 72-year-old woman stricken with gangrene objects to the amputation of her feet). The woman was declared incompetent to decide in *State Dep't of Human Services v. Northern*, 563 S.W.2d 197 (Tenn. Ct. App. 1978).

The competent adult thus presents a relatively easy case. However, those cases where an adult patient is not competent to decide because of severe injury or illness present special problems. The courts instinctively resort to the principle of self-determination even in these cases, and try to ascertain what the will of the patient was or would have been in the situation presented. But the principle is often of little use where the self is no longer in a position to determine anything. Instead, the question of surrogate decisionmaking arises, with all its predictable complications.

In these vexing cases, the need for live-saving medical treatment is generally taken for granted at the onset of the patient's calamity. However, when the patient neither recovers nor dies, falling into a persistent vegetative state without hope of recovery, the decisionmaking about whether to withdraw the life-sustaining medical treatment falls to others, who must reluctantly accept the burden. In this most difficult area, the courts still make a sometimes desperate effort to determine what the clear will of the patient was before the onset of the debilitating condition. If, as often happens, the patient's prior wishes are unclear, there simply is no easy solution. Courts have groped for an acceptable answer to this problem with only limited success. Families, hospitals, and the public have incurred great expense while the riddles of artificially sustained life are imperfectly sorted out.¹¹ Legislators, for their part, have begun to provide a partial answer in the form of living will legislation that is now on the books in one form or another in at least forty-one states.¹²

These illustrative clashes among the will of a patient, the desires of the patient's family, the patient's medical prognosis, and the interests of the state, are complex enough. However, the mixture of rights and interests involving life and death becomes even more complex when the inscrutable element of religious belief becomes part of the equation. Thus, when a

11. See, e.g., *Cruzan v. Director, Mo. Health Dep't*, 497 U.S. 261 (1990); *Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d 417 (Mass. 1977); *In re Conroy*, 486 A.2d 1209 (N.J. 1985); *In re Quinlan*, 355 A.2d 647 (N.J. 1976).

12. See Henry R. Glick, *The Right-to-Die: State Policymaking and the Elderly*, 5 J. AGING STUDIES 283, 289 (1991).

minor is too young to decide for himself, and his parents have decided against medical treatment for religious reasons, then society is presented with a problem both vexing and potentially tragic. For we must respect the free exercise of religion, as well as protect our minor citizens from abuse and neglect. When these duties clash, the state, in its role of *parens patriae*,¹³ is sometimes called upon to pass judgment over the religious practices of competent adults, and a great clash ensues between individual religious freedom and the duties of the state with regard to minor citizens. In the struggle to come to terms with this conflict between free exercise of religion on the one hand, and our perception of medical reality on the other, the law has not altogether succeeded.

The law is fairly clear with respect to at least one aspect of this clash. Where parents have refused to consent to life-saving medical treatment for their minor child based on religious beliefs, and when there is still time to intervene to save the life of the child, the courts of both England and the United States have not hesitated to protect the child first. As Lady Rothschild commented, whatever other rights or interests there may be, "the responsibility to protect the life of the child is ours."¹⁴

Thus, where circumstances have permitted, courts have consistently intervened to protect children's lives and health by assigning temporary legal custody of the child to an organ of the state, and by consenting to the appropriate medical treatment.¹⁵ The governing principles in this area have developed over many decades in the state courts of this country, particularly in cases involving the Jehovah's Witnesses, and the ordering of needed blood transfusions.¹⁶

13. BLACK'S LAW DICTIONARY 1114 (6th ed. 1990) ("Parens patriae,' literally 'parent of the country,' refers traditionally to role of state as sovereign and guardian of persons under legal disability It is a concept of standing utilized to protect those quasi-sovereign interests such as health, comfort and welfare of the people") (citations omitted).

14. Abraham, *supra* note 1, at 436.

15. The "legal custody" concept is well-suited to this purpose, for it allows the parents to retain physical custody of the child—with all the attendant benefits to everyone involved—while temporarily assigning to the state the right to decide questions of medical treatment. See Elizabeth J. Sher, *Choosing for Children: Adjudicating Medical Care Disputes Between Parents and the State*, 58 N.Y.U. L. REV. 157, 158 n.8 (1983).

16. *Id.* at 162 n.22 (citing a number of cases to this effect, including *People ex rel.*

Our highest court first articulated these principles—and eloquently so—in a case not involving medical treatment at all. The case was *Prince v. Massachusetts*,¹⁷ decided in 1944. This case presented the question of whether the child labor laws applied to an aunt who was the legal guardian of her nine-year-old niece, and who claimed an exemption from the laws on religious grounds. The aunt, a Jehovah's Witness, was brought into court for employing her nine-year-old niece to distribute the *Watchtower* and *Consolation Magazines* on public streets. The Court held that the aunt was not entitled to an exemption from the protective child labor laws on account of her religion.¹⁸ The Court's decision was by an 8-1 vote with a concurring opinion from Justices Jackson and Frankfurter, and with Justice Murphy in dissent. Justice Rutledge, speaking for the Court, stated:

[N]either rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well-being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways The right to practice religion does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.¹⁹

The Court concluded: "Parents may be free to become martyrs themselves. But it does not follow [that] they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."²⁰

Wallace v. Labrenz, 104 N.E.2d 769 (Ill. 1952), *cert. denied*, 344 U.S. 824 (1952); Morrison v. State, 252 S.W.2d 97 (Mo. Ct. App. 1952); State v. Perricone, 181 A.2d 751 (N.J. 1962), *cert. denied*, 371 U.S. 890 (1962); Santos v. Goldstein, 16 A.D.2d 755, 227 N.Y.S.2d 450 (N.Y. App. Div. 1962), *appeal dismissed*, 232 N.Y.S.2d 1026 (1962); *In re Brooklyn Hosp.*, 258 N.Y.S.2d 621 (N.Y. Sup. Ct. 1965); *In re Clark*, 185 N.E.2d 128 (Ohio C.P. Lucas 1962); Mitchell v. Davis, 205 S.W.2d 812 (Tex. Civ. App. 1947).

17. 321 U.S. 158 (1944).

18. *Id.* at 161-62.

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

20. *Id.* at 170.

The Court's language here was limited to the facts of the case, and so might have remained non-binding dicta, if not for a rare federal case directly on point which arose more than twenty years later in 1967. *Jehovah's Witnesses in the State of Washington v. King County Hospital*²¹ involved a class action challenge to the constitutionality of Washington's Juvenile Court Act by the 8,900 Jehovah's Witnesses in the state.

Under the Juvenile Court Act, whenever it appeared that the child of Jehovah's Witnesses could possibly need a blood transfusion in the course of medical treatment and the parents refused to consent, the attending physician or the hospital would petition the state courts for removal of the child from the legal custody of the parents pending the medical treatment. The courts of the state generally granted these petitions, made the children wards of the court for the period medically necessary, and consented to the transfusions over the religious objections of the parents.²² The parents' constitutional challenge in the *King County Hospital* case claimed that this practice, and the underlying statute, violated the First Amendment's free exercise clause, and the equal protection clause of the Fourteenth Amendment.

A special three-judge federal district court was convened to hear the case.²³ It found no difficulty in affirming the constitutionality of Washington's Juvenile Court statute. Possibly considering itself bound by the Supreme Court's language in *Prince*, and persuaded by the analysis of several state court cases on the same subject, the three-judge court concluded that the statute must stand, notwithstanding the plaintiff's religious objections.²⁴

Naturally dissatisfied with this judgment, the plaintiff Jehovah's Witnesses appealed to the United States Supreme Court, which then resolved the issue with crystal clarity, per curiam, and without comment. The opinion in the case stated, in its

21. 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd per curiam*, 390 U.S. 598 (1968).

22. *Id.* at 491.

23. *Id.*

24. *Id.* at 505.

entirety: "The judgment is affirmed, *Prince v. Massachusetts*, 321 U.S. 158."²⁵

Thus, the ability of a state to exercise its responsibility as *parens patriae*, and to intervene in a family's decisionmaking process where a child's life is at stake, is clear, regardless of the parents' religious convictions. An apparently unbroken line of state court decisions had upheld this principle even before the Jehovah's Witnesses challenged Washington's juvenile court laws in the federal courts.²⁶

In fact, even where the danger to the child falls short of a life-threatening situation, but threatens the child's continued health and development, courts have frequently held that the state may intervene, largely under the principles developed by state common law and enunciated in *Prince v. Massachusetts*. The standards for such intervention are of course, not as easily articulated as they are when a child's life is at stake. However, the sensible thrust of this line of cases is that the state will intervene when the child's life, limb, health, or future is at stake.²⁷

This is perhaps as it should be. In many of these cases, as in the case adroitly resolved by Magistrate Rothschild in 1960, *all the parties win*: the state, because it has successfully exercised its responsibility to protect the lives of its minor citizens; the child, because the child lives and has perhaps better prospects for future health; and the parents, both because the child is alive and well, and because in most cases they have not violated their conscience by choosing the sin of medical treatment.²⁸ Instead, the "sin" falls upon the state, which accepts it willingly. Moreover, the child himself may be regarded as blameless.

Of course, the religious beliefs of the parents and the interference with their decisionmaking in some cases render their satisfaction less than complete, especially if they should feel morally or spiritually tainted even by unavoidable subjection to court order. But, unless the state is to adopt the religious

25. *Jehovah's Witnesses v. King County Hosp. Unit No. 1*, 390 U.S. 598 (1968).

26. See *supra* note 16.

27. See *Sher*, *supra* note 15, at 162-65.

28. See *Abraham*, *supra* note 1, at 436.

beliefs of a faith-healing denomination or abandon its role as *parens patriae* altogether, this cannot be helped. On the whole, a more desirable legal result for all parties involved can hardly be conceived than that executed by Lady Rothschild, standing in, as it were, for the angel of the Lord.²⁹

However, these clashes between the state, the religious beliefs of a child's parents, and brute physical and medical reality become even more vexatious and tragic in those cases where intervention has not been timely. In these cases, tragedy has already ensued. No amount of legal intervention can now save the child's life. No careful balancing of interests can now satisfy the State's obligations as *parens patriae*. Nothing can restore the status quo ante. Here, the parents' defense of free exercise of religion frequently evokes much sympathy. Moreover, the sympathy thus evoked has deterred many a court and prosecutor from the proceeding, despite what sometimes has apparently been the easily avoidable death of a child.³⁰

Some argue that these tragic cases carry their own punishment. They insist that prosecution for child neglect or manslaughter under these circumstances simply adds unnecessary insult to tragic injury. The parents, the argument goes, did not neglect the child per se, but cared for the child in the way they thought best. Further, having just suffered the grievous loss of a child, parents should not be required to suffer further punishment at the hands of the state for simply practicing their religious beliefs.³¹ Needless to say, others disagree strongly; some go as far as to urge prosecution for murder.³²

What then is the state's proper response in the heart-wrenching situation where parents, acting upon sincere religious

29. *Id.*

30. See Abraham, *supra* note 1, at 432 (citing 100 A.L.R. 2d 483, 514-15 (1965)).

31. See, e.g., Shelli D. Robinson, Comment, *Who Owns the Child?*, 7 J. CONTEMP. HEALTH L. & POL'Y 413 (1991) ("Whether parents choose to forego conventional medical treatment for either religious or non-religious reasons, their wishes should be honored Sometimes parents make the wrong choice. When that happens, no one [sic] suffers more than the parents themselves.").

32. See, e.g., Judith I. Scheiderer, Note, *When Children Die as a Result of Religious Practices*, 51 OHIO ST. L.J. 1429, 1445 (1990) (suggesting that the state should prosecute for murder rather than manslaughter).

beliefs, have refused life-saving medical treatment resulting in the death of their child?

Unfortunately, the law as it stands on this point is rather confused and inconsistent. Neat resolution is complicated by the natural human sympathies for both the children who have died and for the parents who mourn them. Legislators, too, are reluctant to inject themselves into this delicate decisionmaking process or to pass judgment upon its results. Consequently, the federal government and the states have stepped only gingerly into this area in an attempt to provide some protection for both the children and the parents. Ironically, however, such legislation has often complicated rather than clarified the issue. Although this tragic line of cases and statutes has a history stretching back at least to the latter part of the nineteenth century, the results have been repeatedly unsatisfactory and inconsistent, and courts and juries still struggle for a solution.

III. REGULATING FAITH: SOME EARLY HISTORY³³

The first attempts of the English courts and Parliament to respond to four faith-healing cases during the latter part of the nineteenth century illustrate the difficulties that have attended this area of the law ever since advances in medical care began to provide arguably dependable remedies for grievous illnesses.³⁴ It seems that an English sect known as "The Peculiar People" believed that the use of medical care showed a lack of

33. Evidently, religion and medicine have long been uneasy bedfellows in the Western world. See *People v. Pierson*, 68 N.E. 243 (1903) (reporting that for a thousand years it was considered dishonest in the West to practice physics or surgery). The Church's Lateran Council of the thirteenth century forbade physicians to practice their arts except in the presence of a priest, and the proscription was eventually enforced by excommunication. *Id.* at 245, noted in Daniel J. Kearney, Comment, *Parental Failure to Provide Child with Medical Assistance Based on Religious Beliefs Causing Child's Death*, 90 DICK. L. REV. 861, 873 (1986). Given the state of the medical arts at the time, these suspicions may well have been justified.

34. See Scheiderer, *supra* note 32, at 1429-31; Paula A. Monopoli, *Allocating the Costs of Parental Free Exercise: Striking a New Balance Between Sincere Religious Belief and a Child's Right to Medical Treatment*, 18 PEPP. L. REV. 319 (1991); see also Robert L. Trescher & Thomas N. O'Neill, *Medical Care for Dependent Children: Manslaughter Liability of the Christian Scientist*, 109 U. PA. L. REV. 203, 206-07 (1960).

faith in God.³⁵ In each of the four principal cases involving the Peculiar People which arrived in the English courts, a minor child had died after the parents declined to seek medical assistance for the child's illness, and criminal charges were brought against the parents. The results were mixed.

In 1868, the judge in *Regina v. Wagstaffe*³⁶ left the issue to the jury to decide whether the actions of the parents, based on their sincere religious beliefs, were negligent under the circumstances. The jury acquitted. The case attracted the attention of Parliament, however, and the Mother of Parliaments immediately passed an amendment to the Poor Laws to prevent similar tragedies in the future. The amendment required that parents or legal guardians provide medical care for children with serious illness, on pain of misdemeanor for willful neglect.³⁷

Nevertheless, six years after the 1868 Poor Law amendment was passed, a two-year-old child among the Peculiar People died of pneumonia while the parents prayed; yet the trial judge, not mentioning the statute, directed a verdict of not guilty. Evidently, the judge simply took a dim view of contemporary medical practice, and did not find the requisite causal relationship between failure to provide medical care and the child's death from pneumonia. He therefore found no failure of duty in the parents' decision to resort to nursing and prayers instead of "calling in a doctor to apply blisters, leeches, and calomel. . . ."³⁸ Subsequent cases in England were far more stern, and expressed more confidence in the medical profession by finding guilt even where the alleged neglect was based on a mistaken judgment that medical assistance was not needed,

35. See *Regina v. Wagstaffe*, 10 Cox Crim. Cas. 530 (1868).

36. *Id.*

37. The amendment stated in part that "[w]hen any parent shall willfully neglect to provide adequate food, Clothing, Medical Aid, or Lodging for his Child . . . whereby the Health of such Child shall have been . . . injured, he shall be guilty of an offence" Christine A. Clark, *Religious Accommodations and Criminal Liability*, 17 FLA. ST. U. L. REV. 559, 562 (1990) (quoting Poor Law Amendment Act, 1868, 31 & 32 Vict., ch. 22, § 37). This was evidently the first statute of its kind in England or the United States to impose a duty of medical care upon a parent or guardian. *Id.*

38. *Regina v. Hines*, 33 L.T.R. 675, 676 (1878); noted in *Regina v. Downes*, 1 L.R.-Q.B. 25 (1875).

and where the responsible parent believed that it was wrong to call for medical aid.³⁹

Like the early English cases, early American cases portrayed a certain ambivalence about criminal liability for reliance upon faith-healing. In *State v. Sandford*,⁴⁰ for example, the defendant, the leader of a close-knit religious community, was charged with manslaughter in connection with the death of a fifteen-year-old boy by illness and starvation, partly as a result of a religious fast. The defendant was convicted after a jury trial, but the conviction was overturned on appeal. It appeared to the appellate court that the jury instructions had left open the impermissible possibility that the verdict turned on the question of whether the jury thought faith-healing was efficacious.⁴¹ Thus, the defendant's manslaughter conviction was overturned.

In contrast, the early case of *People v. Pierson*⁴² involved a charge under a statute specifically creating misdemeanor liability for failure to provide needed medical care for children. The judge instructed the jury that a religious belief in the efficacy of faith-healing and the inefficacy of medicine was not a legal excuse for failure to comply with the statute.⁴³ Detecting no excuse, the jury found the defendant guilty. The New York Court of Appeals affirmed the conviction, holding that the following jury instruction was not erroneous:

[I]f at the time [the defendant] refused to call a physician, he knew the child to be dangerously ill, his belief constitutes no defense whatever to the charge made. In other words, no man can be permitted to set up his religious belief as a defense to the commission of an act which is in plain violation of the law of the state.⁴⁴

These essentially inconsistent early English and American cases and statutes illustrate the legal community's historically

39. *Regina v. Downes*, 1 L.R.-Q.B. 25 (1875).

40. 59 A. 597 (Me. 1905).

41. *Id.*

42. 68 N.E. 243 (N.Y. 1903).

43. *Id.*

44. *Id.* at 244.

equivocal response to this clash of law, faith, and medicine. Courts and legislators in the United States have continued their ambivalence in the face of this difficult issue to this day. In fact, in a talk I gave thirteen years ago, I was able to say that there apparently exists "no appellate case of record upholding the conviction of a parent or guardian on homicide charges where religious belief was presented as a defense."⁴⁵ While there had been convictions for misdemeanors, the cases involving one degree or another of homicide⁴⁶ had all been overturned on appeal for one reason or another.⁴⁷ In light of this fact, I have not been alone in suggesting that courts of appeal have been very creative in finding ways to overturn these verdicts because of sympathy for the bereaved parents.⁴⁸ Today, however, the courts have rounded this corner. This may be because there is less sympathy for religious practice, more confidence in medicine or because courts have begun to lose patience with the apparently avoidable loss of life. In any event, no longer can it be said that no homicide convictions have been upheld upon appeal.⁴⁹

45. Abraham, *supra* note 1, at 432 (citing Catherine W. Laughran, *Religious Beliefs and the Criminal Justice System: Some Problems of the Faith Healer*, 8 LOY. L. REV. 396, 407 n.48 (1975)).

46. "Homicide," the killing of one human being by the act, inducement, or omission of another human being, includes a range of offenses that involve either purposefully, knowingly, recklessly, or negligently causing death. The term thus includes murder, manslaughter, and negligent homicide, all generally classified as felonies. See BLACK'S LAW DICTIONARY 734 (6th ed. 1990).

47. See, e.g., *People v. Arnold*, 426 P.2d 515 (Cal. 1967) (overturning conviction on appeal for procedural error in case involving child suffering from intestinal obstruction which mother treated with enemas, compresses, and prayer); *Craig v. State*, 155 A.2d 684 (Md. 1959) (reversing parents' conviction of manslaughter, finding that proximate cause of death was illness, not neglect).

48. See Abraham, *supra* note 1, at 432 (observing reversals for failure to show proximate cause, erroneous jury instructions, failure of the state to file a timely bill of particulars, and insufficiency of the evidence). This trend, if indeed it may be called such, has not disappeared. See also *State v. McKown*, 461 N.W.2d 720 (Minn. Ct. App. 1990). In *McKown*, an 11-year-old boy died of diabetes complications after withdrawal of insulin in favor of reliance on prayer. The conviction was overturned on due process grounds, with two judges dissenting. However, in an intriguing contrary development, following the Minnesota Supreme Court's affirmation of the lower tribunal in 1991, a jury awarded \$5.2 million in damages to the boy's biological father in a *civil* lawsuit. The jury said that the First Church of Christ, Scientist, the boy's mother, Kathleen McKown and her husband, were directly responsible for the death of the boy, Ian Lundman.

49. The first case of a homicide conviction upheld on appeal against a religion

Before turning to consider some of these cases from the last seven years or so, and before elaborating the resolution of the first amendment question about free exercise of religion and the modern legislative and judicial responses to this problem, it may be helpful to glance at some of the religious groups whose disagreement with the wider society regarding the efficacy or propriety of medical treatment have brought them into conflict with the laws.

IV. FAITH-HEALING SECTS AND LEGAL CONFLICT

Members of a fair number of religious faiths in the United States have run up against criminal laws for failure to provide medical treatment to their children. Sects which have called upon members to refrain from certain or all types of medical treatment for reasons of faith have included Jehovah's Witnesses,⁵⁰ The Faith Assembly,⁵¹ Christ Assembly,⁵² Church of the First Born,⁵³ Faith Tabernacle Church,⁵⁴ the Christian Catholic Church of Chicago,⁵⁵ and the well-known First

defense apparently came in 1985 with the case of *Commonwealth v. Barnhart*, 497 A.2d 616 (Pa. Super. Ct. 1985). The child essentially died of starvation where a tumor obstructed the intestines. The parents, of Faith Tabernacle persuasion, did not seek medical assistance but relied upon God to heal their child. *Id.* at 619. *See also* *Walker v. Superior Court*, 763 P.2d 852 (Cal. 1988), *cert. denied*, 109 S. Ct. 3186 (1989).

50. *See supra* note 16.

51. *See* *Bergman v. Indiana*, 486 N.E.2d 653 (Ind. Ct. App. 1985); *Dodes, supra* note 10, at 170 n.31 (citing CHILD, Spring 1986, at 3 (documenting the deaths of three Ohio children whose parents are members of a sect of Faith Assembly)); Bill Zlatos, *Couple Recount Break With Faith Assembly*, FORT WAYNE NEWS SENTINEL, Mar. 3, 1986, at 2B; Richard Hughes, *Infanticide in a Faith Healing Sect* (1986) (unpublished paper, on file with the University of Richmond Law Review).

52. *See* Ivy B. Dodes, *'Suffer the Little Children . . .'* *supra* note 10, at 170 n.31 (citing *State Should Stop Needless Deaths*, CLEV. PLAIN DEALER, Oct. 27, 1986, at 9A (documenting death of 13-month-old of pneumonia whose parents were members of Christ Assembly)).

53. *People v. Arnold*, 426 P.2d 515 (Cal. 1967).

54. Members of the Faith Tabernacle Church believe life is ultimately in God's hands, not the hands of medical practitioners. *See* *Commonwealth v. Barnhart*, 497 A.2d 616 (Pa. Super. Ct. 1985) (upholding parents' conviction for manslaughter where parents used faith healing and child starved to death by obstruction to intestines due to untreated tumor).

55. *People v. Pierson*, 68 N.E. 243 (N.Y. 1903) (affirming conviction of defendant whose distrust of physicians and belief in prayer allowed 16-month-old to die of pneu-

Church of Christ, Scientist.⁵⁶ Members of all of these sects have been accused of crimes based on the deaths of their children after the parents refused medical treatment.

As I have already observed, the state usually does not hesitate to intervene to order medical treatment while the endangered child is alive; yet courts, juries, legislators, and some commentators have been uncomfortable with cases involving criminal charges against the parents after the child has died. One cherished legacy of the First Amendment, perhaps, is that casting judgment upon the sincere religious beliefs and practices of others is not a well-respected enterprise in our pluralist country. This is particularly true where casting such judgment carries with it the ominous weight of the criminal justice system. As the late United States Circuit Judge Irving Kaufmann succinctly expressed, “[c]ourts temporal are not ideally suited to resolve problems that originate in the spiritual realm.”⁵⁷ Nevertheless, the courts are repeatedly called upon to do just that, particularly where such problems have important implications for other people.

Until recently, the one religious group which probably attracted the most attention of the courts over the years in the United States was the Jehovah’s Witnesses.⁵⁸ Currently, however, the Witnesses pose perhaps the least case-by-case medical and legal difficulty of all the groups mentioned above for several reasons.

First, Jehovah’s Witnesses do not object categorically to all medical treatment—only medical treatment that involves blood transfusions. Consequently, the medical problems of Witnesses’ children are far more likely than those of the other groups to come to the attention of doctors and of the state while there is still time to intervene effectively on behalf of the child.

monia).

56. *State v. McKown*, 461 N.W.2d 720 (Minn. Ct. App. 1990).

57. Irving Kaufmann, *Life and Death Decisions: Medical Problems for Courts*, THE WASH. POST, Oct. 6, 1985, at E21.

58. *Cf. Prince v. Massachusetts*, 321 U.S. 158, 159 (1944), in which Justice Rutledge’s opinion for the Court begins, “[t]he case brings for review another episode in the conflict between Jehovah’s Witnesses and the state authority.” *Id.*

Second, the Jehovah's Witnesses' objection to blood transfusions is now fairly well-known in the medical and legal communities. Therefore, routine procedures have been developed in some jurisdictions to handle those situations in which a parent refuses to consent to a needed blood transfusion for a child. Moreover, given the Witnesses' long history in this regard, the medical community is now more aware of acceptable medical alternatives to blood transfusions, so that the religious beliefs of Jehovah's Witness patients can be better accommodated.⁵⁹

Finally, advances in medical technology may eventually render blood transfusions unnecessary under most circumstances, thus resolving the Jehovah's Witnesses' dilemma altogether. Nonetheless, cases involving the Witnesses' refusal to accept blood transfusions still arise, and involve adults as well as children. Hence, it would be premature to assert that the problem has by any means gone away.⁶⁰

Not all the children of faith-healing sects are as fortunate as those of the Jehovah's Witnesses in this regard. For the clash between religious belief, medical practice, and the law is greatest and most wrenching where religious belief arguably precludes medical assistance altogether. The result is that state authorities are less likely to learn of any imminent danger to the child until it is too late. This dimension of the conflict is illustrated by the First Church of Christ, Scientist, or the

59. See J. Lowell Dixon & M. Gene Smalley, *Jehovah's Witnesses, The Surgical/Ethical Challenge*, 246 JAMA 2471, 2471 (1981).

60. For example, in one recent federal case, the parents of a 15-year-old girl, Angelica Niebla, sued a California county for alleged violations of their civil rights under 42 U.S.C. § 1983, and for violations of procedural due process. The suit concerned the county's issuance of emergency ex parte custody and blood transfusion orders for Angelica through the juvenile court. The transfusions were effected, Angelica survived, the parents sued, and the county in turn filed a medical neglect petition against Angelica's parents for refusal to authorize the transfusions. The federal district court dismissed the claims of Angelica and her parents, citing *Prince v. Massachusetts*, 321 U.S. 158 (1944) and *Jehovah's Witnesses v. King County Hosp.*, 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd* 390 U.S. 598 (1968). The court stated that the "[f]ree exercise of religion, bodily autonomy and parental rights yield before the compelling interest the state has in protecting children from serious health problems." *Niebla v. County of San Diego*, No. 90-56302, 1992 U.S. App. LEXIS 15049 at *11 (9th Cir. June 23, 1992).

Christian Science Church, whose members, of late, have been involved in a number of highly publicized faith-healing cases.

Presently there are about 2,200 Christian Science churches in the United States.⁶¹ Relatively frequent conflicts between this church and the state in its role as *parens patriae* occur because Christian Scientists believe it is essentially immoral, or at least a sign of imperfect atonement with God, to seek medical assistance rather than relying upon trust in God to eliminate the effects of, or escape the illusion of, illness and disease. In fact, this article of faith is so central to Christian Science that members can truthfully assert that without faith healing, there is no Christian Science religion. A vigorous legal prohibition of all faith-healing practices might destroy Christian Science altogether.

As Church historian Karl Holl has explained, prayer treatment in Christian Science is believed to be a "silent yielding of self to God . . . until His omnipresence and love are felt effectively by man."⁶² The cure of disease through prayer is seen as a necessary element in the redemption from the flesh and in the overcoming of the mental illusions of pain and disease.⁶³

Despite these clear foundational principles, however, the reality of the situation, and hence the corresponding legal difficulty, is slightly more subtle. On the one hand, officials of the Christian Science Church claim that church members may choose medical care without suffering any repercussion from the church while, on the other hand, members who resort to medical treatment may feel as though they have failed in their faith.⁶⁴ This feeling of failure before God must be very strong, for there have been at least seven cases since 1980 brought against Christian Science parents whose children, at least according to our best medical and legal point of view, died be-

61. Dodes, *supra* note 10 at 165 n.3 (citing Muriel Dobbin, *When The State Takes Aim at Faith Healing*, U.S. NEWS & WORLD REPORT, Mar. 24, 1986, at 22).

62. Baumgartner v. First Church of Christ Scientist, 490 N.E.2d 1319, 1321 (Ill. App. Ct. 1986) (quoting 4 ENCYCLOPEDIA BRITANNICA MACROPEdia 562-64 (15th ed. 1984)).

63. *Id.*

64. See Dodes, *supra* note 10, at 165. n.3; Robinson, *supra* note 31, at 419.

cause they chose faith-healing over conventional medical treatment.⁶⁵

V. FREE EXERCISE OF RELIGION AND *Parens Patriae*

What, then, is the constitutional status of criminal cases in which the parents are prosecuted for relying on faith-healing? To what extent does such criminal prosecution violate the First Amendment's free exercise clause? The short answer is that it does not at all. Despite the claims of numerous defendants in these cases, the free exercise of religion under the First Amendment creates no insuperable constitutional barrier to criminal prosecution, any more than it creates a barrier to timely state intervention on behalf of an ailing child.

This may at first seem strange. After all, the Bill of Rights begins with the powerful injunction, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."⁶⁶ However, the United States Supreme Court long ago distinguished between the religious *beliefs* of an individual and *actions* pursuant to those beliefs;⁶⁷ and, more recently, between legislation specifically directed against a given sect, and legislation that is neutral on its face and applies to everyone.⁶⁸ How can the court thus apparently run roughshod over the rights guaranteed in the first sentence of the First Amendment?

There is perhaps no fully satisfying answer to this question, except arguably, that the alternative is even less desirable. Separation of church and state is a fine and comfortable sounding phrase, upon which we rely heavily in our ideas about the nature of our body politic. However, this simple phrase says perhaps more than we can ever practically accomplish. While citizens' judgments about what should be legally permissible will always be formed in some degree by their religious convictions, the state, as representative and protector of the

65. Robinson, *supra* note 31, at 413.

66. U. S. CONST. amend. I.

67. See *infra* notes 69-71 and accompanying text.

68. See *infra* notes 69-71 and accompanying text.

community at large, will always seek to regulate people's actions, some of which are inevitably religiously motivated. Perhaps the best we can do is try to keep these two domains of religion and state in balance, so that neither ultimately dictates or usurps the function of the other.

The First Amendment is of course the fulcrum for this balancing act, and the courts are constantly moving this fulcrum in order to maintain balance as they see it.

The Supreme Court began this balancing act between the interests of free exercise and the interests of the state in 1878, with a deceptively simple distinction between religious *beliefs*, which were held not subject to state regulation, and religiously motivated *actions*, which could be so regulated. The case was *Reynolds v. United States*,⁶⁹ in which the Court upheld a federal law prohibiting bigamy as applied to a Mormon, who claimed bigamy was a religious duty. As Chief Justice Waite reasoned: "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."⁷⁰ He elaborated, using language that indirectly implicates our current subject:

Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?⁷¹

Observing that polygamy has a long history of condemnation by civil society, he concluded that: "to permit [it] would be to make the professed doctrines of religious belief superior to the law of

69. 98 U.S. 145 (1878).

70. *Id.* at 164.

71. *Id.* at 166.

the land, and in effect to permit every citizen to become a law unto himself."⁷²

This deceptively simple distinction between religious belief and religious practice became more subtle when the religious practices in question were connected with another First Amendment freedom, the freedom of speech. In *Cantwell v. Connecticut*,⁷³ several Jehovah's Witnesses had been convicted for soliciting funds without a license while distributing religious materials. The Court overturned the convictions on the ground that the underlying statute, by allowing a licensing officer broad discretion to decide who would be licensed to solicit and who would not, violated both freedom of religion and freedom of speech. This case is significant, here, because the Court would later point out that only in cases where freedom of religion was combined with another fundamental liberty would neutral restrictions be invalidated on grounds of freedom of religion.

The Court apparently developed a new test for adjudicating free exercise claims in *Sherbert v. Verner*,⁷⁴ a case involving a Seventh Day Adventist who was denied state unemployment benefits after she was fired because she refused to work on Saturdays. The State justified its action by claiming that denial of unemployment benefits in such circumstances was necessary to avoid fraudulent claims. The Supreme Court disagreed and held that the state failed to sustain its burden of showing, first, that its interest in discouraging fraud by this means was compelling enough to justify the state-imposed burden upon the person's religious practice; and second, even if discouraging fraudulent claims were shown to be a compelling interest, it is incumbent upon the State to show "that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."⁷⁵ *Sherbert* is especially significant because of its suggestion that the court may require a "least restrictive means" test in cases involving the free exercise of religion. However, as we shall see, this requirement did not survive outside a limited context.

72. *Id.* at 167.

73. 310 U.S. 296 (1940).

74. 374 U.S. 398 (1963).

75. *Id.* at 407.

The Supreme Court further applied the principles set forth in *Sherbert in Wisconsin v. Yoder*,⁷⁶ a fascinating case involving state interference in religious practice and parental control over minors in the context of compulsory school education. Briefly stated, the Court held, with only Justice Douglas in dissent, that the State's interest in compulsory education did not outweigh the burden such a regulation would place on the free exercise rights of Amish people. The Court maintained that "[o]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."⁷⁷ By releasing Amish children from the requirement of school attendance beyond the eighth grade, the Court went as far as it has ever been willing to go in the protection of religious beliefs from neutrally and generally applicable statutes.

The old *Sherbert* standard was more or less reiterated in 1981 in the case of *Thomas v. Review Board of the Indiana Employment Security Division. et al.*⁷⁸ The Court in this case held that if the government is to place a substantial burden on religiously motivated conduct, the government must show that it has a *compelling* state interest, and must protect that interest by means narrowly tailored to advance it.⁷⁹

All of this could arguably have some impact on state prosecutions of parents who have relied on faith-healing. Some commentators have suggested that under a least restrictive means test, as in *Sherbert*, prosecutions after-the-fact do not pass muster, because a state could find narrower, less restrictive, means to protect children's interests by, for example, measures directed at timely intervention.⁸⁰

In any event, the Supreme Court seemed to move the fulcrum again in 1986. The compelling state interest test appeared to have been abandoned, outside a limited context, in favor of a different standard, involving the question of whether affirmative

76. 406 U.S. 205 (1972).

77. *Id.* at 215.

78. 450 U.S. 707 (1981).

79. *Id.* at 718.

80. See Christine Clark, *Religious Accommodation and Criminal Liability*, 17 FLA. ST. U. L. REV. 559, 581 (1990).

compulsion of conduct offensive to the person's religion was involved. The occasion for this apparent shift was *Bowen v. Roy*,⁸¹ in which certain Native Americans objected to a requirement that they obtain a social security number for their child. The Native American plaintiffs believed as a matter of religion that "control over one's life is essential to spiritual purity" and that once a social security number was issued, their daughter would be unable to control the state's use of it.⁸² The Court was unmoved however, and did not believe the intrusion into the family's religious life significant enough to warrant protection, partly because it was not specifically directed at religious practice, and did not force the plaintiffs into any particular conduct that was religiously offensive. The Court stated that "a uniformly applicable statute neutral on its face is of a wholly different, less intrusive nature than affirmative compulsion . . . [of religious conduct]."⁸³

Finally, this "coercion" standard was strongly reaffirmed in the Court's most famous recent free exercise case, *Employment Division, Oregon Department of Human Resources v. Smith*.⁸⁴ This case involved two members of the Native American Church who were employed by a private drug rehabilitation organization. When the organization discovered that these two had ingested the drug peyote as part of a religious ceremony, they were fired. The Native American Church members sued when the Oregon Employment Division denied their applications for unemployment compensation because they had been fired for work-related "misconduct."⁸⁵

The Oregon Supreme Court found that the peyote prohibition, as applied to members of the Native American Church, violated the First Amendment to the United States Constitution.⁸⁶ However, the United States Supreme Court did not agree. On the contrary, the Court held that the First Amendment "does

81. 476 U.S. 693 (1986).

82. *Id.* at 696.

83. *Id.* at 704. The vote was 8:1, with Justice White the sole dissenter.

84. 494 U.S. 872 (1990).

85. *Id.* at 872.

86. See *Smith v. Employment Div., Ore. Dept. of Human Res.*, 763 P.2d 146 (Or. 1988), *rev'd*, 494 U.S. 872 (1990).

not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'⁸⁷

In the *Smith* case, the Court narrowly circumscribed the applicability of *Sherbert v. Verner* by pointing out that the *Sherbert* test was never used to strike down any government action outside the area of unemployment compensation.⁸⁸ Thus, in other contexts, the compelling state interest test was inapplicable.⁸⁹ In addition, the Court pointed out that the only cases in which it had previously found that the First Amendment barred application of a "neutral, generally applicable law to religiously motivated action" were those involving other constitutional claims in addition to free exercise of religion.⁹⁰ Hence, in the face of a "neutral law of general applicability," religious freedom could only triumph if linked with another fundamental right.⁹¹

Thus, under the rationale first announced in *Reynolds* in 1879 and later considerably modified, there have been a surprisingly large number and variety of state interests that have been held sufficient to warrant the infringement of free exercise rights, provided that the law is not specifically directed against religions, and provided further that it is not linked to other fundamental rights. These overriding interests have included preventing the evils of sex discrimination in employment, social security fraud, mail fraud, race and sex discrimination in education, communicable disease, polygamy, the use of snakes and strychnine in the presence of children, and the use of illegal drugs in religious ceremonies. Freedom of religion has also yielded to the promotion of safety on the highways, and even to the right to travel and to the protection of forest resources.⁹²

87. *Smith*, 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)).

88. *See id.* at 883.

89. *Id.*

90. *See id.* at 881.

91. Examples include free exercise plus free speech, as in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), and free exercise plus the exercise of parental rights, as in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

92. *See Dodes, supra* note 10, at 179 n.79, for case citations for each of the catego-

Moreover, in light of *Prince v. Massachusetts*, the argument that, in the faith-healing context, free exercise is linked to fundamental parental rights, and therefore, deserves the court's protection, is also apparently unpersuasive.⁹³

Thus, it seems clear that when an important governmental interest is served thereby, the state can pass general laws which incidentally infringe upon the rights of individuals to practice their religion as they see fit,⁹⁴ and that this state intervention will be seen as especially justified where children's lives are at stake.

Moreover, by intervening in these cases, the state is arguably not so much interfering in parents' rights to instruct their children in a chosen religion, as it is doing what it can to save the child's life, so that, as the Supreme Court indicated in *Prince v. Massachusetts*, when the time comes for the child to work out his or her religious beliefs as a competent adult, the child is alive to do so.⁹⁵ Saving the child's life preserves religious freedom for the child in the future, even as it infringes on the present rights of the parents.

In this sense, the state recognizes the individual's long-term claim to life and to religious freedom and self-determination in the future over the parent's immediate claim to exercise these rights for the child in the present. As one theologian has stated the issue, "by insisting on medical care, the state compels religious communities to become attentive to physical reality."⁹⁶ As a constitutional matter, the state is thus free to do so. What effect, if any, the Restoration of Religious Freedom Act of 1993⁹⁷ will have upon the issue is an open question. In any event, that Act re-adopted the *Sherbert v. Verner* tests which

ries mentioned, except the reference to drugs, an issue which was recently resolved in *Smith*. See *supra* notes 86-90.

93. 321 U.S. 158 (1944).

94. On the other hand, a unanimous, albeit fractured, Supreme Court ruled in 1993 that city ordinances, such as Hialeah, Florida's barring ritual animal sacrifice, violated the free exercise clause. *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 113 S. Ct. 2217 (1993).

95. See *id.* at 170.

96. Hughes, *supra* note 51.

97. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488.

compel the government to prove a "compelling interest" and "least restrictive means."⁹⁸

VI. STATE ACCOMMODATION OF FAITH-HEALING

In view of the fairly firm and well-settled general legal principle that the state may intervene in the interests of minor children, it may be surprising that the free exercise claim is so often raised as a defense in the faith-healing cases, and should so frequently cause difficulty for the courts; yet it does so, repeatedly. Why should this be?

Ironically, part of the answer is that in many of the recent cases, the free exercise argument has become plausible only because of ambiguous state statutory exemptions from liability for child neglect. It appears that many states intended to carve out a religious exception to accommodate faith-healing, so that under the standard child neglect statutes, parents who refuse to seek needed medical treatment for their children due to sincere religious beliefs need not fear prosecution. These exemptions resulted from HEW regulations in 1974, which basically *required* state exemptions for faith-healing as a condition on the state's receipt of certain matching funds.⁹⁹ Needless to say, nearly every state in the country created the exemptions.¹⁰⁰ The regulations, a result of Christian Science lobbying, were later modified, but most of the state exemptions remain.¹⁰¹ However, there are two reasons why these exemptions have not worked.

First, not only does the Constitution *not* require such exemptions, but in some cases the particular state accommodation statutes are themselves unconstitutional in that they violate the Establishment Clause of the First Amendment.¹⁰²

98. See *Sherbert v. Verner*, 374 U.S. 398 (1963).

99. 12 U.S.C. §§ 5101-07 (1988).

100. At least 47 states passed the exemptions. See Monopoli, *supra* note 34, at 320 n.5. One state, Oklahoma, has modified the exemption to require medical attention "where permanent physical damage could result" to the child. *Id.* at 330 n.57.

101. See Child Abuse and Neglect and Prevention and Treatment, 45 C.F.R. § 1340 (1992).

102. See, e.g., *Ohio v. Miskimeus*, 490 N.E.2d 931 (Ohio Com. Pl. 1984).

Second, while the accommodation statute works fine in the child neglect context before a child dies, the exemptions do not necessarily apply in the context of a later charge of homicide. Thus, faith-healing parents are assured on the one hand that the state recognizes their practice and will not prosecute them for child neglect; but on the other hand, if a child dies as a result of reliance on faith-healing alone, the parents may be prosecuted for homicide. This creates terrible confusion. Under these accommodation statutes, a parent's status as a non-negligent, innocent faith-healer is suddenly transformed to that of a criminal the moment the child dies.¹⁰³ Thus, as one commentator has aptly observed, it is permissible to rely on faith-healing, but the parents had better hope that God is listening, or they may be prosecuted for homicide!¹⁰⁴

*Ohio v. Miskimens*¹⁰⁵ considers such a statute. The challenged Ohio statute contained the following accommodation clause:

It is not a violation of a duty of care, protection, or support under this division when the parent, guardian, custodian, or person having custody or control of a child treats the physical or mental illness or defect of such child by spiritual means through prayer alone, in accordance with the tenets of a recognized religious body.¹⁰⁶

The Ohio court found the statute impossible to apply in a constitutional manner.

[The statute] hopelessly involves the state in the determination of questions which should not be the subject of governmental inquisition . . . such as what is a "recognized religious body," by whom must it be "recognized," for how long must it have been "recognized," what are its tenets, did the accused act in accordance with those tenets, what are "spiritual means," and what is the effect of combining some prayer with some treatment or medicine.¹⁰⁷

103. See Sheiderer, *supra* note 32, at 1443.

104. *Id.* at 1445.

105. 490 N.E.2d 931 (Ohio Com. Pl. 1984).

106. *Id.* at 933.

107. *Id.* at 934.

Thus, far from being constitutionally required, Ohio's statutory exemption for faith-healing was unconstitutional. Similarly, although many of the accommodation statutes which currently exist in a majority of the states are worded differently than the Ohio statute,¹⁰⁸ they nonetheless raise thorny issues of constitutionality. A number of commentators have therefore understandably called for the modification or outright repeal of these exemptions.¹⁰⁹ Such repeal would send the unambiguous message that, in the context of a medical emergency, prayer and faith-healing efforts, however laudable, caring and arguably efficacious they may be, are acceptable to the state only if a child's life or safety is also protected by the provision of any needed medical treatment.

Of course, the repeal of the statutory exemptions would not solve all of the problems associated with this issue. Nor is it the single best solution that can be had. However, if the state is determined to protect children, as it should be, it makes no sense to persist in presenting faith-healing parents with a false appearance of safety by granting an exemption with one hand, only to take it away with the other. Moreover, by clearly setting forth the legal rights and duties of everyone involved, the state will be doing everything it knows how to protect the lives of its citizens. In the absence of Lady Rothschild or the angel of the Lord, it may be the best we can do for both Abraham and Isaac, in this three-way collision between faith, medicine, and the law.

VII. SOME RECENT CASES

Having reviewed the constitutional and statutory context of faith-healing and criminal prosecutions where tragedy has ensued, it may be useful to examine a few of the recent cases that have arisen. These examples will graphically illustrate the inadequacy of the statutory exemptions mentioned above, and the perhaps avoidable tragedy that can result.

108. See Monopoli, *supra* note 34, at 320 n.5.

109. See Scheiderer, *supra* note 32, at 1445.

The first instance of record in the United States in which an appellate court upheld a guilty verdict for homicide in connection with the failed faith-healing of a child was the Pennsylvania case of *Commonwealth v. Barnhart*¹¹⁰ in 1985. Justin Barnhart, a two-year-old, died as a result of a kidney tumor, which essentially caused his starvation, by using up nourishment and crowding out Justin's intestines. The illness continued over a period of several months and was treated only by prayer. Following an autopsy, physicians testified that, had the problem been brought to the attention of a doctor before the cancer had metastasized and spread to his lungs, the child would have had an eighty-five to ninety-five percent chance of survival, and even if discovered after it metastasized, Justin would have had a fifty percent chance of survival. While this raises the question of whether the failure to seek medical help was, beyond a reasonable doubt, the cause of death, the jury at the trial level resolved this question in the affirmative.

On appeal, the appellate court had little difficulty with this aspect of the case. Nor did the appellate court spend inordinate time considering whether Justin's parents were on notice of the dangers of his condition. However, as the court succinctly stated: "What does remain is troublesome. Our decision today directly penalizes appellants exercise of their religious beliefs. Appellants ask how we can hold them criminally liable for putting their faith in God? No easy answer attends."¹¹¹

The court resolved this uncomfortable problem by resorting to *Prince v. Massachusetts*.¹¹²

We recognize that our decision today directly penalizes appellants in the practice of their religion. We emphasize that the liability attaches not to appellants' decision for themselves but rather to their decision effectively to forfeit their child's life Admittedly, the distinction is not a happy one. An integral part of family life is the transmission of values from one generation to the next. In the case at bar, the values include a set of religious beliefs. Sitting

110. 497 A.2d 616 (Pa. Super. Ct. 1985).

111. *Id.* at 621.

112. 321 U.S. 158 (1944).

as a court of law, we abjure even the suggestion that, by our decision today, we are passing on the contents of those beliefs Now, this case is really not a question of Christian faith or the efficacy of prayer. It is whether the parents of Justin failed to seek medical assistance for a seriously ill child and that failure caused his death.¹¹³

Significantly, the *Barnhart* court gave short shrift to the religious accommodation portion of the Pennsylvania Child Protective Services Law.¹¹⁴ In regard to the defendant's reliance on this provision, the Pennsylvania court stated simply, "failure to report, however, is not at issue here."¹¹⁵ The U.S. Supreme Court denied certiorari in the case in 1988.¹¹⁶

One other recent case that has generated considerable controversy involving Christian Science is the case of *Commonwealth v. Twitchell*,¹¹⁷ one that underscores the tragedy and suffering to children that can attend a parent's choice of faith-healing. The case is also useful in that it illustrates the mechanics of the Christian Science practice of faith-healing, and in that the Christian Science Church took up the cause of the Twitchell's legal defense.

Robyn Twitchell was a six-month-old boy who fell sick on April 3, 1986. Over the course of the next five days, Robyn showed continuing signs of illness, including screaming, vomiting, and the appearance of being in severe pain.¹¹⁸ Robyn's mother called a Christian Science practitioner and a Christian Science church official on the second day of his illness.¹¹⁹ On the third day the practitioner went to pray with the child, who had continued vomiting. After the practitioner left, Robyn's mother called her back, to report that Robyn was still vomiting.

113. *Barnhart*, 497 A.2d at 624-25.

114. 11 PA. CON. STAT. ANN. §§ 2201-24 (Supp. 1984). That accommodation provision exempted from reporting cases in which the child in question "is in good faith being furnished treatment by spiritual means through prayer alone in accordance with the tenet and practices of a recognized church or religious denomination" *Id.*

115. *Barnhart*, 497 A.2d at 628.

116. 488 U.S. 817 (1988).

117. 617 N.E.2d 609 (Mass. 1993).

118. Monopoli, *supra* note 34, at 323-24. See Robinson, *supra* note 31, at 114.

119. Monopoli, *supra* note 34, at 323.

It was decided that they would continue to pray for the child.¹²⁰

On the evening of the fourth day, the Christian Science nurse suggested bland foods and liquid, which had no effect. On the fifth day, Robyn's vomiting had a strange smell and his mother became alarmed. When she could not reach the Christian Science practitioner on the phone, she called a church official, Nathan Talbot, who advised her to keep trying to reach the practitioner, which she finally did.¹²¹ On this, the fifth day of the child's illness, the Christian Science practitioner returned to the home to pray; Robyn Twitchell went into spasms, and died about an hour later of a bowel obstruction.¹²²

At no time during the course of this increasingly serious illness did Robyn's parents seek medical attention. Only after Robyn had apparently died, and his father, David Twitchell, had called a funeral home, was an ambulance contacted.¹²³ By then, it was too late. In the opinion of the medical examiner who performed the autopsy, Robyn could have been resuscitated up to one-half hour after cardiac arrest if medical assistance had been obtained within that time.¹²⁴ Moreover, according to the physician on call at the time of Robyn's death, the bowel obstruction itself could have been corrected by surgery with an expectation of success that approached one hundred percent.¹²⁵

Thus, in the Twitchell case, the legal community was faced with the apparently easily preventable death of a child that was caused by a religious practice lying at the heart of a church's beliefs. The Massachusetts judge who prepared the inquest report on Robyn Twitchell's death, nevertheless, found that the facts warranted prosecution for involuntary man-

120. *Id.* at 323-24.

121. *Id.* at 324 (citing *Justice's Report on Inquest Relating to the Death of Robyn Twitchell*, Commonwealth of Massachusetts District Court Department, Suffolk County, West Roxbury Division, Inquest No. 1. of 1986, at 6, [hereinafter *Just. Rep. on Inquest*]).

122. Monpoli, *supra* note 34, at 323.

123. *Id.* at 324 (citing *Just. Rep. on Inquest*, at 7).

124. *Id.* at 325 (citing *Just. Rep. on Inquest*, at 7-8).

125. Monpoli, *supra* 34, at 324-25.

slaughter.¹²⁶ Still, his conclusion in this regard was tempered not so much by the religious concerns involved, but by the unsatisfactory state of the applicable law. He acknowledged that in light of the Massachusetts child neglect statute's exemption for faith-healing, a religious family could easily be misled into thinking that its faith-healing beliefs "have won public endorsement."¹²⁷ The judge thus indicated that while the facts warranted prosecution, the statutory law was ambiguous and should be changed.

Shortly thereafter, Robyn's parents were tried and convicted of involuntary manslaughter, despite defense arguments regarding freedom of religion and the statutory exemption for parents who rely on faith-healing. However, in light of the nature of the case, no prison sentence was imposed. The Twitchells were sentenced to ten years' probation, including regular medical attention for the remaining children.¹²⁸ But on August 11, 1993, the Supreme Judicial Court of Massachusetts overturned their conviction 6:1 on a narrow point of law.¹²⁹ The justices ruled that the Twitchells "reasonably believed that they could rely on spiritual treatment without fear of criminal prosecution"¹³⁰ based on a church publication the father had read. That argument, the court held, should have been presented to the jury.¹³¹ However, the court did not rule out all prosecutions of parents who rely on spiritual healings; instead, parents can be found guilty of involuntary manslaughter if they are found to be "wanton and reckless" in their care of a child.¹³²

Many of the tragic features and legal ambiguities arising in the Twitchell case have been repeated elsewhere. The case of *Walker v. Superior Court*¹³³ in 1988 provides another example, not only of the jolting human tragedy that attends these cases, but also of the logical perversity of the exception for faith-heal-

126. *Id.* at 325.

127. *Id.*

128. Monopoli, *supra* note 34, at 325 & n.28 (citing *Christian Scientists Are Given Probation for Death of Child*, N.Y. TIMES, July 7, 1990, S1 (Nat'l Desk), at 8, col. 5).

129. 617 N.E.2d 609 (Mass. 1993).

130. *Id.* at 613.

131. *Id.*

132. *Id.* at 612.

133. 763 P.2d 852 (Cal. 1988).

ers that so many states have included in their child neglect statutes. *Walker* also shows to some extent the legal impact of the efforts of the Christian Science Church to maintain legal protection for members whose faith-healing efforts have gone awry.

Shauntay Walker fell ill on February 17, 1984, with what appeared to be an ordinary flu.¹³⁴ Her mother, Laurie Walker, was a Christian Scientist, and she prayed for the child. However, after four days, Shauntay developed a peculiar stiff neck, and so her mother called a Christian Science practitioner.¹³⁵ As in the *Twitchell* case, the practitioner also prayed for the child, and visited her on two occasions. After a week, a Christian Science nurse was engaged. She visited the home on February 27, and twice in early March, including the day before Shauntay's death.¹³⁶ "Shauntay nevertheless lost weight, grew disoriented and irritable during the last week of her illness, and died on March 9 of acute purulent meningitis after a period of heavy and irregular breathing. During the seventeen days she lay ill, the child received no medical treatment."¹³⁷

The State of California charged Shauntay's mother with involuntary manslaughter and felony child endangerment, alleging that the mother's criminal negligence was the cause of Shauntay's death.¹³⁸ Once again however, as we saw in the *Twitchell* case, the defendant was able to raise the argument that the prosecution violated her First Amendment rights¹³⁹ and that her conduct was, in any event, specifically protected by law because of the religious faith-healing exemption under the applicable child endangerment statute.¹⁴⁰ She further argued that the statutes under which she had been charged did not provide fair notice that her conduct was a crime, and moved to dismiss the prosecution. The trial court denied the

134. *Id.* at 855.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 855.

139. *Id.* at 855-56.

140. *Id.* at 856.

motion¹⁴¹ and she appealed to the Court of Appeals. The motion was summarily denied and she appealed a second time. The issues of the effect of the statutory exemption for faith-healing, the extent of freedom of religion, and of fair notice as to the criminality of faith-healing which has failed, all came before the California Supreme Court.¹⁴²

Laurie Walker's defense in the case, and on appeal to the California Supreme Court, was supplemented by an *amicus curiae* brief by the Christian Science Church.¹⁴³ This is fitting, because the statutory ambiguities, to which we have already referred, resulted largely from a 1976 amendment to California's child endangerment statute, which was accomplished due to the lobbying efforts of the church.¹⁴⁴ The statute, originally enacted in 1872 currently reads in pertinent part:

If a parent of a minor child willfully omits, without lawful excuse, to furnish necessary clothing, food, shelter or medical attendance, or other remedial care for his or her child, he or she is guilty of a misdemeanor¹⁴⁵

This is fairly straightforward. In 1976, lobbyists for the Christian Science Church succeeded in persuading the California legislature to enact the following exception to the statute:

If a parent provides a minor with treatment by spiritual means through prayer alone in accordance with the tenets and practices of a recognized church or religious denomination, by a duly accredited practitioner thereof, such treatment shall constitute 'other remedial care' as used in this section.¹⁴⁶

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. CAL. PENAL CODE § 270 (West 1988).

146. *Id.* See *Walker*, 763 P.2d at 856 & n.3.

We have already seen a similar statute in Ohio declared unconstitutional as a violation of the Establishment Clause of the First Amendment in the case of *State v. Miskimins*.¹⁴⁷ While the California court did not take this approach, Justice Mosk, in a separate concurrence to his own majority opinion, urged that this approach be followed and lamented that a majority of his fellow Justices were, as yet, unwilling to go down the constitutionality road with him.¹⁴⁸

In any event, the majority of the California Supreme Court found, astonishingly, that the child endangerment statute's exception for faith-healing was not only ineffective to prevent Laurie Walker's prosecution for involuntary manslaughter under a different statute, but it was also ineffective to prevent her prosecution for child endangerment itself.¹⁴⁹ Relying on legislative history, precedent, painstaking grammatical analysis, and rules of statutory interpretation, the majority concluded that the faith-healing exception under section 270 of the California Penal Code was intended not to exempt faith-healing parents like Laurie Walker from liability for child-endangerment. Rather, the majority found that the exception was intended to secure financial support for the child and to "protect the public from the burden of supporting a child who has a parent able to support him."¹⁵⁰ Thus, according to the court, the faith-healing exception protects the state from the costs associated with taking custody of children merely because their parents practice faith-healing. State custody will not be assumed on that basis alone.¹⁵¹ However, this does not mean that parents can, with impunity, allow their children to suffer and die for lack of medical treatment. Thus, the court concluded:

The legislative design appears consistent: prayer treatment will be accommodated as an acceptable means of attending to the needs of a child not insofar as serious physical harm or illness is not at risk[!] When a child's life is placed in

147. 490 N.E.2d 931 (Ohio Com. Pl. 1984).

148. *Walker*, 763 P.2d at 873 (Mosk, J., concurring).

149. *Id.* at 860.

150. *Id.* at 859-60 (quoting *People v. Sorensen*, 437 P.2d 495 (Cal. 1968)).

151. *Id.* at 860.

danger, we discern no intent to shield parents from the chastening prospect of felony liability.¹⁵²

This counter intuitive conclusion, which was supported by the court's painstaking statutory analysis, but was not persuasive enough to convince all the justices,¹⁵³ is matched in peculiarity by the court's analysis of Laurie Walker's negligence liability. In a reprise of the problems we saw in the old English cases, the court applied an objective "reasonable man" standard to Laurie Walker's religious beliefs.¹⁵⁴ Under such a standard, a jury may find guilt if a hypothetical "reasonable man," or ordinarily prudent and careful person, determines that the conduct in question was incompatible with a proper regard for human life, and was therefore culpably reckless. Under such an objective standard, Laurie Walker could be found guilty. We might easily conclude that under California law, the hypothetical "reasonable man" is not a Christian Scientist. Obviously, such an analysis comes perilously close to a direct legal punishment for a religious belief. The clash between the religious and the legal evaluation of this situation could not be more stark.

The *Walker* court, as so many other courts since 1985 have begun to do, relied on *Prince v. Massachusetts*,¹⁵⁵ to uphold the legality of Laurie Walker's prosecution, concluding that "parents have no right to free exercise of religion at the price of a child's life."¹⁵⁶ The U.S. Supreme Court denied certiorari in 1988.¹⁵⁷

VIII. CONCLUSION

What should the state's response be in the face of these repeated tragedies? We might answer the question by process of elimination. A blanket prohibition of faith-healing is patently

152. 763 P.2d at 866.

153. Justice Broussard concurred in part and dissented in part, observing that the child-endangerment exception does not bar a charge of manslaughter, but certainly applies to a charge of child-endangerment. *Id.* at 878-81.

154. *Id.* at 868.

155. 321 U.S. 158 (1944).

156. *Walker*, 763 P.2d at 870.

157. 491 U.S. 905 (1989).

out of the question. Aside from the perhaps salutary effects of faith-healing practice in many instances not discussed here, such a prohibition would fly in the face of the First Amendment's free exercise component as an act specifically directed at suppressing a religious belief.

At the same time, we have seen that the religious accommodation statutes built in to many states' child neglect laws and policies are plainly counterproductive, for they promise a protection from liability that in practice neither protects nor accommodates anyone in the final analysis. Nor can the state sit idly by and allow children in its community to die, when this result can so easily, albeit controversially, be prevented. Finally, state criminal prosecution of the parents is not the optimal solution. While such prosecution sends a clear constitutionally permissible message in light of *Prince v. Massachusetts*¹⁵⁸ and *Employment Division, Oregon Department of Human Resources v. Smith*,¹⁵⁹ we are still left with the uncomfortable conclusion addressed by the Pennsylvania Court in *Barnhart*. "Appellants ask how we can hold them criminally liable for putting their faith in God? No easy answer attends."¹⁶⁰

While prosecutions may be a necessary component of any such solution, it may be argued with some coherence that few people who believe so strongly in faith-healing as to lose a child will be deterred by the prospect of a few year's probation, as is usually the sentence. Whether the imposition of stiffer sentences would prove to be viable, is a contentious question.

In the end, it seems, the best balance obtainable would be to maximize the occurrence of those situations where some local substitute for the angel of the Lord could intervene in a timely fashion. A general and neutrally applicable reporting requirement regarding serious child illness could perhaps be crafted best to serve this purpose. In fact, at least two states¹⁶¹ have now amended their child neglect statutes to require timely

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

159. 494 U.S. 872 (1990).

160. *Commonwealth v. Barnhart*, 497 A.2d 616, 621 (Pa. 1985).

161. See FLA. STAT. CH. 415.503(9)(f)(1) (1989); MINN. STAT. § 626.556(2)(c) (Supp. 1989).

reporting of serious child illnesses in cases where the religious exemption may be invoked, so that the state can act to transfer legal custody in a timely manner. For in the end, as Lady Rothschild observed, "the responsibility to protect the life of the child is ours."¹⁶²

162. *Court Edict*, *supra* note 1.

