

# Religious Healing in the Courts: The Liberties and Liabilities of Patients, Parents, and Healers

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## I. INTRODUCTION

Since the close of the nineteenth century, American courts have struggled with the legal dilemmas presented in religious healing controversies. In particular, judicial opinions reveal the manner in which state and federal governments have attempted to satisfy their twin obligations of promoting public

health and preserving religious liberty.<sup>1</sup> Likewise, scholars have wrestled with the place of religious healing in our legal and medical systems, proposing a variety of measures to restrict<sup>2</sup> or expand<sup>3</sup> the legitimate scope of religious healing.

As the end of the twentieth century draws near, however, the increasingly precarious state of healthcare in the United States has intensified the debate over the appropriate scope of religious healing as an alternative to conventional medical care. Specifically, as one government commission reports, "[r]apidly rising medical costs are increasing the numbers of people without health coverage and [are] straining the system's

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1. See, e.g., *United States v. Article or Device, etc.*, 333 F. Supp. 357 (D.D.C. 1971) (balancing protection of public from healing device with religious liberty).

2. See, e.g., I.H. RUBENSTEIN, *A TREATISE ON THE LAW ON CULTS* (1948); C.C. Cawley, *Criminal Liability in Faith Healing*, 39 MINN. L. REV. 48 (1954); I.H. Rubenstein, *Criminal Aspects of Faith Healing*, 224 NEW ENG. J. MED. 239 (1941); Jonathan Turley, *Laying Hands on Religious Racketeers: Applying Civil RICO to Fraudulent Religious Solicitation*, 29 WM. & MARY L. REV. 441 (1988); Ivy B. Dodes, "Suffer the Little Children . . .": *Toward a Judicial Recognition of a Duty of Reasonable Care Owed Children by Religious Faith Healers*, 16 HOFSTRA L. REV. 165 (1987); Comment, *Quackery in California*, 11 STAN. L. REV. 265 (1959); Donna K. LeClair, Comment, *Faith-Healing and Religious-Treatment Exemptions to Child-Endangerment Laws: Should Parental Religious Practices Excuse the Failure to Provide Necessary Medical Care to Children?*, 13 U. DAYTON L. REV. 79 (1987); Wayne F. Malecha, Comment, *Faith Healing Exemptions to Child Protection Laws: Keeping the Faith Versus Medical Care for Children*, 12 J. OF LEGIS. 243 (1985).

3. See, e.g., Christine A. Clark, *Religious Accommodation and Criminal Liability*, 17 FLA. ST. U. L. REV. 559 (1990); Marjorie Heins, "Other People's Faiths"; *The Scientology Litigation and the Justiciability of Religious Fraud*, 9 HASTINGS CONST. L.Q. 153 (1981); Robert L. Trescher & Thomas N. O'Neill, *Medical Care for Dependent Children: Manslaughter Liability of the Christian Scientist*, 109 U. PA. L. REV. 203 (1960); Jenny Brown, Comment, *California Penal Code's Child Neglect/Abandonment Statutes: Religious Freedom or Religious Persecution?*, 25 SANTA CLARA L. REV. 613 (1985); Ellen L. Hodgson, Comment, *Restrictions on Unorthodox Health Treatment in California: A Legal and Economic Analysis*, 24 UCLA L. REV. 647 (1977); Daniel J. Kearney, Comment, *Parental Failure to Provide Child with Medical Assistance Based on Religious Beliefs Causing Child's Death—Involuntary Manslaughter in Pennsylvania*, 90 DICK. L. REV. 861 (1986); Paul M. Smith, Comment, *Medical Care, Freedom of Religion, and Mitigation of Damages*, 87 YALE L.J. 1466 (1978). See also Steven Schneider, *Christian Science and the Law: Room for Compromise?*, 1 COLUM. J. L. & SOC. PROBS. 81 (1965) (noting that Christian Scientists have accommodated themselves to some laws restricting choice of health treatment); Elizabeth R. Koller, Note, *Walker v. Superior Court: Religious Convictions May Bring Felony Convictions*, 21 PAC. L.J. 1069 (1990) (arguing that California Supreme Court decision disallowing common law reliance on a religious belief in prayer healing as a defense may be unconstitutional under the religion clauses); Catherine W. Laughran, Comment, *Religious Beliefs and the Criminal Justice System: Some Problems of the Faith Healer*, 8 LOY. L.A. L. REV. 396 (1975) (concluding that judicial leniency toward parents choosing faith healing for their children is preferred where the law is unclear).

capacity to provide care for those who cannot pay."<sup>4</sup> In addition, advanced medical technology has been accompanied by tighter governmental control over healthcare.<sup>5</sup> Thus, decreased access to medical treatment combined with increasing healthcare regulation has generated friction over the appropriate regulation of alternatives to conventional medical care.<sup>6</sup> The regulation of religious healing, in particular, has recently drawn considerable attention around the nation with the prosecution of parents who chose religious rather than medical care for their seriously ill children.<sup>7</sup>

Accordingly, in light of this struggle to balance public health with religious liberty, this Article chronicles the evolving liberties and liabilities of religious patients, parents, and healers over the course of the twentieth century and examines the current state of religious healing law. Throughout, it advocates the greatest possible liberty for religious healing consistent with public and family security, as well as advocating equal protection under the law for all involved in religious treatment, whether they are members of organized religious groups or individual practitioners.

Section II begins with a summary of the extensive history of religious healing in the West and describes how its origins on these shores precede national independence. It then traces the development of religious healing in American culture from the early methods of revivalism, mesmerism, and spiritualism in the nineteenth century, to more recent forms of religious healing employed by the Church of Scientology and the New Age movement. Section II then describes how the increased interest in religious healing in the twentieth century and the simultaneous increase in healthcare regulation has led to significant conflict over the parameters of the First Amendment guarantee of religious liberty.

Section III focuses on religious patients, the source of their right to refuse medical treatment, and the various limitations

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4. PEPPER COMMISSION: U.S. BIPARTISAN COMMISSION ON COMPREHENSIVE HEALTH CARE, A CALL FOR ACTION, EXECUTIVE SUMMARY 2 (Sept. 1990).

5. See, e.g., *infra* part V.B.1 (discussing regulation of drugs and devices).

6. See, e.g., Bill Thompson, *Treating Your Sick Child: Are Parents Free to Choose Alternative Therapies?*, EAST WEST, Feb. 1991, at 40. See generally David Eisenberg et al., *Unconventional Medicine in the United States*, 328 NEW ENG. J. MED. 246, 246 (1993) (describing the prevalence, costs, and patterns of use of alternative treatments).

7. James T. Richardson & John DeWitt, *Christian Science Spiritual Healing, the Law, and Public Opinion*, 34 J. CHURCH & ST. 749 (1992).

imposed on this right. This section finds that religious patients are limited in their right to refuse medical treatment when there is a clear threat of danger to innocent third parties. Section III then describes the various consequences of a patient's preference for religious treatment over medical care. In particular, a patient's choice of religious treatment over medical care may jeopardize his or her recovery for personal injuries and may cast doubt on his or her competency as a juror or testator. Finally, Section III concludes that the growing recognition of a patient's right to control his or her own form of healthcare supports increased freedom for proponents of religious healing.

Section IV explores religious parents' rights and responsibilities for their children's healthcare. Specifically, this section describes the expanding scope of government involvement in compelling medical treatment for children over their parents' religious objections. This section then details the prosecution of parents who relied exclusively on religious healing for their seriously ill child. Section IV concludes that courts should refrain from interfering with the parent-child relationship absent life-threatening circumstances accompanied by the probability—rather than the possibility—of medical cure. Courts should also be willing to entertain evidence that religious healing is a reasonable form of treatment for a sick child.

Section V examines the tension between a legitimate government interest in protecting individuals from fraud and the public's right to practice and receive unorthodox treatment. It explores various forms of regulation applicable to religious healers and suggests that courts should liberally construe current state statutes to permit religious healers to employ spiritual treatment so long as it is harmless in itself and delivered in a religious context.

A hypothetical will help to illustrate the variety of legal dilemmas regarding religious healing that are dealt with in the following pages:

Parent and Child are driving home one afternoon when another motorist collides with their vehicle. Both Parent and Child sustain internal injuries, but they do not go to the hospital. Parent chooses instead to employ Religious Healer who treats both patients on a number of occasions using prayer and other spiritual means.

When State Officials later learn of the accident, they ask Parent and Child to seek medical care. Parent refuses for him-

self and on behalf of Child. State Officials bring court actions against Parent and Child to compel them both to receive medical care. State Officials claim that Parent's reliance on religious healing is evidence that Parent lacks the mental competence to make decisions of any kind. State Officials also bring criminal charges against Religious Healer for practicing medicine without a license.

While these proceedings are pending, Child dies. The prosecutors charge Parent and Religious Healer with involuntary manslaughter. Disillusioned with religious healing, Parent sues Religious Healer for negligence and malpractice. In addition, Parent sues the motorist for his own and Child's injuries. Unable to return to his former employment as a result of the accident, Parent also files for disability benefits.

Although a thorough analysis of this fact pattern requires the remainder of this Article, the most likely results of this hypothetical litigation may be summarized here. As detailed in Section III, Parent's rights of religious freedom and privacy will protect him from being compelled against his will to submit to medical treatment unless his condition poses a threat to community health. Parent will not be required to seek medical care to recover government disability benefits, and a doctor who forces medical care upon him will be liable for a personal injury.

In addition, Parent cannot be declared incompetent to conduct his affairs simply on the basis of his preference for religious healing. If Parent loses consciousness altogether, however, without first making it clear that he objects to subsequent medical care, a court might order life-saving treatment for him. And in Parent's action against the motorist who caused the accident, the doctrine of avoidable consequences will bar recovery for any of Parent's complications or suffering that could have been avoided had he chosen medical rather than religious treatment.

The decision to employ only religious treatment for Child has at least two significant legal consequences, as described in Section IV. First, the court would most probably have compelled life-saving treatment for Child, unless Child were deemed mature enough to have made the medical decision independently. Had it not been clear that Child's life was in danger, however, Parent's choice of religious treatment might have prevailed, especially in those jurisdictions which statuto-

rily provide that affording spiritual treatment alone for children does not constitute neglect.

As a second consequence, Parent himself may suffer prosecution when Child dies from injuries sustained in the accident. If it is determined that a physician could have saved Child's life, Parent may be convicted of child neglect, child endangerment, or even some form of homicide. Parent's good faith reliance on religious healing, however, may help to reduce or eliminate a prison sentence if he is convicted.

Religious Healer may be more fortunate. As discussed in Section V, she might escape criminal liability for practicing medicine without a license because of statutory exceptions to most state medical licensing acts. The mere fact that she received compensation for her services will not subject her to liability. So long as Religious Healer confined her healing activities to prayer, she need not fear prosecution. But if she employed other means besides prayer—such as laying-on-hands, anointing with oil, or other verbal or material aids—her immunities may vanish. This outcome is even more likely if she is not closely affiliated with an organized religious group.

Finally, with regard to Parent's tort claim against Religious Healer, she would not be liable for negligence or malpractice even though Parent and Child did not benefit from her care. In addition, her employment of spiritual means alone would protect her from liability for negligently causing Child's death even had she advised Parent against seeking medical treatment for his child.

Analysis of nine decades of litigation from which the above conclusions were drawn, together with suggestions concerning future directions in the law, follows an overview of the place of religious healing and religious liberty in America.

## II. RELIGIOUS HEALING AND RELIGIOUS LIBERTY IN AMERICA: AN OVERVIEW

*[I]t has been ultimately recognized by the medical profession and by the AMA that there is a direct relationship between spiritual health and physical health.*

—David Everhart, Vice-President Administrator,  
Johns Hopkins Hospital<sup>8</sup>

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8. *Truitt v. Board of Public Works*, 221 A.2d 370, 388 (Md. 1966). See also Denise M. McKee & John N. Chappel, *Spirituality and Medical Practice*, 35 J. FAM. PRACT. 201 (1992).

Throughout the ages, religious healing has played a significant role in world religions.<sup>9</sup> This section examines the origins and development of that role and its impact on the development of religious healing in America. This section then touches briefly on both the importance and difficulty of interpreting and preserving the First Amendment's guarantee of religious liberty in today's diverse society.

It would seem tautological to argue that religion's proper role is to promote spiritual health. The assertion that religious practices may directly benefit mental or physical health is more likely to engender debate. Nonetheless, the combination of spiritual, mental, and physical healing has played a major role in religious life around the world.<sup>10</sup> Scholars have even speculated that it was the experience of suffering, together with the desire for healing, that first gave rise to the religious impulse.<sup>11</sup> In any event, apart from the truth or falsity of such speculation, that courts and other authorities have recognized the historical connection between religion and healing is undeniable.<sup>12</sup>

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9. Lawrence E. Sullivan, *Healing*, 6 ENCYCLOPEDIA OF RELIGION 226 (Mircea Eliade et al. eds., 1987).

10. "Often the most important figure or symbol in any given religious tradition is the source of healing." SULLIVAN, *supra* note 9, at 226. In the Christian tradition—which has dominated American approaches toward religious healing—Jesus's miraculous cures have served as an indication of his messiahship. Biblical accounts of Jesus and his apostles healing the sick are numerous. In the four Gospels, Morton Kelsey has identified "[f]orty-one distinct instances of physical and mental healing. . . ." MORTON T. KELSEY, *HEALING AND CHRISTIANITY IN ANCIENT THOUGHT AND MODERN TIMES* 54, 55-62 (1973). In the New Testament, the power to heal—divine in origin—is not mediated through Jesus alone. Jesus instructs his disciples to "heal the sick, raise the dead, cleanse the lepers, cast out demons," *Matthew* 10:8, and the book of *Acts* records that the apostles performed numerous cures. In *James*, church elders are told that the sick may be cured by anointing them with oil and praying to the Lord:

If one of you is ill, he should send for the elders of the church, and they must anoint him with oil in the name of the Lord and pray over him. The prayer of faith will save the sick man and the Lord will raise him up again; and if he has committed any sins, he will be forgiven. So confess your sins to one another, and pray for one another, and this will cure you.

*James* 5:14-16.

11. See, e.g., RICHARD THOMAS BARTON, *RELIGIOUS DOCTRINE AND MEDICAL PRACTICE* 3 (1958); STEFAN ZWEIG, *MENTAL HEALERS* x (1932).

12. In this regard, one court has noted:

From the earliest recorded times, the care of the sick was undertaken by the religious organizations. The temples of Saturn, some 4000 years B.C., were medical schools in their earliest form; in Egypt and Greece the custom of laying the sick in the precincts of the temples was a national practice. Harun al-Rashid, Caliph of Baghdad, (763-809 A.D.) attached a hospital to every



In the Christian tradition, spiritual healing was initially revered by the early church. Over time, however, authorities began to downplay its importance. By the fourth century, Augustine—who remained the major Catholic theologian for more than a millennium—declared that Christians were no longer to seek a continuation of the gift of physical healing.<sup>13</sup> At about the same time, another well-known theologian, Jerome, used the more theological term “save” in the Vulgate when translating the word “cure.”<sup>14</sup> Unction for healing, at one time a common Christian practice, was transformed by the thirteenth century into a sacrament in preparation for death.<sup>15</sup> During the Reformation, prominent Protestant theologians also instructed their followers not to expect miracle cures.<sup>16</sup> Reformers criticized what they considered Roman Catholic magical practices and questioned the belief that prayer and other ritual acts would lead to physical healing.<sup>17</sup>

Despite these forces, Christian interest in religious healing did not disappear. Early American Christians, in particular, were not unapprised of the relationship between religion and healing. The roles of minister and doctor were often united in one person whose charge it was to tend to the spiritual, mental, and physical ills of the community. Churches founded the earliest hospitals,<sup>18</sup> and healing that was not sanctioned by the Church met with suspicion.<sup>19</sup>

During the eighteenth and nineteenth centuries, reports of cures effected at revival meetings along with the establishment of “healing homes”—in which various forms of treatment were combined with prayer—provide evidence of American’s continuing faith in the intimate connections involved in healing body, mind, and soul.<sup>20</sup> The spread of Enlightenment theories regarding the material causation of disease, however, generally

mosque. Christian religious orders founded and maintained hospitals from the time of Constantine.

*Truitt*, 221 A.2d at 387 (citing 13 *ENCYCLOPEDIA BRITANNICA* 791-92 (11th ed. 1910)).

13. He later repudiated his skepticism. *KELSEY*, *supra* note 10, at 184.

14. *Id.* at 193-94.

15. *Id.* at 209.

16. *Id.* at 221.

17. *Id.*

18. *Truitt*, 221 A.2d at 387.

19. *See, e.g.*, *RECORDS OF SALEM WITCHCRAFT* 262-63 (1969) (offer to cure presented as evidence of witchcraft).

20. David Edwin Harrell, Jr., *Divine Healing in Modern American Protestantism, OTHER HEALERS: UNORTHODOX MEDICINE IN AMERICA* 215, 216 (Norman Gevitz, ed., 1988).

served to undercut belief in the power of prayer. By the latter part of the nineteenth century, revivalism—called “the single most effective healing ritual at [the churches’] disposal”—had been seriously undermined by “intellectual secularism and social pluralism.”<sup>21</sup>

Despite this undermining effect, other wellsprings of religious healing arose contemporaneously.<sup>22</sup> Beginning around the middle of the nineteenth century, mesmeric—then called magnetic—and spiritualist healers gained popularity, encouraging Americans to enter into trancelike or hypnotic states.<sup>23</sup> Consequently, many Americans in the latter half of the nineteenth century entertained the belief in a metaphysical healing experience whose explanation lay outside of traditional Christian theology. Healers entered altered states of consciousness to transmit healing energies, to divine causes of illness, and to prescribe remedies.<sup>24</sup> Mesmerists also induced patients themselves into trance states to effect cures.<sup>25</sup>

Mesmerism and spiritualism, by emphasizing the connection between healing and mental states, contributed to the subsequent development of the mind-cure religions—Christian Science and the various forms of New Thought. These “religions of healthy-mindedness,” as William James called them, gained considerable followings by the beginning of this century.<sup>26</sup> James even speculated that the mind-cure religions might some day have as great an impact on popular religion as had the Reformation.<sup>27</sup>

At the beginning of this century, one New Thought leader outlined three healing methods—still prominent today—pro-

21. ROBERT C. FULLER, *ALTERNATIVE MEDICINE AND AMERICAN RELIGIOUS LIFE* 64 (1989) [hereinafter FULLER, *ALTERNATIVE MEDICINE I*].

22. See generally *id.*; Robert C. Fuller, *The Turn to Alternative Medicine*, SECOND OPINION (Jul. 1992) [hereinafter Fuller, *Alternative Medicine II*].

23. One court has written that:

Hypnotic techniques have been used since antiquity; healing practices by priests of ancient Egypt and Greece are striking examples. Trancelike behavior attributed to “spirit possession” has played a role in Christianity, Judaism, and in many primitive religions. Miraculous powers ascribed to witches and the arts of faith healing throughout the ages are probably related to hypnosis.

*People v. Hughes*, 417 N.Y.S.2d 643, 646 (Onondaga Cty. Ct. 1979) (quoting Hypnosis, *ENCYCLOPEDIA BRITANNICA* 134 (15th ed. 1974)).

24. Fuller, *Alternative Medicine II*, *supra* note 22, at 12-15.

25. *Id.*

26. WILLIAM JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE* 78 (1982).

27. James wrote as follows: “[S]eeing [mind-cure’s] rapid growth in influence, and its therapeutic triumphs, one is tempted to ask whether it may not be destined . . . to

noted by mind-curists: (1) pranic or magnetic healing, in which the healer transmits a vital force to the patient's body, often through the healer's hands; (2) mental healing, in which the healer uses direct suggestion or telepathy to communicate the potent image of perfect health to the patient; and (3) spiritual healing, in which the healer becomes an "instrument or channel through which flows the Spiritual Healing Force of the Universe."<sup>28</sup>

Although their curative theories and methodologies differ somewhat, New Thought and Christian Science each rely heavily on healing for empirical proof of their validity. One scholar has observed that "[v]irtually every new American religion of the nineteenth and twentieth centuries has offered to prove itself by empirical and objective standards."<sup>29</sup>

The mind cure traditions have not been the only religions in recent times to turn to healing as a demonstration of faith. Early in this century, Christian interest in divine healing reawakened. The pentecostal movement, sparked by events at the Azusa Street Revival in 1906, placed considerable signifi-

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play a part almost as great in the evolution of the popular religion of the future as did those earlier [Reformation] movements in their day." JAMES, *supra* note 26, at 108.

To what did mind-curists attribute their "therapeutic triumphs?" According to James, the following testimony of one adherent expresses "the feeling of continuity with the Infinite Power, by which all mind-cure disciples are inspired." *Id.* at 101.

The first underlying cause of all sickness, weakness, or depression is the *human sense of separateness* from the Divine Energy which we call God. The soul which can feel and affirm in serene but jubilant confidence, as did the Nazarene: "I and my Father are one," has no further need of healer, or of healing. This is the whole truth in a nutshell. . . .

*Id.* at 102.

28. YOGI RAMACHARAKA, *THE SCIENCE OF PSYCHIC HEALING* 33-34 (1937).

Christian Science authors, on the other hand, have not been as all-inclusive as Ramacharaka in acknowledging the value of the various mind-cure methods. Specifically, Christian Scientists decry the use of magnetic and mental healing and rely on spiritual healing only. See, e.g., Judge Septimus J. Hanna, *Christian Science: A Practical Religion*, CHRISTIAN SCIENCE AND LEGISLATION 51, 63 (Clifford P. Smith ed., 1905). Christian Science founder Mary Baker Eddy explained that Christian Science healing arises from realization of the patient's true spiritual nature. Eddy wrote as follows:

There is no life, truth, intelligence, nor substance in matter. All is infinite Mind and its infinite manifestation, for God is All-in-all. Spirit is immortal truth; matter is mortal error. Spirit is the real and eternal; matter is the unreal and temporal. Spirit is God, and man is His image and likeness. Therefore man is not material; he is spiritual.

MARY BAKER EDDY, *SCIENCE AND HEALTH WITH KEY TO THE SCRIPTURES* 468 (1875).

29. R. LAURENCE MOORE, *IN SEARCH OF WHITE CROWS: SPIRITUALISM, PARAPSYCHOLOGY, AND AMERICAN CULTURE* 235 (1977).

cance on the gift of healing as well as on speaking in tongues.<sup>30</sup> The spread of pentecostalism resulted in the formation of the Assemblies of God, the Church of God, and other enduring Christian sects. Healing evangelists also attracted national followings to their ministries, and mainline churches expressed interest in exploring the connection between religion and healing.<sup>31</sup>

After the relative quiet of the Depression and World War II years, America entered the "heyday of healing revivalism."<sup>32</sup> Mainline Protestant denominations issued official studies emphasizing the need for religious healing, and the Vatican Council II gave renewed support to healing within the Catholic Church.<sup>33</sup> At the grass roots level, the charismatic movement, with its emphasis on speaking in tongues and miraculous healings, began sweeping through mainstream American Christian churches.

The tumultuous years of the 1960s and early 1970s also saw an increase in the popularity and diversity of non-Christian forms of religious healing.<sup>34</sup> Religions with origins in the East, Transcendental Meditation for instance, gained considerable support promoting the healing effects of meditation and related ritual practices.<sup>35</sup> The Church of Scientology attracted a large following extolling the healing virtues of an interactive process called auditing. Native American forms of religious

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30. Interracial and multi-ethnic in scope, the Azusa Street Revival in Los Angeles continued through 1909 and had international reverberations. CATHERINE ALBANESE, *AMERICA: RELIGIONS AND RELIGION* 105 (1981).

31. In the first decades of this century, the Reverends Elwood Worcester and Samuel McComb of the Emmanuel Episcopal Church in Boston founded the Emmanuel Movement to bring together the healing abilities of clergy and medical doctors. See generally ELWOOD WORCESTER & SAMUEL MCCOMB, *RELIGION AND MEDICINE: THE MORAL CONTROL OF NERVOUS DISORDERS* (1908). Following the footsteps of the Emmanuel Movement, the Federal Council of the Churches of Christ organized the Commission on Religion and Health in 1923. Primary among the aims of the Commission were "[t]o show that health of body, mind, and spirit is an essential concern of religion" and "[t]o discover and demonstrate the distinctive function of religion in the maintenance, restoration, and improvement of health and emotional balance." J. STILLSON JUDAH, *THE HISTORY AND PHILOSOPHY OF THE METAPHYSICAL MOVEMENTS IN AMERICA* 301-02 (1967).

32. Harrell, *supra* note 20, at 219.

33. KELSEY, *supra* note 10, at 223, 241-42.

34. See Fuller, *Alternative Medicine II*, *supra* note 22, at 11.

35. See generally *Malnak v. Yogi*, 440 F. Supp. 1284 (D.N.J. 1977) (Transcendental Meditation garnered enough public support in the 1970s to be introduced in public school system).

healing also gained increased attention, and the New Age movement, in which healing plays a central role, took shape.

Many of the new religious movements that have developed during the past thirty years employ eastern, spiritualist, psychotherapeutic, or shamanic methods of religious healing. To a greater extent than traditional Christian healers and mind-curists, these practitioners make use of material and performative aids to diagnose, prescribe remedies, and cure illness. Crystals and feathers, chanting and dancing, for example, have supplemented the better recognized modes of prayer and laying-on-hands.

Interest in religious healing, revitalized early in this century and accelerating in the 1960s, has not subsided today. A recent study located one hundred thirty religious healing groups in one suburban New Jersey county alone.<sup>36</sup> Two sociologists have offered the opinion that religious healing is on the point of becoming "mainstream" and "seems positioned to assume a significant role in American culture and modern medical consumerism."<sup>37</sup> The ongoing interest in religious healing described above has led to significant conflict with American healthcare regulation over the course of the twentieth century. At the core of the dispute is the constitutional guarantee of religious liberty.

Religious liberty holds an esteemed position among American values. The first words of the First Amendment to the United States Constitution set forth the federal policy regarding religion: "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof."<sup>38</sup> These broad prohibitions guard against the twin dangers of favoritism and hostility by the government toward one or more religions. At the amendment's adoption in 1791, the federal government was one of limited powers, and religious expression was relatively uniform. Hence, the First Amendment's mandate that Congress neither establish nor interfere with religion was not a major source of dispute.<sup>39</sup>

In the twentieth century, however, the government's obligation toward religion has proved more troublesome. Govern-

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36. See MEREDITH MCGUIRE, *RITUAL HEALING IN SUBURBAN AMERICA* (1988).

37. Anson Shupe & Jeffrey K. Hadden, *Understanding Unconventional Healing Models: A Progress Report*, 7 *SECOND OPINION* 82, 91, 101 (Mar. 1988).

38. U.S. CONST. amend. I.

39. See JOHN T. NOONAN, *THE BELIEVER AND THE POWERS THAT ARE* xiii (1987).

ment regulation of social and economic life has grown enormously, and the forms of American religious expression have diversified. Accordingly, government neutrality has become more difficult to define, and controversy has flourished over the proper relationship between government and religion. One constitutional scholar and federal judge has observed that "[n]o area of modern law . . . has been so marked by sectarian struggle, so strained by fundamental fissures, so reflective of deep American doubts and aspirations."<sup>40</sup>

The Supreme Court's interpretation of the First Amendment has played the central role in defining the parameters of American religious liberty in the twentieth century.<sup>41</sup> But the Court has not had occasion to rule on every form of government regulation affecting religious life. Hence, other federal and state court opinions have also been important in setting bounds for the liberties and liabilities afforded to those involved in the practice of religious healing. In most instances, as the following sections detail, courts across the nation have risen to the challenge of protecting religious liberty while guaranteeing the rule of law in religious healing litigation. But in other cases to be examined, religious freedom has been unjustly subordinated to interests of a lower order.<sup>42</sup>

### III. RELIGIOUS PATIENTS

Control of one's own healthcare has often been considered an essential element of individual liberty. In vetoing an early twentieth-century bill that would have required physicians to obtain licenses, Governor Charles Thomas of Colorado declared: "The fundamental vice of the bill is that it denies absolutely to the individual the right to select his own physician. This is a right of conscience, and as sacred as that which enables the citizen to worship God as he may desire."<sup>43</sup>

Governor Thomas's position, however, represents the minority view today. Through extensive regulation of healers

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40. *Id.*

41. The First Amendment's religion clauses are equally applicable to state and local government activity. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

42. Former Chief Justice Warren E. Burger has written: "The essence of all that has been said and written on the subject [of religious freedom] is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972).

43. CLIFFORD P. SMITH, *CHRISTIAN SCIENCE AND LEGISLATION* 33 (1905).

and their instrumentalities, every state indirectly limits individual freedom of choice in healthcare matters. This section addresses the liberties and liabilities of individuals who wish to refuse medical care on a variety of religious grounds.<sup>44</sup> It also explores some collateral legal consequences that have arisen for patients who chose religious treatment rather than medical care. Increasing recognition of the patient's right to refuse medical care—even in the face of death—supports the position advanced throughout this Article that patients should be afforded a high degree of liberty in their pursuit of religious healing.

#### A. *The Source of the Right to Refuse Medical Treatment*

While judicial opinion has not been unanimous, a qualified right to refuse care for religious reasons has emerged. Courts have based this right not only on the First Amendment's guarantee of religious freedom, but also on the constitutional and common law protections of privacy.<sup>45</sup> The patient's right of refusal may even prevail at death's door.

"Do our humane laws make it the duty of a physician to leave the bedside of a dying man, because he demands it, and, if he remains and relieves him by physical touch, hold him guilty of assault?" asked the New York high court shortly after the turn of this century.<sup>46</sup> Justice Irving Vann's opinion in *Meyer v. Supreme Lodge, Knights of Pythias*<sup>47</sup> clearly implied that New York law required no such result. But a decade later, the same court laid the foundation for a contrary conclusion.

In *Schloendorff v. The Society of the New York Hospital*,<sup>48</sup>

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44. Christian Science, for example, teaches that spiritual healing is incompatible with *materia medica*. Mary Baker Eddy wrote: "The schools have rendered faith in drugs the fashion, rather than faith in Deity. . . . Such systems are barren of the vitality of spiritual power." EDDY, *supra* note 28, at 146. Jehovah's Witnesses, on the other hand, refuse medical care involving blood transfusions, which they believe are prohibited by the Bible. See generally Maureen L. Moore, Comment, *Their Life is in the Blood; Jehovah's Witnesses, Blood Transfusions and the Courts*, 10 N. KY. L. REV. 281 (1983).

45. See, e.g., *In re Brown*, 478 So. 2d 1033, 1039-40 (Miss. 1985) (upholding refusal of blood transfusion based on constitutional rights of free exercise of religion and privacy, as well as common law right of privacy).

46. *Meyer v. Supreme Lodge, Knights of Pythias*, 70 N.E. 111, 112 (N.Y. 1904), *aff'd*, 198 U.S. 508 (1905).

47. *Id.*

48. 105 N.E. 92 (N.Y. 1914) (refusing to hold hospital liable), *overruled by* *Bing v. Thunig*, 143 N.E.2d 3 (N.Y. 1959) (finding hospital liability under negligence theory).

the plaintiff sued the hospital as the result of a surgery performed without her consent. The court held the hospital immune from liability. But Justice Benjamin Cardozo nonetheless asserted that: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages."<sup>49</sup>

*Schloendorff* did not involve a patient who spurned medical intervention in the face of a life-threatening condition. During the second half of this century, however, numerous courts have been confronted with precisely this scenario.<sup>50</sup> Until fifteen years ago, most of these matters involved patients with religious objections to medical care. More recently, litigation involving nonreligious refusals has also arisen.<sup>51</sup>

The first reported opinion concerning the right of a competent adult to refuse life-saving medical treatment appeared in 1962.<sup>52</sup> Jacob Dilgard, a Jehovah's Witness, was voluntarily admitted to the hospital suffering from gastro-intestinal bleeding.<sup>53</sup> Although he was willing to undergo a recommended operation, Dilgard refused to submit to a blood transfusion.<sup>54</sup> The court upheld the patient's right to control his own healthcare.<sup>55</sup>

In deciding for the patient, the court first disagreed with the physician's contention that Dilgard's action was the equivalent of suicide.<sup>56</sup> The court wrote that: "[I]t is always a question of judgment whether the medical decision [about the need for a transfusion] is correct."<sup>57</sup> Without reference to authority, Justice Bernard S. Meyer continued that: "[I]t is the individual who is the subject of a medical decision who has the final say and . . . this must necessarily be so in a system of government which gives the greatest possible protection to the

49. *Id.* at 93.

50. See *Cruzan v. Harmon*, 760 S.W.2d 408, 412 n.4 (Mo. 1988) (collecting 54 such decisions), *aff'd sub nom. Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990).

51. *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 270 (1990).

52. *Erickson v. Dilgard*, 252 N.Y.S.2d 705, 706 (N.Y. Sup. Ct. 1962).

53. *Id.* at 706.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Dilgard*, 252 N.Y.S.2d at 706.



individual in the furtherance of his own desires."<sup>58</sup>

Three years later, the Illinois Supreme Court reached a similar conclusion based on the First Amendment's guarantee of the free exercise of religion.<sup>59</sup> A probate court had already compelled the medical treatment against the will of Bernice Brooks, but the supreme court nonetheless issued its opinion because the matter was of "substantial public interest."<sup>60</sup>

The court concluded that the First Amendment "protects the absolute right of every individual to freedom in his religious belief and the exercise thereof, subject only to the qualification that the exercise thereof may properly be limited by governmental action where such exercise endangers, clearly and presently, the public health, welfare or morals."<sup>61</sup>

The opinion further noted that, prior to the transfusion, Bernice Brooks had released her doctor and hospital from any civil liability and that she had no minor children who might have become wards of the state upon her death.<sup>62</sup> Accordingly, the court ruled that Brooks' refusal to accept a blood transfusion did not pose a clear and present danger to society and that her wishes should have been respected.<sup>63</sup>

*Brooks* also implied that the right of refusal might find constitutional support beyond the First Amendment in a broader "right to be let alone."<sup>64</sup> Since *Brooks*, most courts have relied on either the First Amendment's right of free exercise, or the right of privacy, or both, to uphold religious patients' medical refusals.<sup>65</sup> Courts have protected this right of

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58. *Id.*

59. *In re Estate of Brooks*, 205 N.E.2d 435, 442 (Ill. 1965).

60. *Id.* at 437 (quoting *People ex rel. Wallace v. Labrenz*, 104 N.E.2d 769, 772 (Ill. 1952), *cert. denied*, 344 U.S. 824 (1952)).

61. *Id.* at 441.

62. *Id.* at 442.

63. *Id.*

64. *Brooks*, 205 N.E.2d at 442. Quoting from a 1928 dissenting opinion by Supreme Court Justice Louis D. Brandeis, the court noted: "The makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man." *Id.* (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

65. *E.g.*, *Public Health Trust v. Wons*, 541 So. 2d 96 (Fla. 1989); *In re Brown*, 478 So. 2d 1033 (Miss. 1985). Most recently, the Supreme Court has held that an individual's interest in refusing medical care falls within the Fourteenth Amendment's guarantee of liberty. *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 281 (1990). The Court, however, did not take the opportunity to analyze this liberty interest in detail. *Cruzan*, 497 U.S. at 279. In fact, the Court specifically refused to decide whether "the United States Constitution would grant a competent person a

refusal by providing various legal and equitable remedies even after treatment has been compelled. In a number of cases, the patients or their representatives won declaratory judgments after treatment had been provided and even after the patients were deceased.<sup>66</sup> In other actions, doctors and hospitals have faced civil liability for violating a patient's right to refuse.<sup>67</sup>

As a general rule, physicians who render treatment without or beyond the scope of the patient's consent are liable for damages.<sup>68</sup> Causes of action for assault and battery, negligence, and malpractice are most common in this regard. But actions may also be brought for fraud, breach of fiduciary duty, and infliction of emotional distress.<sup>69</sup> In addition, healthcare professionals who provide medical care against the patient's religious wishes may be liable under federal civil rights laws designed to protect individuals from constitutional deprivations.<sup>70</sup>

### *B. Limitations on the Right to Refuse Medical Treatment*

While a patient's interest in refusing medical care has been characterized as fundamental—particularly when supported by religious considerations—this interest must, in each case, be weighed against state interests before courts will order medical care to be withheld or withdrawn.<sup>71</sup> State interests have most often been categorized as preservation of life, pro-

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constitutionally protected right to refuse lifesaving hydration and nutrition." *Id.* In passing, however, Chief Justice Rehnquist did note that the "Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment." *Id.* at 281. Hence, the extent to which a patient may rely solely on the Fourteenth Amendment to refuse medical treatment is still open for debate.

66. See, e.g., *In re Estate of Brooks*, 205 N.E.2d 435 (Ill. 1965); see also *Mercy Hosp., Inc. v. Jackson*, 489 A.2d 1130 (Md. Ct. Spec. App. 1985), *vacated*, 510 A.2d 562 (Md. 1986).

67. E.g., *Interblitzen v. Lane Hosp.* 12 P.2d 744 (Cal. Ct. App. 1932) (cause of action in assault and battery upheld against hospital where female patient alleged repeated intimate examinations by ten or twelve male doctors without her consent); *Mims v. Boland*, 138 S.E.2d 902 (Ga. Ct. App. 1964) (the administration of a barium enema, if without the plaintiff's consent, would amount to an assault and battery); *Physicians' & Dentists' Business Bureau v. Dray*, 8 Wash. 2d 38, 111 P.2d 568 (1941) (cause of action for medical malpractice upheld where, upon a visit to the hospital for lab tests, cross-complainant was given a hysterectomy against her will).

68. See, e.g., *Leach v. Shapiro*, 469 N.E.2d 1047 (Ohio Ct. App. 1984); 61 AM. JUR. 2D *Physicians and Surgeons and Other Healers*, § 197 (1981); and *supra* note 67.

69. See, e.g., *Lunsford v. Regents of the University of California*, No. 837936 (Sup. Ct. Cal. 1990).

70. *Winters v. Miller*, 446 F.2d 65 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971).

71. See *infra* part III.B.1, 2 (discussing court imposed limitations on the right to refuse treatment).

tection of the interests of innocent third parties, prevention of suicide, and maintenance of the ethical integrity of the medical profession.<sup>72</sup> As a general rule, however, the government's interest in compelling medical treatment has outweighed the patient's desires only when the lives of third parties were jeopardized or when the patient was not competent to refuse care.<sup>73</sup> The state's obligation to protect innocent third parties has routinely overridden the autonomy of patients who opposed compulsory vaccination or who were pregnant.<sup>74</sup> Patients may refuse life-saving treatment, however, even if the patient's dependents will be abandoned.<sup>75</sup>

## 1. Protection of Third Parties

### a. Vaccination

Early in this century, religious opposition to smallpox vaccinations provided the Supreme Court with its first opportunity to balance an individual's desire for freedom from medical intervention against society's interest in protecting the health of its citizens. In *Jacobson v. Massachusetts*,<sup>76</sup> the Court stated as follows: "Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."<sup>77</sup>

Since *Jacobson*, courts have upheld compulsory vaccination laws even without the immediate threat of an epidemic.<sup>78</sup> State legislatures have made exceptions in these statutes, however, for members of recognized denominations that oppose immunization.<sup>79</sup> But of late, these exemptions have been called into question.<sup>80</sup> Several courts have eliminated the exemptions because they reveal a governmental preference for organized religion over individual religious or secular prac-

72. *E.g.*, *St. Mary's Hosp. v. Ramsey*, 465 So. 2d 666 (Fla. Dist. Ct. App. 1985).

73. *See infra* part III.B.1.a-c.

74. *See infra* part III.B.1.a-b (discussing right to refuse treatment in situations of vaccinations and pregnancy).

75. *See infra* part III.B.1.c (discussing right to refuse treatment for patients with dependents).

76. 197 U.S. 11 (1905).

77. *Id.* at 27.

78. *See, e.g.*, *Cude v. State*, 377 S.W.2d 816 (Ark. 1964).

79. *See, e.g.*, *Dalli v. Board of Educ.*, 267 N.E.2d 219 (Mass. 1971); *Davis v. State*, 451 A.2d 107 (Md. 1982).

80. *Dalli*, 267 N.E.2d 219; *Davis*, 451 A.2d 107.

tices.<sup>81</sup> Other courts have construed the exemptions broadly to allow individuals with personal religious objections to avoid vaccination.<sup>82</sup>

### b. *Pregnancy*

Governmental concern with preventing harm to innocent third parties also lies behind court decisions compelling life-saving medical treatment for pregnant women with religious objections to medical care. In the earliest case of note, *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*,<sup>83</sup> the Supreme Court of New Jersey expressed its willingness to compel a transfusion for a Jehovah's Witness in her thirty-second week of pregnancy.<sup>84</sup> The medical evidence established a probability that at some point in the pregnancy both she and her unborn child would die unless a transfusion was administered.<sup>85</sup> The court ruled that a transfusion could be administered to the mother if necessary because "the welfare of the child and the mother are so intertwined and inseparable that it would be impracticable to attempt to distinguish between them."<sup>86</sup>

In *Jefferson v. Griffin Spalding County Hospital Authority*,<sup>87</sup> the court authorized a more intrusive medical procedure upon a woman in her thirty-ninth week of pregnancy. The patient and her husband opposed a Caesarean section because they were "of the view that the Lord ha[d] healed her body and that whatever happen[ed] to the child [was] the Lord's will."<sup>88</sup> But the trial court concluded that the unborn child had a ninety-nine to one hundred percent certainty of dying without the operation and that the mother had a fifty percent chance of dying. With the operation, both parties had nearly a

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81. See, e.g., *Brown v. Stone*, 378 So. 2d 218 (Miss. 1979), *cert. denied*, 449 U.S. 887 (1980).

82. See, e.g., *Maier v. Besser*, 341 N.Y.S.2d 411 (N.Y. Sup. Ct. 1972) (upholding preliminary injunction prohibiting exclusion from school of non-immunized children who practiced faith similar to Christian Science); *Kolbeck v. Kramer*, 202 A.2d 889 (N.J. Super. Ct. Law Div. 1964) (compelling state university to accept a non-immunized student who belonged to no recognized religious group when Christian Scientists were exempted from vaccination).

83. 201 A.2d 537 (N.J.), *cert. denied*, 377 U.S. 985 (1964).

84. *Id.* at 538.

85. *Id.*

86. *Id.*

87. 274 S.E.2d 457 (Ga. 1981).

88. *Id.* at 459.

one hundred percent chance of surviving.<sup>89</sup> On review, the Supreme Court of Georgia agreed with the trial court that the intrusion into the lives of both parents was "outweighed by the duty of the State to protect a living, unborn human being from meeting his or her death before being given the opportunity to live."<sup>90</sup>

In *Crouse Irving Memorial Hospital, Inc. v. Paddock*,<sup>91</sup> a New York trial court took the unusual step of extending the state's interest beyond the life of the fetus to the protection of the medical profession as well.<sup>92</sup> The court concluded that physicians must be permitted to stabilize patients following an operation.<sup>93</sup> Stacey Paddock consented to a Caesarean section but not to blood transfusions, which her physician deemed necessary to safeguard her life. The court found that "[e]very such grant of responsibility should be accompanied by 'authority sufficient to properly carry out the delegated responsibilities.'"<sup>94</sup>

Thus, this summary of pregnancy cases reveals that the state's interest in rendering life-saving medical care for a viable fetus may outweigh the mother's religious objections to medical intervention, at least where the mother's health is not threatened by the treatment.<sup>95</sup>

### c. Dependents

As noted above, in defense of innocent third parties, courts have imposed medical care on those who refused vaccination and on pregnant women who jeopardized the lives of their unborn offspring. Some courts have gone even further and indicated that a religious patient may not refuse life-saving

89. *Id.* at 458.

90. *Id.* at 460.

91. 485 N.Y.S.2d 443 (N.Y. Sup. Ct. 1985).

92. *Id.* at 446.

93. *Id.*

94. *Id.* But see *Mercy Hosp. v. Jackson*, 489 A.2d 1130 (Md. Ct. Spec. App. 1985) (affirming a pregnant woman's right to refuse a life-saving blood transfusion where fetus was not at risk), *vacated*, 510 A.2d 562 (Md. 1986).

95. Given the unstable status of abortion laws at the present time, the outcome of future litigation in this area is particularly uncertain. Outside parameters for judicial intervention, however, may be suggested. A court has more reason to closely scrutinize a religious healthcare decision affecting a viable fetus than it does a religiously inspired choice by a non-pregnant adult. In any event, however, a court should not intervene on behalf of a fetus as readily as it would in the case of a seriously ill child whose parent refuses medical treatment on religious grounds. See *infra* part IV for a detailed discussion regarding the latter circumstances.

medical care if the decision will result in the abandonment of a minor child.<sup>96</sup> Other courts have indicated, however, that the state's interest is negated by proof that minor children will receive adequate financial support if the patient dies.<sup>97</sup> Most recently, the New York Court of Appeals completely subordinated the state's interest in protecting dependent children to the patient's right of refusal.<sup>98</sup> The court relied on the fact that no legislation forced a patient to submit to medical treatment for the benefit of a child.<sup>99</sup>

## 2. Protection of Patients

In addition to giving credence to the state's interest in protecting innocent third parties, courts have identified the protection of patients themselves as a countervailing interest to autonomy. Accordingly, courts generally act to prevent suicide and to prevent all types of self-inflicted injuries by those lacking the capacity to know better.<sup>100</sup> Although refusal of medical care by competent adults is probably no longer equated with self-destruction,<sup>101</sup> defining the scope of autonomy for incompetent patients can be a complex matter.

### a. *Suicide*

Despite Supreme Court Justice Wiley B. Rutledge's much-noted dictum that "parents may be free to become martyrs,"<sup>102</sup> the state's interest in preventing acts of self-destruction has often been asserted. As the Supreme Court remarked in its first significant religious free exercise opinion, it is not beyond

96. See, e.g., *In re Georgetown College, Inc.*, 331 F.2d 1000 (D.C. Cir.) (state as *parens patriae* will not permit a parent to abandon a child by refusing life-saving medical treatment), *cert. denied*, 377 U.S. 978 (1964); *In re Winthrop Univ. Hosp.*, 490 N.Y.S.2d 996 (N.Y. Sup. Ct. 1985) (same).

97. See, e.g., *In re Osborne*, 294 A.2d 372 (D.C. 1972) (family business would supply children's material needs in absence of father); *St. Mary's Hosp. v. Ramsey*, 465 So. 2d 666 (Fla. Dist. Ct. App. 1985) (refusal of medical care would not result in abandonment because primary residence of child was in another state and child was supported by mother).

98. *Fosmire v. Nicoleau*, 551 N.E.2d 77, 84 (N.Y. 1990).

99. *Id.* at 83-84. See also *In re Farrell*, 529 A.2d 404 (N.J. 1987) (state's interest in protecting minors does not outweigh right of parent with two teenage sons to terminate life support); *Norwood Hosp. v. Munoz*, 564 N.E.2d 1017 (Mass. 1991) (state's interest in protecting minors does not outweigh parent's right to refuse care when there is no evidence of abandonment).

100. See, e.g., *Fosmire*, 551 N.E.2d at 82.

101. See, e.g., *Farrell*, 529 A.2d at 411.

102. *Prince v. Massachusetts*, 321 U.S. 158, 170 (1943) (parents are not free to make martyrs of their children).

the power of the civil government to prevent religious suicide.<sup>103</sup> And as recently as 1990, the Court declared that it did "not think a State is required to remain neutral in the face of an informed and voluntary decision by a physically-able adult to starve to death."<sup>104</sup>

Accordingly, several courts have raised the state's interest in preventing suicide as a reason for preventing religious medical refusal.<sup>105</sup> In *John F. Kennedy Memorial Hospital v. Heston*,<sup>106</sup> the Supreme Court of New Jersey declared that "unless the medical option itself is laden with the risk of death or of serious infirmity, the State's interest in sustaining life in such circumstances is hardly distinguishable from its interest in the case of suicide."<sup>107</sup>

Since *Heston*, however, a majority rule has emerged to the contrary, and courts no longer equate medical refusal with suicide.<sup>108</sup> The New Jersey Supreme Court itself has reversed its earlier position.<sup>109</sup>

#### b. Incompetency

A more difficult question is presented concerning individuals who, by reason of incapacity, are unable to decide on their own course of treatment. The state's interest in preventing harm to the patient is greatest when the patient is no longer—or has never been—competent. The government's authority to act as guardian for those who are unable to care for themselves is well-established in the law.<sup>110</sup> The standard used by courts to determine whether an individual is in need of a guardian

103. *Reynolds v. United States*, 98 U.S. 145, 166 (1879).

104. *Cruzan v. Director, Missouri Dep't. of Health*, 497 U.S. 261, 280 (1990).

105. *John F. Kennedy Mem. Hosp. v. Heston*, 279 A.2d 670 (N.J. 1971), *overruled by In re Conroy*, 486 A.2d 1209 (N.J. 1985); *In re Georgetown College, Inc.*, 331 F.2d 1000, 1009 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964); *St. Mary's Hosp. v. Ramsey*, 465 So. 2d 666, 669 (Fl. Dist. Ct. App. 1985).

106. 279 A.2d 670 (N.J. 1971), *overruled by In re Conroy*, 486 A.2d 1209 (N.J. 1985) (no longer equating rejection of medical treatment with suicide).

107. *Id.* at 673.

108. *In re Farrell*, 529 A.2d 404, 411 (N.J. 1987) (collecting decisions).

109. *See In re Conroy*, 486 A.2d 1209 (N.J. 1985).

110. The Supreme Court has traced the origin of the doctrine of *parens patriae* back to the English constitutional system in which the sovereign or his representative served as "the general guardian of all infants, idiots, and lunatics." *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1971) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 47 (1768)). The power to act as "father of the country" passed from the king to the states and was subsequently upheld by the Supreme Court as early as 1890. *Church of Jesus Christ of Latter Day Saints v. United States*, 136 U.S. 1, 57 (1890).

varies, however, according to the circumstances under consideration. An individual may be deemed competent to make some decisions, but not others. Although reluctant to set forth detailed competency standards for medical decision-making, courts generally consider a patient to be competent if he or she "has a clear understanding of the nature of his or her illness and prognosis, and of the risks and benefits of the proposed treatment, and has the capacity to reason and make judgments about that information."<sup>111</sup>

While adults are presumed competent, this presumption may be overcome by evidence to the contrary.<sup>112</sup> Those patients who oppose doctors' recommendations are more likely to be deemed incompetent.<sup>113</sup> Certain types of evidence, however, will not prove incompetency. For instance, a patient who has been involuntarily committed to a mental institution is not thereby deprived of the capacity to refuse medical care for religious reasons.<sup>114</sup> In addition, while evidence pertaining to an individual's cognitive abilities is admissible at a competency adjudication, religious beliefs may not serve as the basis for a finding of incompetence.<sup>115</sup>

Although minors enjoy some constitutional liberties,<sup>116</sup> courts have been willing to override children's objections to medical care on incompetency grounds.<sup>117</sup> Children as young as twelve years of age, however, have been permitted to reject medical care when such action would not endanger their lives.<sup>118</sup> And two recent cases have upheld mature minors' rights to refuse even life-saving medical care for religious

111. *Farrell*, 529 A.2d at 413.

112. *Id.* at 415.

113. See *Developments in the Law—Medical Technology and the Law*, 103 HARV. L. REV. 1519, 1646 (1990) (noting commentators who have reached this conclusion).

114. *Winters v. Miller*, 446 F.2d 65 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971) (holding that mental illness and commitment does not raise presumption of incompetency). See also *In re Milton*, 505 N.E.2d 255, 257 (Ohio) (holding that involuntary commitment is not tantamount to finding of incompetency), *cert. denied*, 484 U.S. 820 (1987).

115. *Milton*, 505 N.E.2d at 257.

116. *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976). In this case, the court stated that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Id.*

117. See, e.g., *In re D.L.E.*, 645 P.2d 271, 276 (Colo. 1982) (overriding minor's objection to treatment).

118. See, e.g., *In re Seiferth*, 127 N.E.2d 820, 823 (N.Y. 1955) (allowing child to refuse treatment for cleft palate and harelip). See *infra* part IV for further discussion regarding healthcare for children.



reasons.<sup>119</sup>

The difficulty in determining whether a minor has made a mature, independent decision to refuse medical care is akin to the problem of ascertaining the competency of an adult whose mental state is variable. As a general rule, treatment instructions articulated while the patient is competent are entitled to respect despite prior or subsequent incapacity.<sup>120</sup> Nevertheless, several courts have ordered life-saving treatment for presently incompetent patients despite evidence from family members that the patients would have objected on religious grounds. These decisions relied in part on the notion that the patient's actual wishes were not known because he or she was already incompetent on arrival at the hospital.<sup>121</sup>

In a few relatively early cases, courts even turned a patient's prior objection to medical care into a type of consent. These courts emphasized the fact that the patient actually *consented* to be compelled by a court order.<sup>122</sup>

The related argument has also been advanced that patients who object to medical care on religious grounds may be compelled to accept treatment if such compulsion will relieve the patient of any responsibility for accepting treatment. Thus in *In re E.G.*,<sup>123</sup> the State asserted that the court should have

119. *In re E.G.*, 515 N.E.2d 286 (Ill. App. Ct. 1987) (cited in *In re E.G.*, 549 N.E.2d 322, 330 (Ill. 1989)). *But see In re J.J.*, 582 N.E.2d 1138, 1141 (Ohio Ct. App. 1990) (court ordered fourteen-year-old to undergo medical treatment for gonorrhea over his religious objections).

120. *See, e.g., In re Eichner*, 420 N.E.2d 64, 72 (N.Y.), *cert. denied*, 454 U.S. 858 (1981); *In re Quakenbush*, 383 A.2d 785 (N.J. Morris Cty. Ct. 1978) (upholding patient's refusal of amputation despite evidence of incompetency).

121. *See, e.g., In re Georgetown College, Inc.*, 331 F.2d 1000, 1008 (D.C. Cir.) (ordering blood transfusions for unconscious patient despite husband's religious objections), *cert. denied*, 377 U.S. 978 (1964); *John F. Kennedy Mem. Hosp. v. Heston*, 279 A.2d 670 (N.J. 1971) (ordering blood transfusion for unconscious adult patient despite parent's religious objections), *overruled by In re Conroy*, 486 A.2d 1209 (N.J. 1985); *In re Estate of Dorone*, 534 A.2d 452 (Pa. 1987) (ordering blood transfusion for unconscious patient despite parent's objection on grounds that patient was a Jehovah's Witness).

122. In *In re Georgetown College*, for instance, Justice Skelly Wright lent support to his decision compelling treatment by noting that when he asked the patient whether she would oppose a court-ordered transfusion "she indicated . . . that it would not then be her responsibility." 331 F.2d at 1007. *See also United States v. George*, 239 F. Supp. 752, 753 (D. Conn. 1965) (patient stated that his "conscience was clear" and that the responsibility was "upon the court's conscience"); *Powell v. Columbian Presbyterian Medical Center*, 267 N.Y.S.2d 450, 451 (N.Y. Sup. Ct. 1965) (patient did not object to receiving treatment, but would not direct its use).

123. 515 N.E.2d 286 (Ill. App. Ct. 1987), *as amended* (1988), *aff'd in part and rev'd in part*, 549 N.E.2d 322 (Ill. 1989).

compelled treatment for the seventeen-year-old patient because her church would view the transfusion as "the court's transgression, not her own, and would support rather than punish her."<sup>124</sup> On appeal, however, the court explicitly refused to adopt the State's suggested rationale because of the harm inevitably inflicted on the patient's conscience.<sup>125</sup>

Two additional objections help dispose of the "relief from transgressions" argument: (1) a judicial determination of a religious transgression necessitates a theological inquiry, but theological inquiries by the court are to be avoided,<sup>126</sup> and (2) if the patient opposes medical care because of a belief that religious healing is incompatible with medicine, the patient's desire is to be healed by religious means, not to avoid a religious transgression; thus, the spiritual consequences of the court's action are irrelevant to the exercise of the patient's right of refusal.

Courts have not been so reluctant to withhold or withdraw medical care for the mentally incapacitated when life does not hang in the balance.<sup>127</sup> In such cases, courts have regularly employed what has been termed the "substituted judgment" approach to determine the course of treatment.<sup>128</sup> Employing this method, the District of Columbia Court of Appeals declared that: "(a) when an individual, prior to incompetence, has objected, absolutely, to medical care on religious grounds, (b) the evidence demonstrates a strong adherence to the tenets of that faith, and (c) there is no countervailing evidence of vacillation, the court should conclude that the individual would reject medical treatment."<sup>129</sup> In the absence of such clear-cut indications, the court noted that evidence regarding the detri-

124. *Id.* at 289.

125. The court noted that "a Jehovah's Witness minister testified that the withholding of consent did not make transfusions a less difficult experience for one of his faith." *Id.* "He analogized appellant's suffering to that of a rape victim: '[J]ust because the person exonerated you in having participated in it, it wouldn't mean that the trauma wasn't there. Forcing anyone to violate his consideration [sic] is the most painful indignity that an individual could have perpetrated against him.'" *Id.*

126. See *Employment Div., Or. Dep't of Human Resources v. Smith*, 494 U.S. 872, 887 (1990).

127. See, e.g., *In re Boyd*, 403 A.2d 744, 752 (D.C. 1979) (requiring trial court to give greater consideration to the beliefs of a Christian Scientist patient before administration of psychotropic drugs); *Winters v. Miller*, 446 F.2d 65, 70 (2d Cir.) (holding that tranquilizers should not have been administered to an incompetent patient known to be a Christian Scientist), *cert. denied*, 404 U.S. 985 (1971).

128. *Boyd*, 403 A.2d at 749 n.10.

129. *Id.* at 751.

mental side effects of the proposed treatment and the likelihood of cure or improvement is also relevant to determine whether a previously competent patient's religious objections to treatment must be honored.<sup>130</sup>

The Supreme Court recently left open the question of whether a formerly competent patient who has provided clear and convincing evidence of her intent to refuse medical care is entitled to constitutional protection for such a decision.<sup>131</sup> By statute, however, many states now provide that written instructions of the patient's intent in this regard are to be honored.<sup>132</sup>

In sum, regarding the limitations placed on the religious patient's right to refuse medical intervention, the courts have made clear that medical treatment should not be compelled over the patient's objections without a court order unless: (1) an emergency arises in which the life of an innocent third party is threatened; or (2) the patient's life is in immediate danger and there is reason to conclude that the objections arise from mental incapacity. Beyond these existing doctrines, and, in the interest of religious liberty, a court should not compel treatment unless: (1) the lives of innocent third parties are threatened; or (2) the patient would not have objected to the treatment if he or she were competent.

### *C. Limitations on the Right to Seek Religious Treatment*

In reviewing the liberties and liabilities of patients who employ religious healing, the previous subsections outlined the right to refuse orthodox medical intervention and the limitations on the exercise of that right. This section examines various collateral consequences of a patient's preference for religious treatment over medical care. In particular, this section illustrates that the use of religious treatment has created problems for patients by jeopardizing their recovery for personal injuries and by casting doubt on their competency as jurors and testators.

#### 1. Damages and Disability Benefits

The choice of religious rather than conventional medical treatment has raised legal questions concerning the recovery of

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130. *Id.*

131. *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 280 (1990).

132. *See Medical Technology and the Law, supra* note 113, at 1671.

damages and the receipt of disability benefits. Religious plaintiffs have had to overcome arguments that their use of spiritual healing enabled them to transcend all pain and suffering or, to the contrary, served to exacerbate their injuries.

Damage calculations for personal injury include compensation for the victim's pain and suffering. Thus, the fact that the victim's suffering may have been lessened by spiritual treatment is relevant in determining damage awards. On this basis, a Texas appellate court approved cross-examination of the victim regarding her belief in Christian Science and her ability to control her own pain by rising to a "spiritual plane high above mental and physical sufferings. . . ." <sup>133</sup> In a related matter, however, when a Christian Scientist testified that he believed in the existence of pain and had, in fact, suffered as the result of injuries inflicted by the defendant, the Alabama Supreme Court ruled that an inquiry into the plaintiff's contrary religious beliefs was properly forbidden. <sup>134</sup>

A larger hurdle for patients of religious treatment seeking recovery for personal injuries has arisen from the operation of the doctrine of avoidable consequences. Victims of personal injury are under a general duty to promote their own recovery and prevent the aggravation of their condition. <sup>135</sup> Under the doctrine of avoidable consequences, the perpetrator of the harm is not liable for damages that could have been prevented if the plaintiff had taken reasonable measures to mitigate the injury. <sup>136</sup> Courts have struggled with the issue of how to apply this rule to injury victims who object to medical care for religious reasons. <sup>137</sup> In general, juries have been instructed to determine if the plaintiff's choice of religious healing was reasonable under all of the relevant circumstances. <sup>138</sup> If they so find, they are to conclude that none of the plaintiff's harm was avoidable. <sup>139</sup> This course avoids adopting into law the irrebuttable presumption that conventional medicine is the only reasonable form of treatment for injuries.

The leading decision on the doctrine of avoidable conse-

133. *Ft. Worth & D.C. Ry. Co. v. Travis*, 99 S.W. 1141, 1142 (Tex. Civ. App. 1907).

134. *City of Montgomery v. Wyche*, 53 So. 786, 789 (Ala. 1910).

135. *Munn v. Southern Health Plan, Inc.*, 719 F. Supp. 525, 527 (N.D. Miss. 1989), *aff'd*, 924 F.2d 568 (5th Cir.), *cert. denied*, 112 S. Ct. 277 (1991).

136. *Id.*

137. *Id.* at 526-27.

138. *Lange v. Hoyt*, 159 A. 575, 577-78 (Conn. 1932).

139. *Id.* at 578.

quences<sup>140</sup> involved an eight-year-old girl who sustained a fractured left arm and pelvis when she was hit by a car.<sup>141</sup> Although Minelda Lange received emergency medical treatment immediately after the accident, the motorist claimed that the child's mother subsequently interfered with Minelda's medical care.<sup>142</sup> The mother was a Christian Scientist.<sup>143</sup> On appeal, the Connecticut Supreme Court wrote that reasonable treatment following an injury must be determined in light of "all the surrounding circumstances including whatever belief as to methods of treatment . . . [the plaintiff] conscientiously held."<sup>144</sup> The court also pointed out that curative theories held by large numbers of intelligent people should not be disregarded.<sup>145</sup> The court added that the child's personal injury award would not, in any event, be limited by her mother's choice of religious healing over medical care, even if that choice was unreasonable.<sup>146</sup>

Several courts have subsequently elaborated on the "surrounding circumstances" standard.<sup>147</sup> One opinion specified that "[t]here is no hard and fast rule that the injured person must seek medical care of a particular type."<sup>148</sup> Accordingly, evidence that the plaintiff was a Christian Scientist was relevant in determining whether he acted with reasonable diligence following an auto injury.<sup>149</sup> In more recent litigation involving a religious refusal to accept medical care, another court acknowledged that the jury is permitted to consider the victim's knowledge of proposed treatments in determining

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140. For other cases discussing the doctrine of avoidable consequences, see *Miller v. Hartman*, 36 P.2d 965, 966 (Kan. 1934) (approving jury consideration of evidence tending to show that a Christian Scientist's failure to seek medical care resulted in avoidable injury); *Christiansen v. Hollings*, 112 P.2d 723, 730 (Cal. Ct. App. 1941) (court approved jury instruction allowing consideration of Christian Science belief in spiritual healing); *Oxley v. Allstate Ins. Co.*, 237 So. 2d 90, 91-92 (La. Ct. App. 1970) (implying that a belief in faith healing might support a delay in seeking medical care).

141. *Lange*, 159 A. at 576.

142. *Id.* at 576-77.

143. *Id.* at 576.

144. *Id.* at 577.

145. *Id.* at 578.

146. *Lange*, 159 A. at 578.

147. *Munn v. Algee*, 730 F. Supp. 21 (N.D. Miss. 1990), *aff'd*, 924 F.2d 568 (5th Cir.), *cert. denied*, 112 S. Ct. 277 (1991); *Christiansen v. Hollings*, 112 P.2d 723 (Cal. Ct. App. 1941).

148. *Christiansen*, 112 P.2d at 730 (upholding \$8,000 award in wrongful death suit in which decedent opted for treatment from Christian Science Practitioner).

149. *Id.*

whether reasonable steps were taken to mitigate the harm.<sup>150</sup> Thus, the plaintiff's view of religious treatment is arguably relevant.

In light of these conclusions, the decision in *Adams v. Carlo*<sup>151</sup> is subject to criticism. In *Adams*, a Missouri state trial court prohibited the defendant from learning the healing formula employed by a Christian Science plaintiff injured in a steam shovel accident.<sup>152</sup> The defendant appealed the ruling, but the reviewing court affirmed on the ground that the inquiry was intended to expose the plaintiff to jury ridicule.<sup>153</sup>

The jury should have been permitted, however, to learn of all the circumstances surrounding the plaintiff's choice of treatment. Although the exclusion of evidence concerning religious treatment may have benefitted the plaintiff in *Adams*, this approach ultimately contributes to the establishment of orthodox medicine as the only reasonable form of care. Religious parties must be allowed to offer testimony to support the prudence of their actions. To be judged imprudent is the risk assumed in using the courts to recover civil damages after employing religious healing. For his part, the plaintiff in *Adams* had been willing to repeat the prayer.<sup>154</sup> But on its own initiative, the court instructed him not to do so.<sup>155</sup>

Most recently, two other courts have discussed—without finally deciding—the constitutionality of allowing the jury to take religious beliefs into account to determine whether the victim acted reasonably to avoid additional harm.<sup>156</sup> These decisions affirm that patients who employ religious means are not exempt from the doctrine of avoidable consequences.<sup>157</sup> Thus, religious plaintiffs must prove that they acted diligently, although even an unreasonable refusal to seek medical care

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150. *Munn*, 730 F. Supp. at 28 (upholding jury's decision to award no damages in wrongful death suit).

151. 101 S.W.2d 753 (Mo. Ct. App. 1937).

152. *Id.* at 757.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Munn v. Algee*, 719 F. Supp. 525, 530 (N.D. Miss. 1989), *aff'd*, 924 F.2d 568 (5th Cir.), *cert. denied*, 112 S. Ct. 277 (1991); *Corlett v. Caserta*, 562 N.E.2d 257, 264 (Ill. App. Ct. 1990).

157. *Munn*, 719 F. Supp. at 529-30 (to exempt religious practitioners from the doctrine of avoidable consequences might unconstitutionally establish religion); *Corlett*, 562 N.E.2d at 262 (declining to create an exemption from duties to mitigate injuries for a patient who refuses reasonable medical treatment on religious grounds).

does not necessarily relieve the defendant of all liability.<sup>158</sup> If religious discrimination is to be avoided, plaintiffs should continue to be given the opportunity to show that their choice of unorthodox treatment was prudent in light of all relevant circumstances.<sup>159</sup>

A few courts have taken a different tact to avoid religious discrimination in litigation involving the award of governmental disability benefits.<sup>160</sup> In these matters, courts have ruled that the First and Fourteenth Amendments prohibit the state from discriminating against individuals who choose religious treatment over medical care.<sup>161</sup> Although a contrary rule was articulated prior to the 1970s,<sup>162</sup> claimants have been awarded benefits despite evidence that medical treatment would alleviate the disability.<sup>163</sup>

Thus, courts are now willing to compel government agencies to accept disability claims by those who rely exclusively on religious healing. Perpetrators of personal injuries, however, are not required to bear increased liability resulting from the unreasonable use of religious healing. Juries are to determine whether religious healing was reasonable in light of all relevant circumstances and may not disregard popular curative theories even if they are unacceptable to the medical establishment.

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158. *Corlett*, 562 N.E.2d at 262; *Shorter v. Drury*, 103 Wash. 2d 645, 652-53, 695 P.2d 116, 121 (1985) (upholding the trial court's reduction of plaintiff's award in wrongful death case), *cert. denied*, 474 U.S. 827 (1987).

159. This conclusion, as it applies to religious parents who refused medical care for their children, is also discussed *infra* part IV.C.

160. *Montgomery v. Board of Retirement*, 109 Cal. Rptr. 181 (Cal. Ct. App. 1973) (reversing a lower court decision denying benefits to a claimant who refused medical treatment on account of her belief in faith healing). See also *Lewis v. Califano*, 616 F.2d 73, 81 (3d Cir. 1980) (vacating district court's grant of summary judgment due to lack of a specific finding regarding the sincerity of the plaintiff's religious beliefs); *Collins-Maat v. Bowen*, 690 F. Supp. 664, 669 (N.D. Ill. 1988) (plaintiff's religious beliefs disregarded because court found her capable of performing work).

161. *Califano*, 616 F.2d at 81.

162. *Martin v. Industrial Accident Comm'n*, 304 P.2d 828 (Cal. Dist. Ct. App. 1956) (no recovery because plaintiff's death resulted from his unreasonable refusal to accept blood transfusion). *But see Industrial Comm'n v. Vigil*, 373 P.2d 308, 311 (Colo. 1962) (benefits should be awarded for those injuries that would have been sustained had the claimant accepted surgery); *Nashert and Sons v. McCann*, 460 P.2d 941, 943 (Okla. 1969) (holding on constitutional grounds that benefits should be awarded for those injuries that would have been sustained even if the patient had accepted medical treatment).

163. *Montgomery*, 109 Cal. Rptr. at 185. Some state statutes provide for similar results. See, e.g., Comment, *Medical Care, Freedom of Religion, and Mitigation of Damages*, 87 YALE L.J. 1466, 1467 n.5 (1978) (summarizing state statutes).

## 2. Competency

Those who have relied on religious rather than medical treatment have not only faced difficulties recovering compensation for injuries, they have also suffered challenges to their competency to serve on juries and to execute wills.<sup>164</sup> Although religious beliefs have, on occasion, been considered relevant in determining whether a juror is fit to carry out designated duties,<sup>165</sup> no reported opinion holds that a juror's practice of religious healing provides adequate grounds for overturning a jury verdict. Similarly, testators have had their wills challenged in probate because they relied on spiritual care.<sup>166</sup> Although a few courts have used a testator's religion to overturn a will,<sup>167</sup> belief in the efficacy of religious healing should not provide grounds for such an outcome.

### a. Jurors

At common law, trial participants who did not believe in God were deemed incompetent.<sup>168</sup> Statutory and constitutional laws have since provided, however, that witnesses and jurors may not be barred simply because of their religious beliefs.<sup>169</sup> A juror may be disqualified, however, if religious convictions foster a mental attitude that interferes with the faithful execution of that juror's duty to find the facts and apply the law.<sup>170</sup>

In a 1929 California will contest, a testator's nephew unsuccessfully attempted to prove that the testator lacked a sound mind when he executed his will.<sup>171</sup> On appeal, the nephew sought to overturn the verdict by disqualifying a juror because she was a Christian Scientist.<sup>172</sup> The appellant contended that as Christian Science denied the existence of mental disease or incapacity, the juror would not have found the testator incompetent no matter what the evidence

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164. *Smith v. Smith*, 46 P.2d 232 (Cal. Dist. Ct. App. 1935) (challenge to juror's service based on religious beliefs); *Ingersoll v. Gourley*, 72 Wash. 462, 139 P. 207 (1914) (challenge to testator's competency because of religious beliefs).

165. See, e.g., *Smith v. Smith*, 46 P.2d 232 (Cal. Dist. Ct. App. 1935).

166. See, e.g., *Spencer v. Spencer*, 221 S.W. 58 (Mo. 1920).

167. See, e.g., *Ingersoll v. Gourley*, 72 Wash. 462, 139 P. 207 (1914).

168. See 3 BOWE-PARKER, PAGE ON WILLS 401 (1961); Joel E. Smith, Annotation, *Religious Beliefs, Affiliations, or Prejudice of Prospective Jurors As Proper Subject of Inquiry or Grounds for Challenge on Voir Dire*, 95 A.L.R.3d 172, 193-96 (1979).

169. *In re Malvasi's Estate*, 273 P. 1097, 1099-1100 (Cal. Dist. Ct. App. 1929).

170. *Smith v. Smith*, 46 P.2d 232, 233 (Cal. Dist. Ct. App. 1935).

171. *Malvasi's Estate*, 273 P. at 1098.

172. *Id.* at 1099.



showed.<sup>173</sup>

The court rejected the appeal, quoting the juror's affidavit that "Christian Science at all times in the past has recognized and does now recognize the existence of disease, including mental incompetency."<sup>174</sup> In light of the juror's understanding of Christian Science, the court held that the nephew had failed to show that her attitude toward mental disease disqualified her from service.<sup>175</sup>

Six years later, another California court made clear that a juror's religious beliefs could conceivably be related to a state of mind that would result in a challenge for cause.<sup>176</sup> The case involved a dispute between former spouses over a property settlement agreement.<sup>177</sup> The plaintiff's counsel questioned prospective jurors regarding the effects of their religious beliefs on their view of divorce and remarriage.<sup>178</sup> In dismissing the defendant's objections to the plaintiff's line of questioning, the appellate court noted:

While it is certain that no person shall be rendered incompetent to be a juror on account of his opinions on matters of religious belief . . . it is equally true that because of his religious faith a prospective juror may be unable to try a certain case impartially, because of a resulting state of mind which would be a ground of challenge for cause.<sup>179</sup>

Despite theoretical concern that jurors who believe in religious healing might fail to recognize the existence of pain or otherwise acknowledge the operation of natural or human law, there are no holdings to that effect. But judicial opinion is not unanimous as to whether religious beliefs may serve as evidence of incapacity to execute a will.<sup>180</sup>

173. *Id.*

174. *Id.* at 1099-1100.

175. *Id.* at 1100. See also *Hehir v. Bowers*, 407 N.E.2d 149, 151-52 (Ill. App. Ct. 1980) (juror's belief in faith healing held insufficient to impeach jury verdict in personal injury action).

176. *Smith v. Smith*, 46 P.2d 232, 233 (Cal. Dist. Ct. App. 1935).

177. *Id.* at 232.

178. *Id.* at 233.

179. *Id.*

180. See, e.g., *Ingersoll v. Gourley*, 72 Wash. 462, 139 P. 207 (1914) (religious beliefs received as evidence of incapacity). But see *In re Brush's Will*, 72 N.Y.S. 421 (N.Y. 1901) (religious beliefs do not serve as evidence of incapacity).

### b. Testators

Although a testator's religious views are generally not relevant in determining a will's validity, testimony on this subject has, at times, been received into evidence.<sup>181</sup> A belief in the efficacy of religious healing, however, should not serve to prove incompetency.

Among the various types of legal transactions, making a will requires the highest degree of capacity and is thus subject to the closest scrutiny.<sup>182</sup> But the courts have made clear that evidence of the testator's religious beliefs is generally inadmissible to undermine the will's validity. This remains true even if such convictions are different from those others commonly hold.<sup>183</sup> Nor will evidence of religious enthusiasm or extreme piety prove mental incapacity.<sup>184</sup> Regarding religious healing in particular, courts have declared that belief in laying-on-hands<sup>185</sup> or in miraculous cures<sup>186</sup> does not constitute evidence of insanity.<sup>187</sup>

Nonetheless, litigants have, on occasion, been permitted to introduce the deceased's religious beliefs into evidence to support a claim that the individual lacked the requisite capacity to execute the will. Religious beliefs have been admitted as evi-

181. See, e.g., *Ingersoll*, 72 Wash. 462, 139 P. 207.

182. The test for capacity has been described as follows:

First, the testator must understand the ordinary affairs of his life; second, he must know both the nature and extent of his property and the persons who are the natural objects of his bounty; third, he must know that he is disposing of his property in the manner and to the persons mentioned in his will.

*Spencer v. Spencer*, 221 S.W. 58, 63 (Mo. 1920) (quoting *Halm v. Hammersteen*, 198 S.W. 833, 836 (Mo. 1917)).

183. See, e.g., *Brush's Will*, 72 N.Y.S. at 425; see generally 3 BOWE-PARKER, PAGE ON WILLS, *supra* note 168 at 573.

184. See, e.g., *Clark v. Johnson*, 105 S.W.2d 576, 579 (Ky. 1937). See also *In re Elston's Estate*, 262 P.2d 148, 151 (Okla. 1953) (the term "insane delusion" does not include a religious belief if not altogether illogical).

185. See, e.g., *Spencer*, 221 S.W. at 62.

186. See, e.g., *Brush's Will*, 72 N.Y.S. at 425.

187. In considering a believer's faith in Christian Science healing, one court summarized judicial sentiment as follows:

[H]owever opposed these teachings may be to the beliefs or notions of others, they are founded on the religious convictions of those professing them. This being so, the court cannot say that those persons are mentally unsound. The truth or falsity of religious belief is beyond the scope of a judicial inquiry. Thus, the court has often been asked to pass upon the falsity of Spiritualism, and to hold that a follower of this faith, which, like Christian Science, is contrary to the convictions of most men, was of necessity laboring under an insane delusion; but it has uniformly refused so to declare or hold.

*Brush's Will*, 72 N.Y.S. at 425 (citations omitted).

dence of an insane delusion<sup>188</sup> or on the grounds that they so impaired the testator's mind as to control his judgment on the disposition of property.<sup>189</sup> This evidence may be rebutted by testimony that the testator's convictions were "in accord with the practices and beliefs of a religion to which a substantial number of people adhere."<sup>190</sup>

On at least one occasion in this century, a belief in religious healing provided evidence for the conclusion that the deceased person lacked testamentary capacity.<sup>191</sup> In that case, the Washington State Supreme Court found that Miranda Crim, an Alaskan miner, suffered from an insane delusion, and for that reason the court invalidated his will.<sup>192</sup>

For five years preceding his death, Crim had belonged to a religious sect known as the Saints of the Lord.<sup>193</sup> The Saints' founder, Thomas H. Gourley, taught that illness could only be cured through faith in Christ and that one should give all of one's property to the poor.<sup>194</sup> Gourley's followers believed that their leader had miraculous healing powers, and when Crim contracted cancer, he forsook medical treatment to rely on religious healing.<sup>195</sup> In a will written eight months prior to his death, Crim bequeathed one-half of his \$70,000 estate to Gourley "in trust for the benefit and use of widows, orphans, and deserving poor."<sup>196</sup>

After hearing conflicting testimony on Crim's mental capacity, the trial court set aside the will.<sup>197</sup> The Washington State Supreme Court affirmed the decision, declaring that "this will was wholly the result of Crim's belief that his sanctification and redemption depended upon his bestowing his property upon the poor, and that Gourley was the steward chosen

188. See, e.g., *Ingersoll v. Gourley*, 78 Wash. 406, 411, 139 P. 207, 209 (1914) (testator's belief in giving property to poor and that religious leader was God's steward constitutes insane delusion).

189. See, e.g., *In re Murray's Estate*, 144 P.2d 1016, 1022, 1023 (Or. 1944) (evidence of religious fanaticism may render will invalid); *In re Trich's Will*, 30 A. 1053, 1056-57 (Pa. 1895) (will may be overturned if testator is subject to a delusion rendering him insensible to his parental duty).

190. *Nalty's Administrator v. Franzman's Ex'r*, 299 S.W. 585, 586 (Ky. 1927).

191. *Ingersoll*, 78 Wash. 406, 139 P. 207.

192. *Id.* at 411, 139 P. at 209.

193. *Id.* at 409, 139 P. at 208.

194. *Id.*

195. *Id.* at 409-10, 139 P. at 208.

196. *Ingersoll*, 78 Wash. at 409, 139 P. at 208.

197. *Id.* at 407, 410, 139 P. at 207, 208-09.

by God through whom this should be done."<sup>198</sup>

The high court's decision, however, is subject to question. Its holding rests on the finding that Crim's beliefs in sanctification and in redemption and in Gourley's superhuman abilities were delusions. But delusions are, by definition, false. And as the United States Supreme Court has made clear, the truth or falsity of religious beliefs is not subject to adjudication.<sup>199</sup> Accordingly, the Washington court erred in basing its decision on Crim's belief in religious healing. In the words of one nineteenth-century Pennsylvania trial judge, one who makes a will should be found competent "however absurd, ridiculous, or unfounded" his religious views.<sup>200</sup>

#### D. Conclusion

Competent patients possess constitutional and common law rights to refuse medical treatment that may only be overcome by the threat of danger to innocent third parties. The wishes of formerly competent individuals who have left clear evidence of their desires must also be honored. In exercising the right to choose religious over medical care, individuals need not act in accordance with a particular church tenet,<sup>201</sup> nor be affiliated with a recognized religious organization.<sup>202</sup> Remedies for violation of this right to be let alone are available.<sup>203</sup>

Those who pursue religious healing to the exclusion of orthodox medical treatment, however, have faced certain hurdles in related legal matters. Under the doctrine of avoidable consequences, these plaintiffs will not be able to recover personal injury damages for any complications and suffering that they could have avoided by reasonable care.<sup>204</sup> In this regard, juries should not assume that medical treatment is the only

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198. *Id.* at 411, 139 P. at 209.

199. *United States v. Ballard*, 322 U.S. 78 (1944). See *infra* text accompanying notes 483-511.

200. *In re Trich's Will*, 30 A. 1053, 1056 (Pa. 1895).

201. *Lewis v. Califano*, 616 F.2d 73 (3d Cir. 1980).

202. See *In re Milton*, 505 N.E.2d 255 (Ohio), *cert. denied*, 484 U.S. 820 (1987); *Lewis v. Califano*, 616 F.2d 73 (3d Cir. 1980). The Supreme Court has most recently taken a similar stand in protecting the personal religious beliefs of an individual who refused to work on his sabbath. *Frazee v. Illinois Dep't of Employment Security*, 489 U.S. 829 (1989).

203. See, e.g., *supra* cases cited note 67.

204. *Munn v. Southern Health Plan, Inc.*, 719 F. Supp. 525 (N.D. Miss. 1989), *aff'd*, 924 F.2d 568 (5th Cir.), *cert. denied*, 112 S. Ct. 277 (1991).

reasonable form of care. They should consider all of the surrounding circumstances, including evidence that the particular type of spiritual healing chosen by plaintiff is practiced by a relatively large number of reasonable persons.

Believers in religious healing have also had their competency questioned in court.<sup>205</sup> The truth or falsity of religious beliefs, however, is not subject to judicial determination. Nor does religious fervor prove incapacity. Accordingly, the practice of religious healing alone should not disqualify one from jury service nor undermine the validity of one's will.

#### IV. RELIGIOUS PARENTS

The previous section explored the competent individual's right to pursue religious rather than medical care. As noted, adults are presumed to possess the requisite mental capacity to exercise this fundamental right.<sup>206</sup> Of course, the presumption may be rebutted by evidence of incompetency.<sup>207</sup> The situation concerning healthcare for minors is quite different from that of adults. Minors are presumed to *lack* the capacity to make their own treatment choices.<sup>208</sup> While mature individuals below the age of majority have been permitted to follow their own religious preferences on occasion,<sup>209</sup> in most instances parents bear the primary responsibility to make healthcare decisions for their minor children.<sup>210</sup>

This section explores religious parents' rights and responsibilities for their children's healthcare. The first subsection discusses litigation where the state sought medical treatment

205. See, e.g., *Smith v. Smith*, 42 P.2d 232 (Cal. Dist. Ct. App. 1935); *Ingersoll v. Gourley*, 72 Wash. 462, 139 P. 207 (1914).

206. See *supra* text accompanying note 112.

207. See, e.g., *In re Milton*, 505 N.E. 2d 255, 257 (Ohio 1987) (distinguishing commitment from incompetency proceedings).

208. See generally *In re E.G.*, 549 N.E.2d 322 (Ill. 1989).

209. E.g., *In re E.G.*, 515 N.E.2d 286 (Ill. App. Ct. 1987), *aff'd in part and rev'd in part*, 549 N.E.2d 322 (Ill. 1989) (reversed on other grounds), and *supra* text accompanying notes 118 and 119.

210. The rights and responsibilities of court-appointed guardians in choosing religious healing for wards who have never been competent is beyond the scope of this Article. One commentator has suggested, however, that the discretion of such guardians should not be as broad as that of parents. See ROBERT M. VEATCH, *DEATH, DYING, AND THE BIOLOGICAL REVOLUTION* 86 (1989). At least one state provides by statute that courts should consider appointing guardians for adherents of faith healing who are sympathetic to and willing to support religious healing. Amy L. Brown, *Proxy Decisionmaking for Unmarried Adults*, 41 HASTINGS L.J. 1029, 1050 (1990) (citing KAN. STAT. ANN. § 59-3014(a)(2)(c) (Supp. 1987)).

for children whose parents preferred to rely on religious healing or for other religious reasons chose to resist medical care. The second subsection describes the prosecution of parents who relied exclusively on religious treatment for their seriously ill children.

In general, this section concludes that courts should exercise restraint in this area. To promote religious liberty and family integrity, judges should rarely second-guess consensual family healthcare decisions based on religious considerations. Further, parents who rely on religious healing should only suffer conviction following their child's death if the fact finder has considered all evidence—medical and religious alike—to determine whether the parents acted with reasonable care.

#### A. *Compelling Treatment for a Child Over Parents' Religious Objections*

A parent's right to raise children is sacred.<sup>211</sup> The United States Supreme Court has asserted that parenting rights are "basic civil rights"<sup>212</sup> and constitute a "fundamental liberty interest."<sup>213</sup> "It is cardinal with us," the Court has said, "that the custody, care and nurture of the child reside first in the parents."<sup>214</sup>

As child protection legislation has expanded and medical practices have advanced, however, courts have become more willing to intervene in the formerly sacrosanct relationship between parent and child. The government, acting as *parens patriae*,<sup>215</sup> clearly possesses the authority to do so. Accordingly, courts have been asked with greater frequency to compel medical care for children over the religious objections of parents. In resolving these disputes, courts have generally weighed the following factors: the gravity of the child's condition, the risks and benefits of proposed treatments, and the maturity and preferences of the child.<sup>216</sup> Although judges currently order life-saving medical care over parents' religious

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211. *In re Hudson*, 13 Wash. 2d 673, 678, 126 P.2d 765, 768 (1942).

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

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

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

215. See *supra* note 110.

216. *E.g.*, *In re Phillip B.*, 156 Cal. Rptr. 48, 51 (Cal. Ct. App. 1979), *cert. denied*, 445 U.S. 949 (1980).

objections as a matter of course,<sup>217</sup> decisions to provide remedial treatment are not quite so routine.<sup>218</sup> When the burdens of medical intervention are great or the threat to life remote, courts should exercise restraint.

### 1. Historical Development

During the first half of this century, courts were reluctant to intrude on the parent-child relationship without specific legislative authorization.<sup>219</sup> In fact, under the common law, the judicial branch was without power to order surgical treatment for a child over a parent's objection.<sup>220</sup> However, when a statute specifically required parents to provide such care, courts had no difficulty compelling life-saving,<sup>221</sup> corrective,<sup>222</sup> or preventative<sup>223</sup> medical attention. But early in the century, child protection statutes generally failed to mention medical treatment.<sup>224</sup> In 1911, for instance, a Pennsylvania court refused to order corrective surgery for a child suffering from rickets because the relevant statute authorized intervention only if the parents' conduct resulted from "moral depravity" rather than mistaken judgment.<sup>225</sup> As recently as 1942, the Washington State Supreme Court declared itself without power to order surgery in *In re Hudson*<sup>226</sup> because the child dependency statutes made no mention of the provision of medical care.

*In re Hudson* involved an eleven-year-old child suffering

217. See *infra* part IV.A.2.a.

218. See *infra* part IV.A.2.b.

219. See, e.g., *In re Hudson*, 13 Wash. 2d 673, 126 P.2d 765 (1942); *In re Tuttendario*, 21 Pa. 561 (1911).

220. *In re Rotkowitz*, 25 N.Y.S.2d 624, 625 (N.Y. Fam. Ct. 1941); see also *In re Hudson*, 13 Wash. 2d 673, 126 P.2d 765 (1942).

221. See, e.g., *In re Vasko*, 263 N.Y.S. 552 (Sup. Ct. App. Div. 1933) (ordering treatment for a two-year-old suffering from a malignant eye growth).

222. See, e.g., *In re Rotkowitz*, 25 N.Y.S.2d 624 (N.Y. Fam. Ct. 1941) (compelling juvenile to undergo corrective surgery for leg deformity caused by poliomyelitis).

223. See, e.g., *Stone v. Probst*, 206 N.W. 642 (Minn. 1925) (requiring school children recovering from infectious diseases to pass medical examinations before returning to school).

224. See, e.g., *In re Tuttendario*, 21 Pa. 561 (1911); *Justice v. State*, 42 S.E. 1013 (Ga. 1902) (medical care does not amount to "necessary sustenance" required by statute to be provided for children).

225. See *In re Tuttendario*, 21 Pa. 561 (1911). In this case, the parents were afraid that surgery to correct the non-life threatening condition would be fatal even though doctors testified that operation was extensively performed and generally successful. In refusing to order treatment, the court noted that parents had already lost seven of their ten children to an early death.

226. 13 Wash. 2d 673, 712-13, 126 P.2d 765, 783 (1942).

from a congenital deformity.<sup>227</sup> Patricia Hudson's left arm was ten times the size of her right arm and nearly as large as her entire body.<sup>228</sup> As a result of the enormous appendage, the child was frail, subject to infection, and her chest and spine were becoming deformed.<sup>229</sup> On a number of occasions, Patricia tearfully expressed the desire to have the arm removed.<sup>230</sup>

The physicians proposed amputation so that the child could "take her place in society and live a normal life."<sup>231</sup> But Patricia's parents feared for the safety of their child.<sup>232</sup> They had relied in the past on treatment by a divine healer, and they consistently opposed the operation.<sup>233</sup> The court agreed with the Hudsons and declared that determining the risk of the operation was the parents' duty.<sup>234</sup> The parents' decision would not be overturned unless they were otherwise unfit and the child was "treated with cruelty or exposed to immoral or debasing conditions."<sup>235</sup>

Three justices dissented in *Hudson*. They argued that even without a specific legislative mandate, the court should exercise its power as *parens patriae*.<sup>236</sup> Justice George Simpson wrote that the child's welfare, rather than the parents' conduct, should be of paramount importance.<sup>237</sup>

Justice Simpson's reasoning has since prevailed. In 1947, a Texas appellate court signaled the end of the era in which courts looked for specific legislative backing to compel treatment for minors.<sup>238</sup> The court was presented with a child suffering from what appeared to be non-life-threatening complications following rheumatic fever.<sup>239</sup> The mother had sought to cure the child by prayer for divine healing and home remedies.<sup>240</sup> The relevant dependency statute made no mention of a parent's duty to provide medical treatment but

227. *Id.* at 675, 126 P.2d at 767.

228. *Id.* at 714, 126 P.2d at 784 (Simpson, J., dissenting).

229. *Id.* at 676, 126 P.2d at 768.

230. *Id.* at 677, 126 P.2d at 768.

231. *Hudson*, 13 Wash. 2d at 677, 126 P.2d at 768.

232. *Id.*

233. *Id.* at 717, 126 P.2d at 785 (Simpson, J., dissenting).

234. *Id.* at 700, 126 P.2d at 778.

235. *Id.* at 693, 126 P.2d at 775.

236. *Hudson*, 13 Wash. 2d at 723, 126 P.2d at 787 (Simpson, J. dissenting).

237. *Id.* at 733, 126 P.2d at 791 (Simpson, J., dissenting).

238. *Mitchell v. Davis*, 205 S.W.2d 812 (Tex. Civ. App. 1947).

239. *Id.* at 814.

240. *Id.* at 814, 815.



required that children receive "proper parental care."<sup>241</sup>

In ordering the treatment, the court declared that "medicines, medical treatment and attention, are in a like category with food, clothing, lodging and education as necessities from parent to child."<sup>242</sup> "While a considerable amount of discretion is vested in a parent," the court stated, "the right of appellant and his mother here to live their own lives in their own way is not absolute."<sup>243</sup> Rather than looking to the parents' good character or intentions, the court—in accord with the *Hudson* dissenters—reached its decision by focusing on the question of whether the child was neglected and in need of care.<sup>244</sup>

## 2. Modern Approach

### a. Life-Threatening Conditions

Courts have regularly imposed a duty on parents to seek medical care for children with life-threatening conditions.<sup>245</sup> This has been the rule whether parents opposed treatment on religious grounds or sought to rely exclusively on religious healing. As one recent opinion points out, however, courts should not routinely overrule parents whenever their child's life is threatened.<sup>246</sup> When medical treatment will impose great burdens on the patient and its chances of success are relatively small, the family's wishes should be respected.<sup>247</sup>

Since the Second World War, courts have regularly imposed what they hope will be life-saving care over parents' objections. In *Wallace v. Labrenz*,<sup>248</sup> the Illinois Supreme Court directly addressed the issue of the parents' right to object to such care on religious grounds.<sup>249</sup> Darrell and Rhoda Labrenz, Jehovah's Witnesses, refused to give permission for a blood transfusion to their eight-day-old infant.<sup>250</sup> The court ordered the treatment after finding that without it the child

241. *Id.* at 813.

242. *Id.* at 813-14.

243. *Mitchell*, 205 S.W.2d at 815.

244. *Id.*

245. See *People ex rel. Wallace v. Labrenz*, 104 N.E.2d 769 (Ill.) (eight-day-old infant in need of blood transfusion), *cert. denied*, 344 U.S. 824 (1952); *In re D.L.E.*, 645 P.2d 271 (Colo. 1982) (sixteen-year-old suffering from epileptic seizures).

246. *Newmark v. Williams*, 588 A.2d 1108, 1117 (Del. 1991).

247. *Id.*

248. 104 N.E.2d 769 (Ill.), *cert. denied*, 344 U.S. 824 (1952).

249. *Id.* at 773.

250. *Id.* at 771-72.

would "almost certainly die."<sup>251</sup> In response to the argument that the transfusion violated the parents' right to the free exercise of religion, the court relied on the Supreme Court's decision in *Prince v. Massachusetts*,<sup>252</sup> upholding the state's power to regulate child labor.<sup>253</sup> The following quotation from *Prince* became the standard rationale offered by courts to override religious objections to life-saving medical treatment for children:

The right to practice religion freely does not include liberty to expose the community or child to communicable disease or the latter to ill health or death. . . . Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.<sup>254</sup>

This rationale has prevailed in cases involving religious treatment as well. For instance, when evidence indicated that the child's life was in jeopardy without medical treatment, the Colorado Supreme Court saw fit in *In re D.L.E.*<sup>255</sup> to prevent a child from relying exclusively on prayer.<sup>256</sup> In *In re D.L.E.*, the court ordered a sixteen-year-old juvenile suffering from epileptic seizures to resume medication.<sup>257</sup> The child and his adoptive mother, a member of the General Assembly and the Church of the First Born, had resisted medical care in favor of faith healing.<sup>258</sup>

Other courts have also overruled parental decisions to rely exclusively on religious healing when the child's life was in danger even though medical treatment offered little hope of cure.<sup>259</sup> In *In re Hamilton*,<sup>260</sup> expert testimony established

251. *Id.* at 773.

252. 321 U.S. 158 (1944).

253. *Id.* at 171.

254. *Id.* at 166-67, 170 (citation omitted). See *Laurenz*, 104 N.E.2d at 774; see also *Morrison v. State*, 252 S.W.2d 97 (Mo. Ct. App. 1952); *Hoener v. Bertinato*, 171 A.2d 140 (N.J. Super. Ct. 1961); *State v. Perricone*, 181 A.2d 751 (N.J. 1962); *Jehovah's Witnesses v. King Cty. Hosp.*, 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd*, 309 U.S. 598 (1968).

255. 645 P.2d 271 (Colo. 1982).

256. *Id.* at 276.

257. *Id.*

258. *Id.* at 272.

259. See *In re Willmann*, 493 N.E.2d 1380, 1385 (Ohio Ct. App. 1986) (seven-year-old compelled to accept treatment offering sixty percent chance of saving his life). With regard to the denial of the parents' religious liberty in this case, the court felt that it was "important" to note that the Willmanns' had resisted the administration of

that twelve-year-old Pamela Hamilton had between a twenty-five and fifty percent chance of long-term remission, and at least an eighty percent chance of "temporary response and pain relief" with the proposed chemotherapy and radiation.<sup>261</sup> Hamilton suffered from Ewing's Sarcoma, and doctors declared that she would be dead within nine months without treatment.<sup>262</sup> The child and her family were members of The Church of God of the Union Assembly, and they sought to adhere to a church tenet that required them to "live by faith" rather than by "medicine, vaccinations or shots of any kind."<sup>263</sup>

A Tennessee appellate court affirmed the trial court's insistence that the child receive medical treatment. But, apparently out of respect for the family's faith, the court also directed the State to "accede to and respect the wishes of the parents regarding Pamela to the extent that the treatment recommended by the physicians is not interfered with or impaired."<sup>264</sup>

Medical prognoses have spurred courts to order treatment not only in cases where cure is uncertain, but also where there is considerable uncertainty that the child's life is actually in jeopardy. In 1983, testing disclosed that three-year-old Eric B. was suffering from retinal blastoma—eye cancer.<sup>265</sup> Eric's parents, both Christian Scientists, consented to surgery but later objected to follow-up treatment.<sup>266</sup> Eric was declared a dependent child (i.e., subject to court control) upon evidence of the "extremely high statistical probability that, without medical treatment, the cancer would reappear."<sup>267</sup> After the treatment concluded in 1985, doctors recommended a two-year observa-

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medical care because they believed that the child had already been healed by Christ and not because the care was forbidden by scripture. *Id.* at 1388. This rationale, however, is constitutionally suspect. Either the court was relying on testimony that the medical treatment was not forbidden by scripture, or the court reached this conclusion on its own. But the latter course is subject to question because it requires the court to engage in theological analysis. See *Employment Div., Or. Dep't of Human Resources v. Smith*, 494 U.S. 872, 887 (1990). And no matter which course the court followed, First Amendment protection does not hinge on the existence of specific scriptural support. See *Frazee v. Illinois Dept. of Employment Security*, 489 U.S. 829 (1989).

260. 657 S.W.2d 425 (Tenn. Ct. App. 1983).

261. *Id.* at 427.

262. *Id.*

263. *Id.*

264. *Id.* at 429.

265. *In re Eric B.*, 235 Cal. Rptr. 22, 23 (Cal. Ct. App. 1987).

266. *Id.*

267. *Id.*

tional phase, and again Eric's parents objected.<sup>268</sup> Eric had been receiving Christian Science treatment, and they wished to continue only his religious care.<sup>269</sup>

At a hearing to determine whether Eric's care should remain subject to the court's control, the physicians testified that tests had revealed no evidence of cancer during the previous two years, but that without monitoring Eric stood "maybe a 40 percent chance he would die if there's nothing monitored and nothing done about it."<sup>270</sup> Consequently, the referee appointed to hear the matter approved the monitoring plan, the juvenile court refused to review the order, and a California appellate court affirmed the referee's decision.<sup>271</sup>

The appellate opinions in *In re D.L.E.*, *In re Hamilton*, and *In re Eric B.* are indicative of a general reluctance on the part of courts to accept religious healing as an exclusive form of treatment for a potentially endangered minor.<sup>272</sup> When highly intrusive medical procedures offer little hope of success, however, exclusive reliance on religious healing is more acceptable, as the following case demonstrates.

In *Newmark v. Williams*,<sup>273</sup> the Delaware Supreme Court recently refused to force Christian Science parents to subject their three-year-old son to an extremely risky and toxic cancer treatment. Colin Newmark was suffering from Burkitt's lymphoma and doctors predicted that he would die within six to

268. *Id.* at 23, 24.

269. *Id.* at 23. For a discussion of Christian Science healing, see *supra* notes 28, 44.

270. *Eric B.*, 235 Cal. Rptr. at 27.

271. The court wrote:

Granted, there was no clear and present showing of cancer in Eric. But no reason in either law or logic exists to demonstrate why the State, with the substantial interests it is entitled to assert on its own behalf as well as for a child, should be compelled to hold its protective power in abeyance until harm to a minor child is not only threatened but actual.

*Id.* at 26.

272. In *Eric B.*, the referee had stated that he "would not allow Eric to be treated exclusively by spiritual means absent a showing that it would be 100 percent effective." *Id.* at 29. Eric's parents objected to the referee's approach. They argued that an applicable statute declared that a court "shall give consideration to any treatment being provided to the minor by spiritual means," in determining whether to order medical care. *Id.* at 28. The appellate court rejected the parents' claim that the referee had failed to apply this law. The referee did consider the spiritual treatment, the appeals court noted. He simply found such treatment inadequate under the circumstances. *Id.* See also *In re J.J.*, 582 N.E.2d 1138 (Ohio Ct. App. 1990) (fourteen-year-old infected with gonorrhea); *In re Cabrera*, 552 A.2d 1114 (Pa. Super. Ct. 1989) (six-year-old suffering from sickle-cell anemia).

273. 588 A.2d 1108 (Del. 1991).

eight months without chemotherapy.<sup>274</sup> Colin's parents wished to treat the child by spiritual means alone.<sup>275</sup> The high court reversed the trial court's decision and, in effect, allowed the parents to proceed exclusively with religious healing.<sup>276</sup> The linchpin in reaching its decision, the supreme court declared, was a comparison between the risk of the proposed medical intervention and its potential for success.<sup>277</sup> Where, as in this case, the chemotherapy ran a high risk of causing the child's death and threatened to disrupt the parent-child relationship, while offering less than a forty percent chance of success, the parents' preference would not be set aside.<sup>278</sup>

### b. Non-Life-Threatening Conditions

When children suffer from non-life-threatening health conditions, courts are divided on whether to compel medical treatment over parents' religious objections.<sup>279</sup> Although the trend has been in favor of intervention, several courts have found reason for judicial restraint. Legislation in a number of states prevents courts from intervening in family affairs solely because children are being treated by spiritual means alone.<sup>280</sup>

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274. *Id.* at 1111.

275. *Id.*

276. *Id.* at 1115.

277. *Id.*

278. *Williams*, 588 A.2d at 1115. A recent study indicates that a majority of individuals viewed an equivalent chance of survival as reason to refuse an even less intrusive form of medical treatment. In a survey of 226 healthy senior citizens, fifty-eight percent would not want cardiopulmonary resuscitation if their chances of survival were no more than forty percent. Paul Cotton, *Talk to People About Dying—They Can Handle It, Say Geriatricians and Patients*, 269 J.A.M.A. 321, 321 (1993).

279. For cases in which courts compelled medical treatment, see *Harley v. Oliver*, 404 F. Supp. 450 (W.D. Ark. 1975) (cyst removal), *aff'd*, 539 F.2d 443 (8th Cir. 1976); *Muhlenberg Hosp. v. Patterson*, 320 A.2d 518 (N.J. Super. Ct. 1974) (six-day-old infant in danger of brain damage); *In re Sampson*, 317 N.Y.S.2d 641 (N.Y. Fam. Ct. 1970) (15-year-old suffering from neurofibromatosis), *aff'd*, 323 N.Y.S.2d 253 (N.Y. App. Div. 1971), *aff'd*, 278 N.E.2d 918 (N.Y. 1972); *In re Cabrera*, 552 A.2d 1114 (Pa. Super. Ct. 1989) (six-year-old with sickle-cell anemia); *In re Petra B.*, 265 Cal. Rptr. 342 (Cal. Ct. App. 1990) (child with burns covering four percent of her body). For cases in which courts refused to compel medical treatment, see *In re Cochise County*, 650 P.2d 467 (Ariz. Ct. App. 1981) (children declared "anticipatorily dependent"), *vacated*, 650 P.2d 459 (Ariz. 1982); *In re D.L.E.*, 614 P.2d 873 (Colo. 1980) (12-year-old with epileptic seizures); *In re Seiferth*, 127 N.Y.S.2d 63 (N.Y. Child Ct. 1954) (congenital harelip and cleft palate), *rev'd*, 137 N.Y.S.2d 35 (N.Y. App. Div.), *rev'd*, 127 N.E.2d 820 (N.Y. 1955); *In re Green*, 292 A.2d 387 (Pa. 1972) (16-year-old with poliomyelitis), *appeal after remand*, 307 A.2d 279 (Pa. 1973).

280. See *Hermanson v. State*, 604 So. 2d 775, 776 n.1 (Fla. 1992) (listing statutes in various jurisdictions).

*In re Seiferth*<sup>281</sup> illustrates some of the fundamental disagreements that arise when the state intervenes in these intimate family matters. This 1955 case did not involve a threat to the child's life nor to public health, and a New York court refused to compel surgical treatment.<sup>282</sup> Martin Seiferth, Jr. suffered from a congenital harelip and cleft palate.<sup>283</sup> The condition gave the child a "hideous" appearance and caused a speech defect.<sup>284</sup> Nonetheless, the boy and his father refused to consent to corrective surgery.<sup>285</sup> The father asserted that surgery would interfere with certain universal forces that could heal his son. The court found that twelve-year-old Martin was "conditioned" by these beliefs as well.<sup>286</sup>

The trial judge decided that the child should be given the opportunity to make the decision without court compulsion or family interference.<sup>287</sup> Although the operation could improve Martin's condition with "reasonable safety and certainty," the judge declared that to force the child to submit to surgery against his will "might do more harm than good."<sup>288</sup> To help Martin decide, the court restrained the father from interfering in discussions between the child and court-designated advocates of the medical treatment.<sup>289</sup>

On appeal, the intermediate court reversed the trial court and ordered treatment.<sup>290</sup> According to the appellate decision, the father's objections did not rise to the level of religious free exercise but were merely "delusions" or a philosophy of healing in which "a small group of believers, without a leader or literature, meet and exercise the forces."<sup>291</sup> Justice Raymond Vaughan expressed the court's view that it was immaterial that Martin's life was not in danger, because "what is in danger is his chance for a normal, useful life."<sup>292</sup> While the father's decision was entitled to the greatest respect, the court wrote,

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281. 127 N.Y.S.2d 63 (N.Y. Child. Ct. 1954), *rev'd*, 137 N.Y.S.2d 35 (N.Y. App. Div.), *rev'd*, 127 N.E.2d 820 (N.Y. 1955).

282. *Id.* at 65.

283. *Id.* at 63.

284. *Id.*

285. *Id.* at 65.

286. *Seiferth*, 127 N.Y.S.2d at 65.

287. *Id.*

288. *Id.*

289. *Id.*

290. *Seiferth*, 137 N.Y.S.2d at 39.

291. *Id.* at 37.

292. *Id.* at 38.

"it must have some slight basis in fact or reason, when seriously opposed to the best interests of the child."<sup>293</sup>

In a split decision, however, the New York Court of Appeals reinstated the trial judge's verdict.<sup>294</sup> The high court pointed out that no emergency was involved and that Martin's cooperation would be needed for speech therapy following the operation.<sup>295</sup> Thus, the court held that the trial judge's discretion should have been respected with regard to allowing the child to reach his own decision.

Justice Stanley Fuld, joined by two other judges, dissented in *Seiferth* on the grounds that the court should not have avoided its duty to promote the welfare and interests of the child by "foisting upon the boy the ultimate decision to be made."<sup>296</sup> Justice Fuld explained as follows: "Neither by statute nor decision is the child's consent necessary or material, and we should not permit his refusal to agree, his failure to cooperate, to ruin his life and any chance for a normal, happy existence."<sup>297</sup>

The dissent's emphasis on the medical promise of "normalcy and happiness," together with a willingness to ignore the child's own wishes, set the standard fifteen years later in another important New York opinion. *In re Sampson*<sup>298</sup> is indicative of the current trend in which some courts stand ready to override religious objections by parents and to compel even dangerous medical treatment for children whose lives are not in immediate jeopardy.<sup>299</sup>

293. *Id.* at 39.

294. *Seiferth*, 127 N.E.2d at 823.

295. *Id.*

296. *Id.* at 824 (Fuld, J., dissenting).

297. *Id.*

298. 317 N.Y.S.2d 641 (N.Y. Fam. Ct. 1970), *aff'd*, 323 N.Y.S.2d 253 (N.Y. App. Div. 1971), *aff'd*, 278 N.E.2d 918 (N.Y. 1972).

299. For additional cases following this trend, see *Harley v. Oliver*, 404 F. Supp. 450 (W.D. Ark. 1975) (parent may not deny child necessary medical care on religious grounds), *aff'd*, 539 F.2d 1143 (8th Cir. 1976); *In re Petra B.*, 265 Cal. Rptr. 342 (Cal. Ct. App. 1990) (affirming lower court's declaration of child as dependent of Department of Social Services for medical treatment of child's serious burn injuries); *Muhlenberg Hosp. v. Patterson*, 320 A.2d 518, 520 (N.J. Super. Ct. 1974) (six-day-old infant in danger of brain damage); *In re Gregory S.*, 380 N.Y.S.2d 620 (N.Y. Fam. Ct. 1976) (ordering physical and dental examinations where parent's actions posed some substantial threat to health and welfare of children); *In re Jensen*, 633 P.2d 1302 (Or. Ct. App. 1981) (ordering custody of child suffering from hydrocephalus to the Children's Services Division, admitting that child's life was not in immediate danger, but noting that risk to the most basic quality of child's life did not differ significantly in magnitude from an immediate threat to life); *In re Cabrera*, 552 A.2d 1114 (Pa.

Kevin Sampson, age fifteen, was afflicted with extensive neurofibromatosis, which caused massive deformity on the right side of his face and neck.<sup>300</sup> Due to a large fold of facial tissue, Kevin's eyelid, cheek, ear, and the corner of his mouth drooped badly.<sup>301</sup> The trial judge declared that Kevin's appearance could "only be described as grotesque and repulsive."<sup>302</sup> As a result of his condition, Kevin had been exempted from school since age nine, and he was virtually illiterate.<sup>303</sup> Although the child had no outstanding personality aberration, he did evidence feelings of inferiority and a low self-concept.<sup>304</sup>

To treat Kevin's deformity, doctors proposed surgery that could partially excise the disease but would not provide a cure.<sup>305</sup> Moreover, surgeons admitted that the procedure was "much, much, much" above average in risk.<sup>306</sup> Kevin's mother, a Jehovah's Witness, did not oppose the surgery as such, but refused to consent to the use of blood during the operation.<sup>307</sup> Kevin's opinion in this regard was solicited by the trial judge, but was not directly reported in the appellate court opinion.<sup>308</sup>

The trial court ordered the surgery to protect the child's "right to live and grow up with a sound mind in a sound body."<sup>309</sup> Judge Hugh R. Elwyn agreed with the dissent in *Seiferth* that the court should not "place upon [the child's] shoulders one of the most momentous and far-reaching decisions of his life."<sup>310</sup> Rather than reaching its own conclusion about whether the surgery should be performed, however, the court left the final decision to the physicians. Elwyn wrote: "This is a judgment that only the surgeons are qualified to make."<sup>311</sup>

The trial court's decision in *Sampson* was affirmed by the New York Court of Appeals.<sup>312</sup> The court emphasized that it

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Super. Ct. 1989) (appointing hospital as guardian ad litem to consent to blood transfusion therapy, even though child's life was not in immediate peril).

300. *Sampson*, 317 N.Y.S.2d at 643.

301. *Id.*

302. *Id.*

303. *Id.* at 644.

304. *Id.*

305. *Sampson*, 317 N.Y.S.2d at 645.

306. *Id.*

307. *Id.*

308. *Sampson*, 323 N.Y.S.2d at 255.

309. *Sampson*, 317 N.Y.S.2d at 652.

310. *Id.* at 656.

311. *Id.* at 658.

312. *Sampson*, 278 N.E.2d 918.



was clearly within the trial court's discretion to order treatment of "a serious physiological impairment which did not threaten the physical life or health of the subject or raise the risk of contagion to the public."<sup>313</sup> The court also noted that a religious objection to a blood transfusion did not bar the order "at least where the transfusion is necessary to the success of required surgery."<sup>314</sup>

Although *Sampson* did not involve a parent's desire to treat a child by religious means, courts have often followed its lead in addressing this issue.<sup>315</sup> Several courts have even rejected parents' exclusive reliance on religious treatment for children without any evidence that the children's well-being was actually in jeopardy. *In re Gregory*<sup>316</sup> indicates how far the courts have traveled from their reluctance to order medical treatment. The City of New York brought a neglect petition to secure medical and dental examinations for three siblings, aged sixteen, fourteen, and ten, after a school doctor observed that the eldest suffered from an umbilical hernia, cavities, and fractured teeth.<sup>317</sup> The children's mother, a member of the Church of God and Christ, refused to permit medical care unless the children themselves expressed a desire for it.<sup>318</sup> She believed that God or Jesus would help heal her children if the need arose, and ten years earlier she had taken what she described as a vow to the Holy Ghost to this effect.<sup>319</sup>

In accord with a neglect statute that gave the court jurisdiction over minors "impaired" by failure to receive medical care, the trial court ordered the children to submit to the examinations.<sup>320</sup> Judge William Berman admitted that the mother's religious sincerity was beyond question and that she had not failed in her duties in any other respect.<sup>321</sup> But the court declared that its intervention was justified whenever medical treatment would have a beneficial effect.<sup>322</sup> Although the judge made no mention of any evidence that the younger

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313. *Id.* at 918-19.

314. *Id.* at 919. See also *Santos v. Goldstein*, 227 N.Y.S.2d 450 (N.Y. App. Div. 1962).

315. See cases cited *supra* note 299.

316. 380 N.Y.S.2d 620 (N.Y. Fam. Ct. 1976).

317. *Id.* at 621.

318. *Id.*

319. *Id.*

320. *Id.* at 622.

321. *Gregory*, 380 N.Y.S.2d at 621.

322. *Id.* at 623.

children had actually been "impaired" in any way, he noted that they had not been examined by a doctor for at least five years.<sup>323</sup>

Despite the trend toward greater judicial intervention, a few courts in the past two decades have been unwilling to require medical treatment for minors over the parents' religious objections.<sup>324</sup> Because the children's lives were not threatened, these courts supported family integrity and upheld constitutional and statutory protections of religious free exercise.

Less than six months after the New York Court of Appeals affirmed the decision in *Sampson*, the Supreme Court of Pennsylvania chose to follow a different course in *In re Green*.<sup>325</sup> Ricky Green was sixteen years old when his case reached the Pennsylvania high court. He had experienced two attacks of poliomyelitis, which led to obesity and paralytic scoliosis.<sup>326</sup> Consequently, Ricky was unable to stand, and he risked becoming a bed patient.<sup>327</sup> Although his mother consented to a dangerous spinal fusion, she would not consent to any accompanying blood transfusion because of her beliefs as a Jehovah's Witness.<sup>328</sup>

The trial court refused to declare Ricky a neglected child, but the appellate court reversed that decision.<sup>329</sup> The supreme court, in turn, reversed the appeals court and remanded the case for an evidentiary hearing to determine Ricky's wishes in the matter.<sup>330</sup> When the case reached the supreme court for

323. *Id.* at 621. See also *In re Jensen*, 633 P.2d 1302 (Or. Ct. App. 1981) (ordering fifteen-month-old child afflicted with hydrocephalus to submit to repeated surgical shunting in order to drain the fluid from her cranium).

In matters not involving religious healing, courts confronted by religious objections to medical treatment have concluded that the possibility of brain damage, *Muhlenberg Hosp. v. Patterson*, 320 A.2d 518 (N.J. Super. Ct. Law Div. 1974), or of crippling mental retardation caused by sickle-cell anemia, *In re Cabrera*, 552 A.2d 1114 (Pa. Super. Ct. 1989), warranted medical intervention. See generally *In re Karwath*, 199 N.W.2d 147 (Iowa 1972) (approving surgical removal of tonsils and adenoids over the father's religious objections).

324. See *In re Cochise County*, 650 P.2d 467 (Ariz. Ct. App. 1981), *vacated*, 650 P.2d 459 (Ariz. 1982); *In re D.L.E.*, 614 P.2d 873 (Colo. 1980); *In re Green*, 292 A.2d 387 (Pa. 1972), *supplemented by*, 307 A.2d 279 (Pa. 1973).

325. 292 A.2d 387 (Pa. 1972), *supplemented by*, 307 A.2d 279 (Pa. 1973).

326. *Id.* at 388.

327. *Id.*

328. *Id.*

329. *Id.* at 387.

330. In its first opinion, the high court framed the issue in this way: "[T]he penultimate question presented by this appeal is whether the state may interfere with

the second time, Ricky's opposition to the operation proved determinative. The court noted that Ricky's decision was based both on religious grounds and on the risk involved in the procedure.<sup>331</sup>

The Pennsylvania Supreme Court explicitly rejected *Sampson's* conclusion that a religious objection could not bar a transfusion deemed necessary for the success of a required surgery. "One can question," Chief Justice Benjamin Jones wrote for the *Green* majority, "who, other than the Creator, has the right to term certain surgery as 'required.'"<sup>332</sup> The Pennsylvania high court held that the state did not have an interest of sufficient magnitude to outweigh the parent's religious opposition, at least where Ricky objected to the operation and his life was not immediately imperiled.<sup>333</sup>

In *In re D.L.E.*,<sup>334</sup> the Colorado Supreme Court also refused to compel medical treatment of a minor who suffered from grand mal seizures.<sup>335</sup> The child and his parents refused medical care and opted to rely on spiritual healing alone.<sup>336</sup> Finding that the record did not show that the child's life was in danger, the court concluded that the matter was controlled by a state statute protecting the parents' practice of spiritual healing.<sup>337</sup> The court also noted that the proposed medical treatment involved potential hazardous side effects.<sup>338</sup>

The Arizona Supreme Court made use of a similar statute

a parent's control over his or her child in order to enhance the child's physical well-being when the child's life is in no immediate danger and when the state's intrusion conflicts with the parent's religious beliefs." *Id.* at 390.

331. *Green*, 307 A.2d at 280.

332. *Green*, 292 A.2d at 392.

333. *Id.* But see *In re Cabrera*, 552 A.2d 1114 (Pa. Super. Ct. 1989).

334. 614 P.2d 873 (Colo. 1980).

335. *Id.* at 874.

336. *Id.* at 873-74.

337. The statute read as follows:

Notwithstanding any other provision of this title, no child who in good faith is under treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by a duly accredited practitioner thereof shall, for that reason alone, be considered to have been neglected within the purview of this title.

*Id.* at 874 (citing COLO. REV. STAT. § 9-1-114 (1973)).

Similar provisions are included in numerous state laws. See *Hermanson v. State*, 604 So. 2d 775, 776 n.1 (Fla. 1992) (listing statutes in other jurisdictions). Problems with these exemptions are discussed *infra* part IV.B.2.b. Ultimately, the court did order treatment for D.L.E. when the case returned and there was a finding that the child's life was, in fact, in danger. See *supra* text accompanying note 255.

338. *In re D.L.E.*, 614 P.2d at 875.

in rejecting a dependency petition not unlike the one approved in *Gregory*.<sup>339</sup> While the trial court in *Gregory* ordered physical examinations for all three siblings because of the eldest child's condition,<sup>340</sup> the Arizona court in *In re Cochise County*<sup>341</sup> refused to declare several siblings "anticipatorily dependent" following the death of their six-year-old brother.<sup>342</sup>

Therial Drew suffered from a strangulated hernia and was pronounced dead on arrival at the emergency room of the Copper Queen Community Hospital in Bisbee, Arizona.<sup>343</sup> Following Therial's death, the emergency room physician contacted the Department of Economic Security (D.E.S.).<sup>344</sup> A D.E.S. representative later conducted a twenty-minute interview with the child's mother.<sup>345</sup> The mother stated that, because of her faith in miracles, she would not seek medical care if any of her remaining children were to become ill.<sup>346</sup> Subsequently, the D.E.S. drew up a plan to investigate all those families in the area who had refused to sign medical consent forms for their school-age children.<sup>347</sup> The D.E.S. also filed a petition asking the court to assume jurisdiction over the seven surviving Drew children.<sup>348</sup>

The juvenile court denied the petition after finding that the children were "apparently well fed, neatly clothed, . . . attend school with some degree of regularity and they have a home which is clean and well kept."<sup>349</sup> The court of appeals reversed, however, and granted the petition.<sup>350</sup> "In such child protection proceedings," said the court, "it is the function of the court to determine not only whether neglect or far more serious abuse exists, but whether it is likely to exist in the future."<sup>351</sup> "It must also be noted," the court added, "that the particular religious belief of a person provides no defense in prosecution for breach of a duty imposed by statute to furnish

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339. See *supra* text accompanying notes 316-323.

340. See *supra* text accompanying note 320.

341. 650 P.2d 467 (Ariz. Ct. App. 1981), *vacated*, 650 P.2d 459 (Ariz. 1982).

342. *Id.* at 466, 471 (Hathaway, J., dissenting).

343. *Id.* at 460.

344. *Id.*

345. *Id.*

346. *Cochise*, 650 P.2d at 460.

347. *Id.* at 465.

348. *Id.* at 460.

349. *Id.*

350. *Id.*

351. *Cochise*, 650 P.2d at 470.

necessary medical attention to a child."<sup>352</sup>

The Arizona Supreme Court reversed the appellate decision and affirmed the juvenile court determination.<sup>353</sup> The high court declared that without "actual illness," the state ought not interfere with the parents' religious beliefs.<sup>354</sup> In reaching its decision, the court pointed to a statutory exemption which provided that children who received Christian Science treatment were not to be considered abused, neglected, or dependent for that reason alone.<sup>355</sup> And the court concluded: "We cannot imagine that the Legislature would give preferential treatment to one religion over another because one is perhaps more established and thus more acceptable than another."<sup>356</sup> But the court also noted that the outcome might well have been different "[h]ad there been a genetic predisposition to an illness or the strong suggestion that other children would fall ill."<sup>357</sup> In addition, the court indicated that D.E.S. could continue to keep a "close eye" on the Drew children and that an investigation could be prompted "by something less than would be necessary in a typical situation."<sup>358</sup>

When children suffer from non-life-threatening conditions, judges should resist the temptation to compel medical treatment over parents' religious objections. When possible, courts should await patient consent before approving a high-risk treatment with a dubious outcome. Even a low-risk procedure performed to satisfy an outsider's notion of normalcy and happiness has limited value when one considers the potential damage to family and religious integrity. The fact that statutes in a number of jurisdictions recognize spiritual treatment as a legitimate form of care supports this conclusion.<sup>359</sup> These statutes should be construed in a non-discriminatory fashion to avoid governmental favoritism toward any particular religion.

### *c. Religious Healing as a Supplementary Treatment*

Two cases, both resolved in 1979, are worthy of mention

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352. *Id.* at 471.

353. *Id.* at 466.

354. *Id.*

355. *Id.* at 465.

356. *Cochise*, 650 P.2d at 465-66.

357. *Id.* at 466.

358. *Id.*

359. See *Hermanson v. State*, 604 So. 2d 775, 776 n.1 (Fla. 1992) (listing statutes in various jurisdictions).

with respect to a parent's choice of religious healing for a child. Although the opinions themselves barely touch on religious concerns, they do suggest that a parent's use of religious healing as a supplement to medical care may garner judicial support if three conditions are met: the religious treatment is not dangerous in itself, it does not interfere with prescribed medical care, and a competent medical practitioner is willing to endorse its use.

In *Custody of a Minor*,<sup>360</sup> the parents of a three-year-old child suffering from acute lymphocytic leukemia opposed ongoing chemotherapy for their child.<sup>361</sup> They wished to continue providing an alternative treatment consisting of prayer and metabolic therapy.<sup>362</sup> Metabolic therapy involved the administration of enzymes, large doses of vitamins, and laetrile.<sup>363</sup> In the face of conflicting expert testimony regarding the value of metabolic therapy, the Massachusetts Supreme Judicial Court affirmed the trial court's conclusion that the child should continue chemotherapy and desist from metabolic treatment because the latter was useless and dangerous.<sup>364</sup>

Metabolic therapy for another form of cancer was permitted to continue, however, in *In re Hofbauer*,<sup>365</sup> decided earlier the same year. In that case, the New York Court of Appeals ruled that the parents' choice of metabolic treatment would be respected when it was provided by a competent physician.<sup>366</sup> Seven-year-old Joseph Hofbauer was diagnosed with Hodgkin's disease and his doctor recommended radiation and chemother-

360. 379 N.E.2d 1053 (Mass. 1978), *appeal after remand*, 393 N.E.2d 836 (Mass. 1979).

361. *Custody of a Minor*, 393 N.E.2d at 836-38.

362. *Id.* at 839.

363. *Id.*

364. Regarding the uselessness of metabolic therapy, the court noted:

The most that any witness claimed for these substances is that they might help to ease the effects of chemotherapy, or they might have a psychological or placebo effect, but even these claims are totally negated by the fact that the chemotherapy for this child has proceeded with minimum side effects, and the placebo impact on a three year old [sic] is clearly nonexistent.

*Id.* at 844-45.

Concerning the dangers of the alternative treatment, the court pointed out that the child was already afflicted with a low-grade chronic cyanide poisoning from the laetrile and faced the risk of brain damage therefrom. In addition, the enzyme and vitamin therapy posed dangers to the child's liver and intestines and also ran the risk of interfering directly with the chemotherapy treatments. *Id.* at 845.

365. 393 N.E.2d 1009 (N.Y. 1979).

366. *Id.* at 1014.

apy.<sup>367</sup> His parents, however, placed Joseph under the care of doctors employing metabolic therapy.<sup>368</sup> At a fact-finding hearing to determine if the child was being neglected by his parents, sharp medical disagreement erupted over the value of metabolic treatment.<sup>369</sup> Nonetheless, the family court found that Joseph was not neglected and the appellate courts affirmed that decision.<sup>370</sup>

The New York Court of Appeals concluded that the course of treatment pursued by the parents did not have to be "right" according to certain objective criteria in order to meet with judicial approval.<sup>371</sup> "Rather, in our view," the opinion continued,

the court's inquiry should be whether the parents, once having sought accredited medical assistance and having been made aware of the seriousness of their child's affliction and the possibility of cure if a certain mode of treatment is undertaken, have provided for their child a treatment which is recommended by their physician and which has not been totally rejected by all responsible medical authority.<sup>372</sup>

The court emphasized several additional factors in reaching its conclusion: the parents agreed that conventional treatment would be provided if the treating physician so advised; the present treatment appeared to medical authorities to be controlling Joseph's condition; numerous qualified doctors had been consulted and contributed to the child's care; the parents had serious and justifiable concerns about the deleterious effects of conventional treatment; and the nutritional treatment being administered was less toxic than conventional treatment.<sup>373</sup>

Although the court also pointed out that the Hofbauers had not refused medical treatment for religious reasons,<sup>374</sup> implying that such a case would be less likely to find a sympathetic ear, the decision is nonetheless relevant to such cases.

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367. *Id.* at 1011.

368. *Id.*

369. *Id.* at 1012.

370. *Hofbauer*, 393 N.E.2d at 1012-13.

371. *Id.* at 1014.

372. *Id.* Several state legislatures have also concluded that a physician's use of a harmless nontraditional treatment shall not constitute unprofessional conduct. *See, e.g.*, WASH. REV. CODE ANN. § 18.130.180(4) (Supp. 1993).

373. *Hofbauer*, 393 N.E.2d at 1014.

374. *Id.*

As in *Hamilton*, discussed above,<sup>375</sup> *Haufbauer* reveals that courts may be willing to respect alternative treatments unless such care interferes with medical procedures judged to be absolutely necessary. Given the deference that courts have shown to physicians in recent times,<sup>376</sup> it is also clear that medical testimony would be effective in supporting a parent's decision to employ religious healing for a sick child. In addition, the opinion in *Custody of a Minor* implies that evidence regarding a placebo effect of religious treatment may be somewhat persuasive, at least when the child is old enough to believe in religious care or caregivers.<sup>377</sup>

### 3. Conclusion

Following initial reluctance to interfere with parents' sacred duty to raise their children, courts have taken a more active role during the latter half of this century in compelling medical care for children, religious objections by parents notwithstanding. In some instances, courts have been willing to order life-saving and even life-enhancing medical treatment, no matter how remote the threat of death nor how dangerous the procedure, so long as the medical treatment offers hope of being in the child's best interests—in other words, so long as the medical treatment may possibly lead the child toward normalcy and happiness.

In decisions more supportive of religious liberty and family integrity, however, courts have refused to order treatment—particularly high-risk treatment—over religious objections if the child is also opposed to the treatment or if the medical care is either not intended to be or not likely to be life-saving. When a medical prognosis declares it more likely than not that the child will die even with medical treatment, courts should not coerce care. Religious convictions should not be overridden to allow relatively disinterested parties to grasp at straws. In a like manner, petitions to declare children anticipatorily dependent should be—but have not always been—denied.

While some courts have been reluctant to allow minors to make healthcare decisions for themselves, they have shown considerable deference to expert medical opinion. A few courts have even allowed the physicians themselves to make

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375. See *supra* text accompanying note 264.

376. See, e.g., *supra* text accompanying note 311.

377. See mention of the placebo effect *supra* note 364.



the final decision in complex and uncertain cases. But judges should not abnegate their responsibility to decide these cases. Although doctors are recognized as experts in diagnosing ailments and in determining prognoses and possible treatments, they are not specially qualified to balance the patient, familial, and societal interests involved in coercing a particular course of medical care. If the family's decision is to be overruled, only the court—the ultimate arbiter of social values—should make the final treatment decision, as informed by all interested parties.<sup>378</sup>

### *B. Prosecuting Parents for Providing Only Religious Treatment for Seriously Ill Children*

As discussed previously, parents who have chosen to rely exclusively on religious healing have faced neglect and dependency proceedings to compel medical care for their children. Where authorities did not learn of the parents' sole reliance on religious healing until the child's death, prosecutors often have pressed criminal charges. This subsection tracks the development of this criminal offense, examining litigation in which parents who relied exclusively on religious treatment were charged with neglect, child endangerment, manslaughter, or murder in connection with their child's death. To a greater extent than the litigation to compel care for children discussed in the previous subsection, these early parental prosecutions reveal that by the first years of this century, a number of American courts considered medical treatment a part of the common faith of mankind. Developments prior to the Second World War are described initially, followed by an analysis of the modern trend toward increased legal scrutiny. Statutory ambiguity and conflicting judicial opinions in this area signal a need for legislative action.

#### 1. Historical Development

It was probably not until 1802 that cruelty to children was recognized as a criminal offense.<sup>379</sup> In an English case arising at that time, the defendants were indicted for failing to provide their young "apprentice" with sufficient food and clothing.<sup>380</sup>

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378. Regarding physician decision-making, *see generally*, VEATCH, *supra* note 210, at 139-143.

379. *State v. Clark*, 261 A.2d 294 (Conn. Cir. Ct. 1969).

380. *Id.*

More than half a century elapsed, however, before English law made it a crime for a parent, acting pursuant to religious scruples, to withhold medical care from a seriously ill child. Parliament was apparently moved to action by the court's decision in *Regina v. Wagstaffe*.<sup>381</sup>

Thomas and Mary Ann Wagstaffe, members of a religious group known as the Peculiar People, placed their trust in Providence rather than medicine when their fourteen-month-old daughter fell ill. The parents were prosecuted for manslaughter after her death. They were acquitted, however, because they had acted on sincere religious convictions.<sup>382</sup>

Six months after *Wagstaffe*, Parliament enacted the Poor Law Amendment Act, 1868, to make it a criminal offense "when 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."<sup>383</sup> Although the Poor Law was succeeded by legislation that no longer made explicit a parent's duty to provide medical aid to children,<sup>384</sup> English courts subsequently found no difficulty in convicting parents for denying medical care to their seriously ill children.<sup>385</sup>

American courts followed this direction. Shortly after the turn of the twentieth century, parents in this country who provided religious treatment alone to seriously ill children began

381. 10 Cox Crim. Cas. 530 (1868).

382. *Id.*

383. *Queen v. Downes*, 1 L.R.-Q.B. 25 (1875) (quoting Poor Law Amendment Act, 1868, 31 & 32 Vict. ch. 122, § 6 (Eng.)).

384. *Queen v. Senior*, 1 Q.B. 283 (1898) (citing Prevention of Cruelty to Children Act, 1894, 57 & 58 Vict. ch. 41 (Eng.)).

385. The leading case in this regard was *Queen v. Senior*, 1 Q.B. 283 (1898), in which the English court of appeals affirmed the conviction for child neglect of another member of the Peculiar People, whose eight-month-old infant had died of diarrhea and pneumonia. Chief Justice Lord Russell's opinion heralded the age of medical preeminence. Referring to the trial judge's instructions to the jury, Lord Russell wrote:

I agree with the statement in the summing-up, that the standard of neglect varied as time went on, and that many things might be legitimately looked upon as evidence of neglect in one generation, which would not have been thought so in a preceding generation, and that regard must be had to the habits and thoughts of the time. At the present day, when medical care is within the reach of the humblest and poorest members of the community, it cannot reasonably be suggested that the omission to provide medical aid for a dying child does not amount to neglect.

*Id.* at 291.

to face prosecution.<sup>386</sup> Several courts found in the law a specific parental duty to provide medical care to sick children, whether or not such duty existed by statute.<sup>387</sup> These courts simultaneously rejected evidence that religious healing was a prudent means to meet a parent's general duty to care for a minor.<sup>388</sup>

In early cases of criminal prosecution, courts perfunctorily dismissed the parents' free exercise of religion as a defense.<sup>389</sup> The opinions relied on the distinction set forth by the United States Supreme Court in *Reynolds v. United States*,<sup>390</sup> which allowed the government broad latitude to regulate religious action, while holding religious belief inviolate. Although rejected as a defense, the religious nature of parents' refusal to provide medical care often served to mitigate punishment.<sup>391</sup> Until 1985, in fact, it appears that no court of review allowed a parent's conviction for manslaughter to stand when religious beliefs were at issue.<sup>392</sup>

In 1903, the first reported American opinion established the precedent for misdemeanor prosecutions in cases involving religious treatment for minors. In *People v. Pierson*,<sup>393</sup> the New York Court of Appeals affirmed the defendant's conviction of failing to provide medical care to his infant daughter who contracted whooping cough and then died the following month of catarrhal pneumonia.<sup>394</sup> The child had received prayer treatment alone in accordance with the beliefs of the Christian Catholic Church of Chicago—an entity unrelated to the more familiar Roman Catholic Church.<sup>395</sup>

The New York Court of Appeals relied on then Section 288 of the Penal Code, which specifically imposed a duty on parents to provide "medical attendance" for their children, and found that medical attendance, as defined by statute, did not

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386. See, e.g., *People v. Pierson*, 68 N.E. 243 (N.Y. 1903) (denying that medical care is an act of worship protected by the Constitution); *Commonwealth v. Hoffman*, 29 Pa. C. 65 (1903) (finding father guilty of manslaughter); *Commonwealth v. Breth*, 44 Pa. C. 56 (1915) (finding father guilty of manslaughter).

387. *Hoffman*, 29 Pa. C. 65 (1903); *Breth*, 44 Pa. C. 56 (1915).

388. See, e.g., *Pierson*, 68 N.E. 243 (N.Y. 1903); *Hoffman*, 29 Pa. C. 65 (1903); *Breth*, 44 Pa. C. 56 (1915).

389. See, e.g., *Pierson*, 68 N.E. at 246.

390. 98 U.S. 145 (1879).

391. See, e.g., *Beck v. State*, 233 P. 495, 496 (Okla. Crim. App. 1925).

392. See discussion *infra* part IV.B.2.a.

393. 68 N.E. 243 (N.Y. 1903).

394. *Id.* at 244-47.

395. *Id.* at 244.

include the defendant's prayer treatment.<sup>396</sup> The court also rejected the defendant's argument that his actions were a matter of the free exercise of his religion.<sup>397</sup>

In neighboring Pennsylvania that same year, the trial court in *Commonwealth v. Hoffman*<sup>398</sup> declared that parents had a duty to furnish medical care to minors although no such requirement appeared explicitly in Pennsylvania statutes.<sup>399</sup> The court refused to acknowledge the possibility that religious healing satisfied the defendant's general duty to maintain his child, and the judge excluded all testimony that related to the efficacy of prayer.<sup>400</sup> In dismissing the defendant's claim that spiritual treatment was sufficient, the trial judge quoted scripture: "[A]s the body, without the spirit, is dead, so faith without works is dead also."<sup>401</sup> The jury convicted the defendant of manslaughter with a recommendation to mercy, and the defendant did not appeal.<sup>402</sup>

Likewise, in *Commonwealth v. Breth*,<sup>403</sup> another Pennsylvania trial court elaborated on the view that an honest belief in the efficacy of prayer did not constitute a defense to the charge of manslaughter. Quoting the Supreme Court of Pennsylvania, the judge noted:

It is not a question as to how far prayer for the recovery of the sick may be efficacious. The common faith of mankind relies not only upon prayer, but upon the use of means which knowledge and experience have shown to be efficient. It may be said that the wisdom or folly of depending upon the power of inaudible prayer alone, in the cure of disease, is for the parties who invoke such a remedy. But this is not

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396. *Id.* at 245-46.

397. *Id.* at 246-47.

398. 29 Pa. C. 65 (1903).

399. *Id.* at 66.

400. *Id.* at 65-66.

401. *Id.* at 69 (quoting *James* 2:26).

402. *Id.* at 73. See also *State v. Chenoweth*, 71 N.E. 197, 199 (Ind. 1904) (declaring that "[t]he religious doctrine or belief of a person cannot be recognized or accepted as a justification or excuse for his committing an act which is a criminal offense under the law of the land"). Not all courts at the turn of the century, however, took the position that a conscientious objection to medical care was no defense to criminal charges. See, e.g., *State v. Sandford*, 59 A. 597, 600 (Me. 1905) (instructing jury as follows: "When the death of a human being from disease is caused or hastened by reason of the omission to call in a physician, or to provide medicine, when such omission proceeds not from any criminal indifference to the needs of the person, but from a conscientious disbelief as to the efficacy of medicine or medical attendance, it is not criminal negligence, and does not constitute a basis for conviction for manslaughter").

403. 44 Pa. C. 56 (1915).

wholly true. For none of us liveth to himself and no man dieth to himself. . . .<sup>404</sup>

The jury convicted the defendant of manslaughter—again, despite the absence of a statute specifically requiring a parent to furnish medical care to a minor.<sup>405</sup> The court viewed the matter simply as a question of whether the defendant had intentionally failed to do what a “reasonably prudent person” would do in a situation requiring “great care and caution.”<sup>406</sup> No appeal was taken.

As demonstrated by *Hoffman* and *Breth*, early in this century total reliance on the efficacy of religious healing in the face of serious illness was generally considered unreasonable. Although religious motives did, on occasion, serve to mitigate punishment, parents were subject to conviction for providing religious treatment alone if they had failed to call a doctor

404. *Id.* at 64.

405. *Id.* See *Commonwealth v. Barnhart*, 497 A.2d 616, 620-21 (Pa. Super. Ct. 1985), *cert. denied*, 488 U.S. 817 (1988).

406. *Breth*, 44 Pa. C. at 65. The courts have distinguished the reasonably-prudent-person standard by which parents are found guilty of criminal neglect or manslaughter from the less rigorous standard used in civil negligence cases. See *State v. Watson*, 71 A. 1113 (N.J. 1909) (reversing parents' manslaughter convictions on the ground that the jury charge failed to distinguish between the gross, more culpable negligence required for conviction of a crime and the negligence standard used in civil matters).

The reasonably prudent person standard as applied to parents providing religious treatment alone was called into question in *Bradley v. State*, 84 So. 677, 679 (Fla. 1920), where the parent's conviction was reversed on the grounds that omission to provide medical care for daughter's burns did not amount to the type of “killing” contemplated in the manslaughter statute. In his concurring opinion Chief Justice Browne asked:

Must a parent call a physician every time his child is sick, or risk being adjudged guilty of manslaughter if the child should die? . . . Can the law fix what class of ailments a child must be suffering from before the failure to call a physician becomes culpable negligence, so that if death ensues in one class it is manslaughter and in another class it is not?

*Id.* at 679 (Browne, C.J., concurring). Browne answered his own queries in the negative. *Id.* But see *Beck v. State*, 233 P. 495 (Okla. Crim. App. 1925) (reaffirming the reasonably prudent person standard but reducing parent's sentence from six months in jail to a fifty dollar fine). Regarding Browne's concerns, the court in *Beck* explained:

A fair amount of discretion is vested in parents charged with the duty of maintaining and bringing up infant children, and this statute will not be construed to mean that a physician must be called for every trifling complaint with which a child might be afflicted, such as may be overcome by ordinary household nursing by members of the family. But where, as in this case, a child is suffering intense pain, and where the muscles of the body have become drawn and rigid, it would seem that an ordinarily kind or prudent parent, solicitous for the welfare of his child and anxious to promote its [sic] recovery, would call in medical aid.

*Id.* at 496.

when the average person would have done so and if evidence was introduced that a doctor could have saved the child.

## 2. Modern Approach

In the closing decades of the twentieth century, religious parents have faced increased legal pressure to provide medical care for their children. At the turn of the century, government intervention in the parent-child relationship was unlikely if the parents acted in good faith. More recently, courts have disregarded parents' good intentions in order to compel medical treatment that is deemed to be in the child's best interests. Where a child has died for lack of medical care, felony rather than misdemeanor prosecutions have been initiated with mixed results. Constitutional concerns arising from the prosecution of religious parents signal the need for courts and legislatures to chart a new course in this area.

### a. *Free Exercise of Religion*

With but one possible exception, courts have rejected parents' arguments that freedom of religion includes the right to provide religious treatment alone to their seriously ill children.<sup>407</sup> Ironically, as discussed below, some courts have reasoned that the right to religious freedom actually bars parents from presenting part of their defense in these prosecutions. This aberration of free exercise jurisprudence stands in need of correction.

In 1985, a Pennsylvania court became the first appellate tribunal to affirm manslaughter convictions of religious parents who provided only spiritual care for their child.<sup>408</sup> Two-

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407. Trescher & O'Neill, *supra* note 3, at 217 n.76 (quoting *Commonwealth v. Cornelius*, No. 105, April Sessions, 1956, Philadelphia County (Pa.) Quar. Sess., Nov. 5, 1958) (manslaughter charges were dismissed against Christian Science couple following the death of their infant son from diabetes). In *Cornelius*, the prosecutor moved to drop the charges and the judge concluded that

[w]hile a conviction of involuntary manslaughter may, under some circumstances be predicated upon death attributable to the failure to provide medical care, the character of the ailment, the good faith of the parent is of supreme importance. If the failure to provide medical care is the result of [a] religious tenet or a sincere belief in the inefficacy of medical treatment there may be no criminal responsibility under the law.

*Id.* See also *People v. Glaser*, County of Los Angeles, Case No. A 753 942 (jury acquitted Christian Science parents of manslaughter following the death of their child from meningitis).

408. *Commonwealth v. Barnhart*, 497 A.2d 616 (Pa. Super. Ct. 1985), *cert. denied*, 488 U.S. 817 (1988). Three earlier cases in the latter half of the century set the stage

year-old Justin Barnhart died as the result of a Wilm's tumor.<sup>409</sup> His parents, life-long members of the Faith Tabernacle Church, had chosen to treat Justin's cancer with prayer.<sup>410</sup> In upholding the parents' convictions, the appellate court quoted the Supreme Court's decision in *Prince v. Massachusetts*: "The right to practice religion freely does not include liberty to expose the community or child to communicable disease or the latter to ill health or death."<sup>411</sup>

The appellate court then went on to use the Free Exercise Clause itself as a reason to reject the defendants' argument that spiritual healing was a reasonable means of fulfilling a parent's duty.<sup>412</sup> Citing *United States v. Ballard*, the court declared that "the First Amendment precludes scrutiny of the verity or validity of religious beliefs."<sup>413</sup> In other words, had the parents employed nonreligious means to care for their child, they might have been allowed to introduce evidence that their curative efforts were reasonable. But because they chose religious treatment, that possibility was foreclosed. *Barnhart's* conclusion in this regard is actually inimical to *Ballard*; the First Amendment arguably requires courts to follow a contrary course of action.

In *Ballard*, the Supreme Court held that the First Amendment prohibited inquiry into the veracity of religious assertions in a fraud prosecution.<sup>414</sup> The holding sought to protect defendants with unorthodox beliefs from religious persecution at the hands of unsympathetic juries.<sup>415</sup> In parental prosecutions, however, the defendants are not prosecuted for what

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for the Barnharts' convictions: *Craig v. State*, 155 A.2d 684 (Md. Ct. App. 1959) (reversing parents' manslaughter convictions because prosecutor had not introduced sufficient evidence that a doctor could have prevented the child's death from pneumonia at such time as the parents should have realized the danger); *State v. Arnold*, 58 Cal. Rptr. 115 (Cal. 1967) (reversing manslaughter conviction because of improper admission of parent's prearrest statements about the child's illness); *Commonwealth v. Sheridan*, No. 26307 (Super. Ct., Barnstable Cty., Mass., Nov. 1967) (suspended sentence for manslaughter conviction of Christian Science parent not appealed).

409. *Barnhart*, 497 A.2d at 620.

410. *Id.*

411. *Id.* at 623 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944)).

412. *Id.*

413. *Id.* at 623 (citing *United States v. Ballard*, 322 U.S. 78 (1944)).

414. *Ballard*, 322 U.S. at 86.

415. Justice William O. Douglas wrote the following:

Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be

they asserted, but for what they did, or failed to do: for relying on religious rather than medical treatment for their children.<sup>416</sup> Under such circumstances, to permit the defendants to introduce evidence that they acted reasonably—including evidence concerning the efficacy of spiritual healing—is not to subject them to persecution on account of their religious beliefs. To the contrary, to deny defendants the opportunity to introduce such evidence is to discriminate against their action for the very reason that it is religiously inspired. Rather than protecting religious individuals from a heresy trial, as in *Bal-lard*, this practice unfairly strips religious parents of an essential element of their defense.<sup>417</sup>

As the United States Supreme Court declared recently regarding “the performance of . . . physical acts” in connection with the “exercise of religion, . . . it would be true, we think (though no case of ours has involved the point), that a State would be ‘prohibiting the free exercise [of religion]’ if it sought to ban such acts . . . only because of the religious belief that they display.”<sup>418</sup> In a like manner, for a court to refuse to entertain and evaluate evidence about the defendant’s healing practices simply because of the religious beliefs motivating their use is to unlawfully discriminate against the free exercise of religion.

A better rule to be followed in prosecutions of religious parents would permit the defendant to raise the question of the efficacy or reasonableness of religious treatment.<sup>419</sup> Only then would the prosecution be permitted to refute evidence

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incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law.

*Id.* at 86-87.

416. See generally *Hermanson v. State*, 570 So. 2d 322, 334-35 (Fla. App. 1990), *rev’d*, 604 So. 2d 775 (Fla. 1992).

417. Ironically, evidence that parents did seek out religious treatment virtually negates their potential defense that the child’s condition did not appear to warrant healthcare. The parents’ defense that a doctor could not have saved the child’s life is also often unconvincing. In *Barnhart*, for example, the jury concluded beyond a reasonable doubt that physicians could have saved the child’s life despite expert testimony that medical treatment would have afforded Justin Barnhart only a fifty percent chance of survival if the cancer had already metastasized before treatment began. *Barnhart*, 497 A.2d at 625-26.

418. *Employment Div., Or. Dep’t of Human Resources v. Smith*, 494 U.S. 872, 877 (1990) (Free Exercise Clause does not bar state from banning use of peyote in conjunction with religious ceremonies).

419. Courts have permitted juries to consider the reasonableness of religious healing in the context of personal injury actions. See *supra* note 138 and accompanying text.



offered on this point. This judicial course is consistent with the Supreme Court's intention, as expressed in *Ballard*, to prevent heresy trials. Such a procedure is also in harmony with the conclusions offered above.<sup>420</sup> Namely, it was suggested that courts should permit parents to proceed with alternative treatments for their seriously ill children, despite opposition from the orthodox medical community, if at least some credible expert testimony supports the provision of that alternative form of care.<sup>421</sup> Parents prosecuted following their child's death should be allowed no less of an opportunity to defend their liberty.

In addition, there is another reason for allowing parents to introduce evidence that relying on religious healing was a reasonable means of fulfilling their parental duty. To permit finders of fact to consider other than medical evidence helps to prevent medicine from assuming the role of a "religious" orthodoxy, which may not be questioned, even in a court of law.<sup>422</sup> As noted previously, doctors should not be given the authority to render decisions that are the court's to make; nor should doctors' testimony be accepted on faith, as if no reasonable person could disagree. Unless a statute clearly provides that parents must consult a physician when their child falls seriously ill, courts should allow the introduction of evidence offered to prove that parents acted prudently by pursuing religious healing for their child.

#### b. *Religious Statutory Exemptions*

As described above, parents who relied on spiritual healing alone for their seriously ill children have not received protection under the First Amendment's guarantee of religious free exercise. They have found more success, however, arguing that their right to due process of law has been violated. Some courts have concluded that conflicting state statutes fail to give parents adequate notice that their reliance on spiritual healing could be criminal.<sup>423</sup> Courts have also expressed concern that

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420. See *supra* text accompanying notes 375-377.

421. See *supra* text accompanying note 375.

422. For a comparison between orthodox medicine and orthodox religion, see generally ROBERT MENDELSON, *CONFESSIONS OF A MEDICAL HERETIC* (1990).

423. See, e.g., *Hermanson v. State*, 570 So. 2d 322 (Fla. Ct. App. 1990), *rev'd*, 604 So. 2d 775 (Fla. 1992); *State v. McKown*, 461 N.W.2d 720 (Minn. Ct. App. 1990), *aff'd*, 475 N.W.2d 63 (Minn. 1991); *State v. Miskimens*, 490 N.E.2d 931 (Ohio Court of Common Pleas 1984).

religious statutory exemptions discriminate against certain forms of religious expression.<sup>424</sup> These constitutional problems signal the need for legislative reform.

By the early 1980s, more than forty states had enacted exemptions in their child neglect laws to protect parents who provided only spiritual treatment for their children.<sup>425</sup> Since 1983, these exemptions have played a part in a series of conflicting judicial decisions in the prosecution of parents. In *State v. Lockhart*,<sup>426</sup> the first appellate court to interpret such an exemption found that it provided a successful defense for parents who relied on spiritual healing.

In *Lockhart*, parents were charged with manslaughter in the first degree following the death of their nine-year-old son.<sup>427</sup> Jason Dean Lockhart died from peritonitis in Garfield County, Oklahoma, after receiving only spiritual treatment.<sup>428</sup> The Lockharts were acquitted on the basis of the following 1975 exemption to Oklahoma's child endangerment statute:

Nothing in this section shall be construed to mean a child is endangered for the sole reason the parent or guardian, in good faith, selects and depends upon spiritual means alone through prayer, in accordance with the tenets and practice of a recognized church or religious denomination, for the treatment or cure of disease or remedial care of such child; provided that the laws, rules, and regulations relating to communicable disease and sanitary matters are not violated.<sup>429</sup>

Following *Lockhart*, however, religious healing exemptions failed to afford immunity to religious parents in a number of jurisdictions, including Oklahoma. Shortly after the Lockharts were acquitted, prosecuting attorneys found their way around the Oklahoma exemption by charging Kevin Eugene and Jamie Ann Funkhouser with manslaughter in the second degree.<sup>430</sup> The Funkhousers were members of the Church of the New Born, and they had relied on the elders of

424. See, e.g., *Walker v. Superior Court*, 253 Cal. Rptr. 1, 22-27 (Cal. 1988) (Mosk, J., concurring); *McKown*, 461 N.W.2d 720; *Miskimens*, 490 N.E.2d 931.

425. See *Hermanson*, 604 So. 2d at 776-77 n.1 (listing statutes).

426. 664 P.2d 1059 (Okla. Crim. App. 1983).

427. *Id.*

428. *Id.*

429. *Id.* at 1060 (citing OKLA. STAT. tit. 21, § 852 (1981)).

430. *Funkhouser v. State*, 763 P.2d 695, 696 (Okla. Crim. App. 1983), *cert. denied*, 490 U.S. 1066 (1989).

their church to heal their three-month-old son.<sup>431</sup> The child died of pneumonia in 1983 after a two-week illness.<sup>432</sup>

The same appellate court that had affirmed the Lockharts' acquittal ruled that Oklahoma's spiritual healing exemption did not bar the Funkhousers' prosecution because—unlike manslaughter in the first degree—second-degree manslaughter did not involve the violation of the child endangerment statute to which the exemption applied.<sup>433</sup> The court also pointed out that district attorneys had the authority to choose which charges to file.<sup>434</sup>

In his dissent, Justice Ed Parks argued that *Lockhart* recognized a legislative intent not to punish parents who relied on spiritual treatment for their children.<sup>435</sup> "It is absurd," Parks wrote, "to allow district attorneys to circumvent the expressed legislative intent by charging an inapplicable offense under the guise that district attorneys have sole authority to determine what charge to file."<sup>436</sup>

But *Funkhouser's* majority reasoned that the legislature's intention to provide protection for parents who employed religious healing for their children had not been entirely disregarded.<sup>437</sup> The appellate court affirmed a jury instruction that simply modified the religious exemption in order to reinstate the reasonably-prudent-person standard.<sup>438</sup> The approved instruction read that a parent could be justified in offering only religious care "provided that said treatment is something which a reasonably careful person would do under similar circumstances."<sup>439</sup> Courts in Indiana, California, and Colorado have subsequently adopted similar reasoning with regard to the application of their own spiritual healing exemptions.<sup>440</sup>

431. *Id.*

432. *Id.*

433. *Id.* at 698.

434. *Id.* at 697.

435. *Funkhouser*, 763 P.2d at 699 (Parks, J., dissenting).

436. *Id.*

437. *Id.*

438. *Id.*

439. *Id.* at 698.

440. See, e.g., *Walker v. Superior Court*, 253 Cal. Rptr. 1, 6 (Cal. 1988), cert. denied, 491 U.S. 905 (1989); *People v. Lybarger*, 807 P.2d 570, 578-79 (Colo. 1991); *Hall v. State*, 493 N.E.2d 433, 435 (Ind. 1986); *Bergmann v. State*, 486 N.E.2d 653, 660-61 (Ind. Ct. App. 1985). See also *People v. Ripberger*, 283 Cal. Rptr. 111, 122 (Cal. Ct. App. 1991); *Commonwealth v. Twitchell*, No. 89-210 (Mass. Sup. Jud. Ct., May 23, 1989, Suffolk Cty., Docket Nos. 069517 and 069757).

In *State v. Miskimens*,<sup>441</sup> an Ohio trial court took a different approach to the same problem, declaring Ohio's spiritual treatment exemption unconstitutional under both the First and Fourteenth Amendments.<sup>442</sup> The defendants, members of the Christ Assembly, were charged with involuntary manslaughter in the pneumonia death of their thirteen-month-old son.<sup>443</sup> The child had received spiritual treatment alone.<sup>444</sup>

Judge Evans held that the exemption violated the First Amendment establishment clause in that it gave preference to certain religious people—those who practiced spiritual healing through prayer alone in accordance with the tenets of a recognized religious body.<sup>445</sup> The exemption also violated the Establishment Clause, according to Evans, in that its interpretation would unnecessarily entangle the government in determining exactly which religious bodies were to be "recognized" for purposes of the statute.<sup>446</sup> Judge Evans further ruled that the spiritual healing exemption violated the Fourteenth Amendment's Equal Protection Clause in that it failed to protect children in these sects and it failed to give all parents equal religious protection.<sup>447</sup> Finally, Judge Evans found the exemption unconstitutionally vague in that it did not provide fair notice to parents of forbidden conduct.<sup>448</sup>

Judge Evans's non-establishment and due process concerns have been shared by other courts.<sup>449</sup> The supreme courts in Minnesota and Florida have recently concluded that their state laws failed to provide adequate notice to religious parents that relying on spiritual treatment could result in criminal convictions.<sup>450</sup> Christian Science parents in both cases had treated their children by spiritual means only. The Minnesota

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441. 490 N.E.2d 931 (Ohio 1984).

442. *Id.* at 936.

443. *Id.* at 935-36.

444. *Id.* at 938.

445. *Id.* at 934.

446. *Miskimens*, 490 N.E.2d at 934.

447. *Id.* at 936.

448. *Id.* at 937.

449. Regarding non-establishment clause concerns, see, e.g., *Walker v. Superior Court*, 763 P.2d 852, 873 (Cal. 1988) (Mosk, J., concurring), *cert. denied*, 491 U.S. 905 (1989); *Newmark v. Williams*, 588 A.2d 1108, 1112 (Del. 1991); *State v. McKown*, 461 N.W.2d 720 (Minn. Ct. App. 1990), *aff'd*, 475 N.W.2d 63, 69 n.9 (Minn. 1991), *cert. denied*, 112 S. Ct. 882 (1992); see also *In re Cochise County*, 650 P.2d 459, 465-66 (Ariz. 1982).

450. *McKown*, 461 N.W.2d at 723; *Hermanson v. State*, 570 So. 2d 322 (Fla. Dist. Ct. App.), *rev'd*, 604 So. 2d 775 (Fla. 1992).

Supreme Court also implied that the spiritual treatment exemption violated the Establishment Clause as well, but the case was decided on due process grounds only.<sup>451</sup>

As demonstrated by conflicting judicial decisions, exemptions for spiritual healing in child protection statutes across the nation have failed to adequately define the permissible scope of spiritual healing for children. There are two problems with these laws. In the first place, they do not give adequate notice to religious parents that reliance on spiritual treatment can be criminal. The Supreme Court has refused to grant certiorari in cases reaching opposite conclusions on the due process issue.<sup>452</sup> New legislation is required.

Secondly, many spiritual healing exemptions favor the religious practices of "recognized" religious organizations over individual religious expression. These exemptions raise the same problem treated earlier in relation to compulsory vaccination statutes.<sup>453</sup> Although the Supreme Court recently expressed approval of "nondiscriminatory religious-practice" exemptions,<sup>454</sup> a legislative preference for religious healing by "recognized" religious groups only discriminates against less popular sects and accordingly runs afoul of constitutional safeguards against the establishment of religion.<sup>455</sup> New legislation should provide equal protection to all religious parents.<sup>456</sup>

### C. Conclusion

Courts have shown an increasing willingness during this century to intervene in the parent-child relationship. It is clear that the child's best interests usually will prevail over the

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451. *McKown*, 461 N.W.2d at 723; see also *Walker*, 763 P.2d at 873 (Mosk, J., concurring).

452. See *McKown*, 112 S. Ct. 882 (1992); *Walker*, 491 U.S. 905 (1989).

453. See text accompanying notes 80-82 *supra* and *infra* notes 613-21.

454. *Employment Div., Or. Dep't. of Human Resources v. Smith*, 494 U.S. 872, 890 (1989).

455. See *Walker*, 763 P.2d at 873-878 (Mosk, J., concurring) (pointing out that provisions in the California penal code providing exemptions to members of recognized religions violates First Amendment proscription of laws that discriminate among religious groups); *Newmark v. Williams*, 588 A.2d 1108, 1112-1113 (Del. 1991) (suggesting that a Delaware child neglect statute invites courts to "impermissibly determine the validity of an individual's own religious beliefs"); *McKown*, 475 N.W.2d at 69 n.9; *State v. Miskimens*, 490 N.E.2d 931 (Ohio Ct. of Common Pleas 1984) (holding unconstitutional specific exemptions in child endangerment statute for parents and custodians who utilize spiritual healing on children).

456. For a proposed model of a spiritual healing exemption, see Clark, *supra* note 3, at 588-89.

parent's constitutional right to religious liberty. Courts, however, should not use the First Amendment as an excuse to deny religious parents the opportunity to prove that they acted with reasonable care to protect the child's interests.

In addition to First Amendment considerations, statutory religious exemptions in child protection laws must also be taken into account to resolve these dilemmas. Although these statutes are in need of revision to address First and Fourteenth Amendment problems, they do currently afford notice that spiritual treatment helps to satisfy a parent's duty to meet a child's basic needs. Thus, children receiving religious care should not come under court jurisdiction in the absence of actual harm or some immediate likelihood thereof. Spiritual healing provisions do not prohibit courts from ordering life-saving medical care. But courts should refrain from interfering with a family's integrity and religious liberty in most other instances.

## V. RELIGIOUS HEALERS

The individual's right in a free society to practice healing has been considered fundamental. Nevertheless, state and federal governments regulate healers to protect and promote public health, safety, and welfare. Courts consistently uphold these regulations as proper exercises of the state police power and congressional interstate commerce power, so long as the authority is exercised within constitutional limits.<sup>457</sup> Sensitive to constitutional protections, state legislatures often exempt religious healers from regulatory measures applicable to other healing arts practitioners.<sup>458</sup> After exploring the interplay between legislative regulatory power and constitutional guarantees of religious liberty and patient autonomy, this section concludes that First Amendment protections require courts to liberally construe religious healing exemptions in public health, safety, and welfare legislation.

### A. *Fraud*

"Most faith healers are usually uneducated, untrained, incompetent, avaricious charlatans, quacks and quasi-fortune

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457. See, e.g., *Crane v. Johnson*, 242 U.S. 339 (1917); *Drown v. United States*, 198 F.2d 999 (9th Cir. 1952); *Smith v. People*, 117 P. 612 (Colo. 1911); *State v. Marble*, 73 N.E. 1063 (Ohio 1905).

458. See *infra* part V.B.2 (discussing medical licensing laws).

tellers,"<sup>459</sup> concluded I.H. Rubenstein, a prominent legal commentator on religious healing regulation. Rubenstein is not alone in his suspicion of those professing to be religious healers.<sup>460</sup> Judges themselves have not always been free from prejudice when faced with unusual claims by religious healers.<sup>461</sup> This section examines the tension between a legitimate government interest in protecting citizens from fraud and the public's right to practice and receive unorthodox treatment.

As detailed below, fraud actions—both criminal and civil—require (1) proof that the perpetrator knowingly made false representations, and (2) proof that the healer intended to defraud the victim.<sup>462</sup> A religious healer's *good faith* may thus be a double defense to a fraud charge—negating knowledge of falsity as well as fraudulent intent. But is a jury likely to believe that a practitioner who engages in exotic healing rites for pay is actually involved in the good faith practice of reli-

459. RUBENSTEIN, *supra* note 2, at 39.

460. See, e.g., *Commonwealth v. Neely*, 444 A.2d 1199 (Pa. Super. Ct. 1982). Harold Neely was convicted of the aggravated assault and attempted robbery of John Pearson, a seventy-three-year-old faith healer in Philadelphia. Neely claimed that Pearson "had amassed the blessings of 25 stores and a Temple of a thousand people as the Lord's minister of mercy healing" but that, in actuality, the healer "was a demon who was wearing the Lord's mantle to ward off the ugly winds of poverty and honest work." *Id.* at 1204.

In his confession, Neely described what happened when the healer solicited payment:

I told Pearson that I don't have any money but that I would write him a check. Pearson then asked me if I had a car. I told him that I had a car. He then asked me if I owned a home. Pearson then asked me if I could get the deed. I said yes and slapped him alongside the head with my hand.

*Id.* at 1204.

461. For example, in *Jageriskey v. Detroit United Ry.*, 128 N.W. 726 (Mich. 1910), Anna Jageriskey, a seamstress and faith healer, encountered judicial prejudice in the personal injury action she brought after falling from a street car. On cross-examination, the defense counsel inquired at great length into the plaintiff's faith-healing activities. Jageriskey testified that she, her brother, and a ten-year-old girl went out at three o'clock one morning to conduct a healing ceremony for a patient who had recently undergone an operation. The brother dug a hole behind a billboard while the plaintiff and the child prayed for the patient. Upon further examination, the plaintiff testified that she had been instructed by the angel Casimir, who "lives with God in heaven," to dig the hole in order to help her patient. *Id.* at 727.

The plaintiff's counsel objected that this line of questioning impermissibly examined the basis of Jageriskey's religion. Nonetheless, the trial judge permitted the questioning to continue and commented: "I do not think this is religion; you cannot make this religion with me; it is too fakey." *Id.* On appeal, however, the Michigan Supreme Court found that the judge's remarks constituted reversible error, and the court ordered a new trial. *Id.*

462. See generally ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 363-64 (3d ed. 1982).

gion? Courts have attempted to counter prejudice by requiring that conviction for religious fraud be based on more than the jury's disbelief in unusual religious practices.<sup>463</sup>

### 1. Falsity and Knowledge of Falsity

Conviction for fraud requires proof that the victim relied on false claims known by the perpetrator to be false.<sup>464</sup> As a general rule, the falsity and knowledge of falsity requirements are not satisfied simply by a finding that the defendant did not believe his own assertions.<sup>465</sup> Proof must also be offered that those assertions were, in fact, false.<sup>466</sup> As discussed in this section, the truth or falsity of religious claims is outside the scope of judicial determination. Consequently, fraud conviction of religious healers requires proof that the victim relied on a religious healer's insincere claims that were both false and non-religious.

Two turn-of-the-century decisions made clear that the falsity of unorthodox healing claims and the healer's knowledge of that falsity must be proved rather than assumed.<sup>467</sup> In *American School of Magnetic Healing v. McAnnulty*,<sup>468</sup> the petitioner sued to obtain delivery of its mail, which the postmaster had withheld on the grounds that the school was using the mails to defraud customers.<sup>469</sup> The Supreme Court held that promises to heal by highly unorthodox but not illegitimate means were merely the expression of opinion, and would not, in and of themselves, be considered false representations.<sup>470</sup>

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463. See, e.g., *National Ass'n for Better Broadcasting v. F.C.C.*, 591 F.2d 812, 817-18 (D.C. Cir. 1978) (holding that the denial of plaintiff's challenge to a television station's license renewal was insufficient when it alleged certain faith healing programs were fraudulent without specific support for the allegation).

464. PERKINS & BOYCE, *supra* note 462, 363-64.

465. *Id.* at 368-69.

466. *Id.* at 366.

467. *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902); *Post v. United States*, 135 F. 1 (5th Cir. 1905).

468. 187 U.S. 94 (1902).

469. *Id.* at 98-99.

470. The Court declared:

As the effectiveness of almost any particular method of treatment of disease is, to a more or less extent, a fruitful source of difference of opinion, even though the great majority may be of one way of thinking, the efficacy of any special method is certainly not a matter for the decision of the Postmaster General within these statutes relative to fraud . . . . The opinions entertained cannot, like allegations of fact, be proved to be false, and therefore it cannot be proved as a matter of fact that those who maintain them obtain their money by false pretenses or promises . . . .



Three years later, Helen Post was also indicted for mail fraud for using the mails to carry on her mental healing business.<sup>471</sup> The trial court required Post to prove that she could heal at a distance and without the knowledge of the patient.<sup>472</sup> The court also prevented Post from using witness testimony that she had accomplished such healing in the past.<sup>473</sup> Unable to sustain her burden of proof, Post was convicted.<sup>474</sup>

The Fifth Circuit reversed Post's conviction, holding that the prosecution—not the defendant—had the burden of proving Post's representations false.<sup>475</sup> The government must carry the burden of proof, explained the court, even if Post's healing claims appeared to contradict the laws of nature.<sup>476</sup> A conviction could be sustained, however, if the prosecution could show that Post did not believe her own representations. The court explained:

The ultimate question of fact before the jury was as to the good faith of the defendant and that question involved her belief in her representations and promises. While her belief is not the subject of direct proof, it may be ascertained from circumstances and by proof of her actions and declarations.<sup>477</sup>

The Fifth Circuit did not detail what would constitute proof of a healer's bad faith. The court declared, however, that Post's failure to "sit" to administer absent treatment to her mail-order customers did not evidence insincerity.<sup>478</sup> The court noted that Post had mailed healing instructions to her patients

*Id.* at 105-07.

The Court left open the possibility, however, that the Postmaster could show at trial that the healing business, as conducted, involved fraud. What exactly would constitute such fraud, the Court did not say.

471. *Post v. United States*, 135 F. 1, 2 (5th Cir. 1905).

472. *Id.* at 10.

473. *Id.* at 11.

474. *Id.* at 2.

475. *Id.* at 10.

476. *Post*, 135 F. at 5. The circuit court further urged other courts not to jump to conclusions in such matters:

The experience of the judiciary, as shown by history, should teach tolerance and humility, when we recall that the bench once accounted for familiar physical and mental conditions by witchcraft, and that, too, at the expense of the lives of innocent men and women. In that day, it was said from the bench that to deny the existence of witchcraft was to deny the Christian religion.

*Id.* at 11-12.

477. *Id.* at 9.

478. *Id.*

and that she could have used her thoughts to heal "in one posture or place as in another . . . ."479

The *Post* court's assertion that a healer's bad faith—"ascertained from circumstances and by proof of her actions and declarations"<sup>480</sup>—was grounds for conviction provided the standard for subsequent prosecutions of religious healers. In three mail-fraud prosecutions reported over the course of the next fifteen years, juries found sufficient evidence of bad faith to return guilty verdicts against religious healers.<sup>481</sup> In each of these matters, the prosecution introduced proof that the defendant had made false representations about his services.

Not until the prosecution of Edna and Guy Ballard—more than forty years after Helen Post's indictment—did the appellate courts directly address whether a religious healer could be convicted of fraud for not believing his own healing claims, without additional proof that any of his declarations were otherwise false.<sup>482</sup> By its decision in *United States v. Ballard*,<sup>483</sup> the Supreme Court made clear that the First Amendment prohibits judicial determination of the truth or falsity of religious claims.<sup>484</sup> The majority opinion did not go on to decide, however, whether a conviction for religious fraud may be obtained in the absence of such a determination.<sup>485</sup> The *Ballard* opinions warrant further attention as they provide the only Supreme Court commentary on the scope of First Amendment protection for religious healers.

Guy and Edna Ballard founded the "I AM" movement in 1930, and within a decade their theatrical meetings and mailings attracted the attention of as many as three million Ameri-

479. *Id.* at 6.

480. *Id.* at 9.

481. See *Crane v. United States*, 259 F. 480 (9th Cir. 1919); *New v. United States*, 245 F. 710 (9th Cir. 1917); *United States v. White*, 150 F. 379 (D. Md. 1906).

482. In other words, the question that went unanswered can be stated as follows: If the healer asserts "x is true," can he be convicted of making a false representation if no evidence is introduced that x is not true? It can be argued that the healer's statement can be rewritten as "I believe x is true," and if the jury finds that the healer does not believe x is true, then the claim is a false representation, knowingly made, even though there is no evidence that x is, in fact, false. A statement of belief, even if not genuinely held, however, does not constitute a false representation, at least for purposes of some crimes involving fraud. See generally PERKINS & BOYCE, *supra* note 462, at 368-69.

483. 322 U.S. 78 (1944).

484. *Id.* at 86-87.

485. *Id.* at 88.

cans.<sup>486</sup> Mr. Ballard claimed to be in contact with ascended masters through whom he gained supernormal powers, including immortality.<sup>487</sup> Shortly after Guy Ballard died in 1939, his wife, Edna, and son, Donald, were prosecuted for mail fraud.<sup>488</sup>

The Ballards were charged with fraudulently representing that they were divine messengers with supernatural powers and that, *inter alia*, they "did falsely represent to persons intended to be defrauded that . . . [they] had the ability and power to cure . . . [and] had in fact cured . . . hundreds of persons afflicted with diseases and ailments . . ."<sup>489</sup> As part of their defense, the Ballards argued that their healing claims were similar to those made by other more established religious groups, such as those who "conduct the Shrine at Lourdes,"<sup>490</sup> advocate a "scientific system of divine healing," or teach that "healings through others than Christ have occurred."<sup>491</sup>

At trial, the district judge removed from jury consideration the question of whether the Ballards' supernatural beliefs, powers, and experiences were, in fact, false.<sup>492</sup> But the jury apparently found that the Ballards did not *believe* what they preached because it returned a guilty verdict.<sup>493</sup>

On appeal, the Ninth Circuit reversed the convictions, holding that it was an error to withdraw from jury consideration the truth or falsity of all of the defendants' claims.<sup>494</sup> "[I]t was necessary to prove that [the Ballards] schemed to make some, at least, of the representations set forth [in the indictment] and that some, at least, of the representations which they schemed to make were false."<sup>495</sup> In support of this holding, Judge William Denman explained in a concurring opinion that to deny the defendants the right to introduce evidence in

486. SYDNEY E. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 927, 1043 (3d prtg. 1973).

487. NOONAN, *supra* note 39, at 300.

488. *Id.*

489. *Ballard*, 322 U.S. at 80.

490. Brief for Respondent at 77, *United States v. Ballard*, 322 U.S. 78 (1944) (No. 472).

491. *Id.*

492. As in the earlier religious fraud trials, the judge instructed the jury, in part, as follows: "[T]he religious beliefs of these defendants cannot be an issue in this court. The issue is: Did these defendants honestly and in good faith believe those things? If they did, they should be acquitted." *Ballard*, 322 U.S. at 81.

493. *Id.* at 79.

494. *Ballard v. United States*, 138 F.2d 540, 545 (9th Cir. 1943), *rev'd*, 322 U.S. 78 (1944).

495. *Id.*

support of their supernatural claims was "an obvious denial of the freedom of religion of the First Amendment of the Constitution."<sup>496</sup>

The government appealed the Ninth Circuit's ruling and the Supreme Court overturned the appellate decision.<sup>497</sup> The case was remanded to the circuit court for consideration of the defendants' other arguments on appeal.<sup>498</sup> The Supreme Court opinion affirmed the trial judge's instruction that the jury was not to inquire into the truth or falsity of religious assertions.<sup>499</sup> In a passage with direct relevance to the evaluation of assertions regarding religious healing powers, Justice Douglas wrote:

Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom.<sup>500</sup>

In ruling that a jury may not inquire as to the veracity of the Ballards' religious assertions, the Supreme Court did not reach the question that the Ninth Circuit had previously answered in the negative: Can a religious healer be convicted of fraud without proof that he or she made a false representation other than a disingenuous assertion of belief? Nor did the high court's opinion discuss the distinction between religious and nonreligious representations.

In his dissent, however, Chief Justice Harlan Stone addressed both of these matters.<sup>501</sup> Justice Stone concluded

496. *Id.* at 546 (Denman, J., concurring).

497. *Ballard*, 322 U.S. at 88.

498. *Id.*

499. Basing his conclusion on the First Amendment, Justice William O. Douglas declared in the majority opinion:

Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law.

*Id.* at 86-87.

500. *Id.* at 87.

501. *Id.* at 88 (Stone, C.J., dissenting).

that an insincere statement of belief was adequate to satisfy the false representation requirement.<sup>502</sup> In addition, he concluded that the First Amendment does not prevent courts from determining the veracity of representations regarding religious experiences, including the experience of healing.<sup>503</sup>

Justice Robert H. Jackson, in his *Ballard* dissent, expressed a third opinion, diametrically opposed to Justice Stone's conclusions. Whereas the majority refused to say whether the Ballards could be convicted of fraud if they did not believe their religious healing claims, and Justice Stone was convinced that their convictions should be upheld on those very grounds alone, Justice Jackson would have dismissed the indictment and "have done with this business of judicially examining other people's faiths."<sup>504</sup>

Justice Jackson concluded that, both philosophically and practically, prosecution for fraud based on matters of religious belief and experience was ill-advised.<sup>505</sup> As a matter of philosophy, Justice Jackson relied on William James's assertion that personal religious experience constitutes the vital core of religious commitment.<sup>506</sup> To prosecute individuals for communicating these experiences with others, Justice Jackson reasoned, would cut religious liberty to the quick.<sup>507</sup>

As a matter of practice, Justice Jackson implied that even

502. Justice Stone wrote:

The state of one's mind is a fact as capable of fraudulent misrepresentation as is one's physical condition or the state of his bodily health . . . . [I]t is irrelevant whether the religious experiences alleged did or did not in fact occur or whether that issue could or could not, for constitutional reasons, have been rightly submitted to the jury. Certainly none of respondents' constitutional rights are violated if they are prosecuted for the fraudulent procurement of money by false representations as to their beliefs, religious or otherwise.

*Id.* at 90 (Stone, C.J., dissenting).

503. Justice Stone explained:

If it were shown that a defendant in this case had asserted as a part of the alleged fraudulent scheme, that he had physically shaken hands with St. Germain in San Francisco on a day named, or that, as the indictment here alleges, by the exertion of his spiritual power he "had in fact cured . . . hundreds of persons afflicted with diseases and ailments," I should not doubt that it would be open to the Government to submit to the jury proof that he had never been in San Francisco and that no such cures had ever been effected.

*Id.* at 89 (Stone, C.J., dissenting).

504. *Ballard*, 322 U.S. at 95 (Jackson, J., dissenting).

505. *Id.*

506. *Id.* at 93.

507. *Id.*

in the absence of any evidence that healers' assertions were false, jurors might well be disposed to conclude that practitioners had acted in bad faith simply because the religious beliefs involved were unusual.<sup>508</sup> "If we try religious sincerity severed from religious verity," Justice Jackson noted, "we isolate the dispute from the very considerations which in common experience provide its most reliable answer."<sup>509</sup> Justice Jackson also observed that the determination of sincerity was particularly difficult in religious affairs given the various levels of literal interpretation that are quite common.<sup>510</sup> Accordingly, Justice Jackson expressed concern that exposing religious healers to fraud charges would open the door to prosecutions of ministers propounding all varieties of religious beliefs.<sup>511</sup>

Taking Justice Jackson's admonition to heart, one court faced with adjudicating allegations of religious healing fraud has since stated explicitly: "We do not construe *Ballard* to hold that, although courts may not examine the truth or falsity of statements of a religious nature, these statements may be the bases of a fraud action if made in bad faith."<sup>512</sup>

On the other hand, following Justice Stone's advice, judges have not placed religious fraud beyond the ken of governmental regulation.<sup>513</sup> The judiciary's delicate task in matters of

508. *Id.*

509. *Ballard*, 322 U.S. at 93 (Jackson, J., dissenting).

510. Justice Jackson wrote:

Some who profess belief in the Bible read literally what others read as allegory or metaphor, as they read Aesop's fables . . . . It is hard in matters so mystical to say how literally one is bound to believe the doctrine he teaches and even more difficult to say how far it is reliance upon a teacher's literal belief which induces followers to give him money.

*Id.* at 94.

511. Justice Jackson explained:

Prosecutions of this character easily could degenerate into religious persecution. I do not doubt that religious leaders may be convicted of fraud for making false representations on matters other than faith or experience, as for example if one represents that funds are being used to construct a church when in fact they are being used for personal purposes. But that is not this case, which reaches into wholly dangerous ground. When does less than full belief in a professed credo become actionable fraud if one is soliciting gifts or legacies? Such inquiries may discomfort orthodox as well as unconventional religious teachers, for even the most regular of them are sometimes accused of taking their orthodoxy with a grain of salt.

*Id.* at 95.

512. *Van Schaick v. Church of Scientology, Inc.*, 535 F. Supp. 1125, 1142 n.16 (D. Mass. 1982).

513. *National Ass'n for Better Broadcasting v. F.C.C.*, 591 F.2d 812, 817-18 n.33 (D.C. Cir. 1978).

alleged fraud by religious healers was succinctly stated by a federal circuit court confronted by allegations that a television licensee had aired fraudulent faith healing programs:

We note the special difficulties attending the allegation of fraudulent religious programming. While . . . it is quite clear that religious fraud is not protected by any clause of the First Amendment, inquiries into religious fraud must scrupulously avoid becoming inquisitions into the sincerity of religious belief. It will thus ordinarily be necessary to rely on extrinsic evidence of fraud in such cases.<sup>514</sup>

Since *Ballard*, three appellate courts have been forced to decide when it is legitimate to question the veracity and sincerity of healing claims made by those professing to be religious practitioners.<sup>515</sup> These appellate decisions indicate that this type of inquiry is permissible only if the healing assertions are first held to be nonreligious. And as evidence of such, each court found it necessary to rely on the healer's own declarations that the practices described were not religious in nature.

One year after the decision in *Ballard*, Hugh Greer Carruthers appealed his conviction of mail fraud.<sup>516</sup> Carruthers, who professed to be a doctor of both medicine and divinity, claimed that he had learned his healing skills in a lamasery in Tibet.<sup>517</sup> Carruthers tended to the physical and mental needs of his patients through his Neological Foundation, which had a membership of over four thousand students.<sup>518</sup> Through the Foundation, the defendant dispensed health advice, gathered money for investment, and marketed a shampoo and a laxative.<sup>519</sup>

In appealing his conviction, Carruthers argued that the jury was improperly allowed to consider the veracity of his religious teachings regarding the health benefits to be gained from "[b]reathing, silence, and [the] position of persons during sleep."<sup>520</sup> In upholding the jury instruction, the circuit court

514. *Id.*

515. *United States v. Carruthers*, 152 F.2d 512 (7th Cir. 1945), *cert. denied*, 327 U.S. 787 (1946); *Van Schaick v. Church of Scientology of Cal., Inc.*, 535 F. Supp. 1125 (D. Mass. 1982); *Christofferson v. Church of Scientology of Portland*, 644 P.2d 577 (Or. Ct. App.), *cert. denied*, 459 U.S. 1206 (1982).

516. *United States v. Carruthers*, 152 F.2d 512 (7th Cir. 1945), *cert. denied*, 327 U.S. 787 (1946).

517. *Id.* at 514.

518. *Id.*

519. *Id.*

520. *Id.* at 517.

relied on the fact that in his writings the defendant himself had denied that the Neological Foundation was a religious organization, sect, or cult.<sup>521</sup> Thus, the appellate court reasoned, a jury could consider the sincerity and veracity of Carruther's health claims if it first found that his representations were nonreligious, as he himself had once contended.<sup>522</sup>

The court in *Van Schaick v. Church of Scientology*<sup>523</sup> also indicated that it would permit further inquiry into the veracity and sincerity of the defendants' healing claims.<sup>524</sup> The plaintiff alleged that the defendant churches had fraudulently represented that the practice of auditing was "scientifically guaranteed to have certain beneficial physical, mental, and social consequences."<sup>525</sup> The court found that the church's use of the phrase "scientifically guaranteed" in promoting auditing would be sufficient to raise the possibility that such assertions were not presented as matters of religious belief.<sup>526</sup> The court warned, however, that words such as "scientifically guaranteed" were "not always adequate . . . to divide precisely that which relates to the sacred and that which is purely secular."<sup>527</sup> Hence, it was implied that proof that the defendants' assertions were truly nonreligious would require an analysis of the context in which the words were used.

In *Christofferson v. Church of Scientology*,<sup>528</sup> another appellate court declared that healing claims concerning the concededly religious healing practice of auditing could nonetheless serve as the basis of a fraud action if the representations themselves were made for a nonreligious or "wholly secular" purpose.<sup>529</sup> The *Christofferson* court went on to note

521. *Carruthers*, 152 F.2d at 517-18.

522. *Id.*

523. 535 F. Supp. 1125 (D. Mass. 1982).

524. *Id.* at 1144.

525. *Id.* at 1131.

526. *Id.* at 1141. The court stated:

The First Amendment protects utterances which relate to religion but does not confer the same license for representations based on other sources of belief or verification. Statements citing science as their source may provide the basis for a fraud action even though the same contention would not support such an action if it relied on religious belief for its authority.

*Id.*

527. *Van Schaick*, 535 F. Supp. at 1141.

528. 644 P.2d 577 (Or. Ct. App.), *cert. denied*, 459 U.S. 1206 (1982).

529. *Id.* at 602. In determining that a jury question was presented as to whether the defendants' healing claims were wholly secular, the court noted:

[P]laintiff did present evidence that the courses and auditing she received were offered to her on an entirely secular basis for self improvement . . . .



that the defendants' own opinion as to what was or was not "religious" was not conclusive for constitutional purposes.<sup>530</sup> As in *Van Schaick*, the entire context in which the statements were made was the decisive factor in determining whether they were nonreligious.<sup>531</sup>

Court decisions regarding fraud reveal that a conviction requires the government to show that the healer made an insincere and nonreligious claim upon which the patient relied. Whether the healer's assertion actually falls outside of the protected religious realm must be determined by the entire context of the transaction. But statements by the healer concerning the secular or scientific nature of the services are particularly persuasive in this regard.

## 2. Intent to Defraud

Fraud convictions require not only that the perpetrator knowingly make false representations, as discussed above, but also that these deceitful statements be made with the intent to defraud.<sup>532</sup> Usually a jury is free to infer fraudulent intent from the fact that the defendant profited from false and insincere claims. But this is not invariably the case. For example, deception practiced to induce a debtor to pay a legitimate debt will not support a fraud claim.<sup>533</sup> Similarly, religious healers can argue that one who intends to deceive a patient regarding the efficacy of a certain healing instrumentality may not necessarily intend to defraud. This follows because the patient's belief in such an instrumentality may itself be therapeutic, and the healer may intend to induce belief for this beneficent purpose.

W.H. Neher raised this defense in his 1942 prosecution for mail fraud.<sup>534</sup> The defendant advertised that he could draw curative power from the "Divine reservoir" to individual

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Plaintiff testified that she was told that the term "religion" and "church" were used only for public relations purposes. She also presented testimony . . . that the staff was instructed to avoid the issue of religion when attempting to interest someone in Scientology and that, if pressed, they were to say that it was not a religion.

*Id.*

530. *Id.*

531. *Id.* at 603.

532. PERKINS & BOYCE, *supra* note 462, at 364.

533. *Id.* at 380.

534. *Neher v. Harwood*, 128 F.2d 846, 852-53 (9th Cir.), *cert. denied*, 317 U.S. 659 (1942).

patients whose names and addresses were placed on a card in his "Cosmic Generator."<sup>535</sup> The appellate court rejected Neher's argument that his intent to heal would constitute a defense to fraud:

It is intimated in the complaint that even if the machine into which the card is placed does not do the work, the fact that the poor soul seeking relief from physical ills may receive help simply because of the misrepresentation in which he has faith, a sort of argument that the more cleverly convincing the misrepresentation is put the more it will be believed and the belief if strong enough will effect the cure [is] a sophistry that would justify and legalize any fraud upon the sufferer of physical ills.<sup>536</sup>

Yet, in 1943, the very next year, a New York court found that a religious healer and doctor who knowingly employed ineffective means for a fee did not possess the requisite intent to defraud.<sup>537</sup> Dr. Edward S. Cowles, long affiliated with the Emmanuel Movement, conducted a "faith healing clinic" for neurasthenics.<sup>538</sup> The Board of Regents suspended the physician's license for fraud and deceit, but the court reversed that decision, finding that Dr. Cowles did not intend to defraud his patients even if he had knowingly supplied remedies of questionable efficacy.<sup>539</sup> Thus, Dr. Cowles's exoneration provides precedent for the assertion that religious healers who knowingly mislead their patients by prescribing placebos are not guilty of fraud if their intent is to heal, not to defraud, their patients.

### 3. Conclusion

Throughout the twentieth century, appellate courts have sought to protect religious liberty by setting high standards for the prosecution of religious fraud. Fraud inquiries involving religious healers must "scrupulously avoid" becoming inquiries into the sincerity of religious belief.<sup>540</sup> Under the First Amendment, courts may not evaluate the truth or falsity of religious statements, including statements regarding the effi-

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535. *Id.* at 853.

536. *Id.* at 852-53.

537. *Cowles v. Board of Regents*, 44 N.Y.S.2d 911, 916 (N.Y. App. Div. 1943).

538. *Id.* at 912-14.

539. *Id.* at 916.

540. *See supra* note 514 and accompanying text.

cacy of religious healing.<sup>541</sup> Accordingly, conclusions regarding the good faith or sincerity of religious healers must be based on extrinsic evidence of fraud rather than on the evaluation of religious declarations.<sup>542</sup> In other words, the prosecution must show that the victim relied on false and nonreligious claims by an insincere practitioner. The entire context of the transaction must be considered to determine whether or not representations are, in fact, religious.<sup>543</sup> For example, although a simple declaration taken out of context that a healing practice is "scientifically guaranteed" may provide a basis for fraud, it is not conclusive evidence that the statement is not protected by the First Amendment.<sup>544</sup>

## B. Regulation

### 1. Food and Drug Laws

Since the turn of the century, Congress has sought to prevent the sale and use of harmful drugs and related devices that are falsely represented as remedying illness.<sup>545</sup> State legislatures have followed suit. First Amendment protection for the religious use of dangerous drugs has generally been unavailable.<sup>546</sup> In denying free exercise claims in these cases, courts have relied on the Supreme Court's rationale first set forth in *Reynolds v. United States*:<sup>547</sup> while freedom of belief is absolutely protected, dangerous conduct may be regulated regardless of the impact on religious expression.<sup>548</sup> In addition, some courts have interpreted federal laws to prohibit even the use of drugs or devices "harmless in themselves" because—as one justice put it—"danger lies in the possibility that ignorant and

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541. See *supra* note 499 and accompanying text.

542. See *supra* note 514 and accompanying text.

543. *Van Schaick*, 535 F. Supp. at 1141; *Christofferson*, 644 P.2d at 603.

544. See *supra* note 527 and accompanying text.

545. See Norman Gevitz, *Three Perspectives on Unorthodox Medicine, in OTHER HEALERS: UNORTHODOX MEDICINE IN AMERICA* 9 (Norman Gevitz ed., 1988).

546. See generally Laughran, *supra* note 3, at 425 n.179 and accompanying text (asserting that religion is an insufficient basis for allowing non-medical use of legally restricted drugs). See also *Employment Div., Or. Dep't Human Resources v. Smith*, 494 U.S. 872 (1990) (state laws prohibiting religious use of peyote are constitutional). *But see* *People v. Woody*, 394 P.2d 813 (Cal. 1964) (use of peyote in religious ceremonies can not be prohibited under the Constitution).

547. 98 U.S. 145 (1879).

548. See *Employment Div., Or. Dep't Human Resources v. Smith*, 494 U.S. 872 (1990) (holding that religious adherents who use drugs deemed dangerous by legislative authorities are not protected by the First Amendment from prosecution under generally applicable criminal drug laws).

gullible persons are likely to rely on them instead of seeking professional advice for conditions they are represented to relieve or prevent."<sup>549</sup> Nonetheless, citing the First Amendment, at least one court has interpreted the federal food and drug laws to allow the use of harmless healing devices for religious purposes.<sup>550</sup>

Congress passed the first significant legislation regulating the sale of drugs in 1906. The Pure Food and Drugs Act of 1906 was largely a response to muckraking literature—such as Upton Sinclair's novel *The Jungle*—and to pressure from the American Medical Association.<sup>551</sup> "The law was passed," declared the trial judge in the first case brought under the Act, "not to protect experts especially, not to protect scientific men who know the meaning and value of drugs, but for the purpose of protecting ordinary citizens."<sup>552</sup> The *Nation* predicted that the new law would deal a "death-blow" to dangerous nostrums, elsewhere estimated as a sixty million dollar annual trade.<sup>553</sup>

But the task of restricting the flow of drugs proved a difficult one. In an initial setback to regulators, the Supreme Court declared that the 1906 law was only intended to prevent fraudulent statements about the composition and origin of a remedy's ingredients;<sup>554</sup> the law did not restrict claims regarding the remedy's curative powers, no matter how exaggerated. Even after Congress expanded the Act's coverage, critics charged that the law was still inadequate because it applied only to labeling and not to mass advertising schemes.<sup>555</sup>

After some years, federal regulation was again expanded to apply to all representations that could be considered labeling that accompanied a product.<sup>556</sup> In this context, litigation arose to determine whether religious healing devices could be

549. *Church of Scientology v. Department of Health, Educ. and Welfare*, 341 F. Supp. 563, 568 (D. Minn. 1971), *aff'd*, 459 F.2d 1044 (8th Cir. 1972) (quoting *Drown v. United States*, 198 F.2d 999, 1006 (9th Cir. 1952)).

550. See *United States v. Article or Device, etc.*, 333 F. Supp. 357, 365 (D.C. Cir. 1971).

551. Gevitz, *supra* note 545, at 9; RICHARD HARRISON SHRYOCK, *MEDICAL LICENSING IN AMERICA, 1650-1965*, 71 (1967).

552. JAMES HARVEY YOUNG, *THE MEDICAL MESSIAHS: A SOCIAL HISTORY OF HEALTH QUACKERY IN TWENTIETH-CENTURY AMERICA* 9-10 (1967).

553. *Id.* at 36; see also SHRYOCK, *supra* note 551, at 71.

554. *United States v. Johnson*, 221 U.S. 488 (1911).

555. See ARTHUR J. CRAMP, *NOSTRUMS AND QUACKERY* 806 (1921).

556. *Food, Drug & Cosmetic Act*, 21 U.S.C. § 321(m) (1988).

condemned because of alleged misrepresentations regarding curative powers.

In the early 1960s, the United States government sued the Founding Church of Scientology under the Food, Drug, and Cosmetic Act—the successor to the Pure Food and Drugs Act—to condemn the E-meter, a device used and promoted by the church to conduct its auditing process.<sup>557</sup> The government charged that the device was “misbranded in that its ‘labeling’ made false or misleading claims . . . and that the E-meter was not accompanied by adequate instructions for its use.”<sup>558</sup> The prosecution offered proof that L. Ron Hubbard—a science fiction author and the founder of Scientology—and his followers “repeatedly and explicitly represented that such auditing effectuated cures of many physical and mental illnesses.”<sup>559</sup>

At trial, the defendant church argued that it had “abandoned any contention that there is a scientific basis for claiming cures resulting from E-meter use.”<sup>560</sup> But the church affirmed its belief in the religious doctrine that “many illnesses may be cured through E-meter auditing by its trained ministers through an appeal to the spirit or soul of man.”<sup>561</sup> Accordingly, the church contended that the government was prohibited by the First Amendment from introducing into evidence religious assertions regarding the curative effects of auditing.<sup>562</sup>

At the trial’s conclusion, the jury returned a general verdict in favor of the government and condemning the E-meter.<sup>563</sup> On appeal, however, the appellate court reversed the trial court’s decision and ordered a new trial because the jury had been improperly allowed to consider whether thousands of pages of Scientology literature constituted false labeling.<sup>564</sup> Relying on the Supreme Court’s holding in *Ballard*—which prohibited consideration of the truth or falsity of religious

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557. *Founding Church of Scientology v. United States*, 409 F.2d 1146 (D.C. Cir.), *cert. denied*, 396 U.S. 963 (1969).

558. *Id.* at 1161.

559. *United States v. Article or Device, etc.*, 333 F. Supp. 357, 359 (D.C. Cir. 1971) (discussing *Founding Church of Scientology v. United States*, 409 F.2d 1146 (D.C. Cir. 1969)).

560. *Id.* at 360.

561. *Id.* at 359.

562. *Id.* at 360.

563. *Id.* at 359.

564. *Article*, 333 F. Supp. at 359 (citing *Founding Church of Scientology v. United States*, 409 F.2d 1146, 1165 (D.C. Cir. 1969)).

teachings—the court declared that Scientology’s doctrinal religious literature could not be considered labeling accompanying the E-meter for purposes of the statute.<sup>565</sup> Hence, the trial judge should have removed any such material from jury consideration.<sup>566</sup>

On remand, the lower court—referring to auditing as “pseudo-science” and a “scientific fraud”—determined that much of the literature promoting the E-meter was, in fact, secular, not religious.<sup>567</sup> The court then concluded that this secular material constituted misbranding in that it contained misrepresentations and inadequate instructions for the device’s intended use.<sup>568</sup> District Judge Gerhard Gesell declared, however, that the court was “without power” to order the wholesale destruction of the E-meter because of First Amendment protection afforded a religious practice “harmless in itself.”<sup>569</sup> The First Amendment also prevented the government from rewriting Scientology literature to eliminate false claims, a remedy commonly employed in commercial cases.<sup>570</sup> The district court reasoned that even scientific claims could not be excised from religious literature because “there is religious substance to everything when seen with the eyes of the believer,” and “what may appear to the layman as a factual scientific representation (clearly false) is not necessarily this at all when read by one who has embraced the doctrine of the Church.”<sup>571</sup>

In light of these First Amendment concerns, the “most satisfactory remedy,” said Judge Gesell, would be to curtail “purely commercial use of the E-meter while leaving the Church free to practice its belief under limited circum-

565. *Founding Church*, 409 F.2d at 1160-61.

566. Speaking for the majority, Justice J. Skelly Wright concluded:

We cannot assume as a matter of law that all theories describing curative techniques or powers are medical and therefore not religious. Established religions claim for their practices the power to treat or prevent disease, or include within their hagiologies accounts of miraculous cures. In the circumstances of this case we must conclude that the literature setting forth the theory of auditing, including the claims for curative efficacy contained therein, is religious doctrine of Scientology and hence as a matter of law is not “labeling” for the purposes of the Act.

*Id.* at 1161.

567. *Article*, 333 F. Supp. at 363.

568. *Id.* at 362.

569. *Id.* at 363.

570. *Id.* at 363-64.

571. *Id.* at 363.

stances."<sup>572</sup> Accordingly, Gesell set forth a list of restrictions to ensure that Scientologists and others would make no secular use of the E-meter.<sup>573</sup> In other words, said the court, "E-meter auditing will be permitted only in a religious setting subject to placing explicit warning disclaimers on the meter itself and on all labeling."<sup>574</sup>

Similar to the court opinions addressing the issue of religious healing fraud, the E-meter litigation emphasizes the First Amendment's role in protecting religious practices—including religious healing practices. So long as such practices are both "harmless in themselves" and conducted in a clearly religious context, First Amendment protection applies.<sup>575</sup> As discussed below, courts should employ similar criteria to determine the legitimate scope of the religious healer's means of treatment under medical licensing laws.

## 2. Medical Licensing Laws

Medical licensing laws—also known as medical practice acts (MPAs)—have been the most significant form of healer regulation since the turn of this century.<sup>576</sup> MPAs in America,

572. *Article*, 333 F. Supp. at 364.

573. Restrictions set on future auditing consisted of the following:

1. The E-meter could be used only for religious counseling;
2. Users, purchasers, and distributors (other than the Church or its ministers) must file an affidavit and an undertaking;
3. The E-meter must carry a warning that it has no scientific or medical benefit; that it has been condemned in United States District Court for misrepresentation and misbranding under the Food and Drug laws; and that its use is permitted only as part of a religious activity;
4. Users, purchasers and distributees must sign a written statement that they understand the warning; and
5. All literature and E-meter sales contracts must bear a notice that the article has been condemned by the court, and that it has no proven usefulness.

*Id.* at 364-65.

574. *Id.* at 365.

575. See Heins, *supra* note 3, at 153.

576. Comment, *Quackery in California*, *supra* note 2, at 271.

Regarding the licensing of health care professionals, the Supreme Court has explained:

Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and mysterious influences upon which health and life depend, and requires not only a knowledge of the properties of vegetable and mineral substances, but of the human body in all its complicated parts, and their relation to each other, as well as their influence upon the mind. The physician must be able to detect readily the presence of disease, and prescribe appropriate remedies for its removal. Every one may have occasion to consult him, but comparatively few

limiting those who can lawfully practice the healing arts and condemning violators to "severe punishment," date back to 1649.<sup>577</sup> These licensing regulations have not gone unopposed, however. Two hundred years ago, Benjamin Rush, Surgeon General of the Continental Army and signer of the Declaration of Independence, expressed a recurring objection to regulation: "To restrict the art of healing to one class of men and deny equal privileges to others will constitute the Bastille of medical practice. . . . The Constitution of this Republic should make special provision for Medical Freedom as well as Religious Freedom."<sup>578</sup>

The ongoing tension between those supporting and those opposing regulation is evident from the fact that state licensing laws adopted between 1790 and 1820 were repealed during the Jacksonian Era of the "Common Man," 1830-1850. Opposition to regulation arose, in part, from the fact that medical treatment at that time was often characterized by the questionable practices of drawing blood from, raising blisters on, and administering poisons to the sick.

Scientific progress and increasing standardization in medical education during the last quarter of the nineteenth century, however, led to renewed regulation. Medical reform accelerated around the turn of the century as medical societies and state licensing boards gained power over individual schools and practitioners.

When numerous state legislatures first considered bills requiring practitioners of the healing arts to pass medical examinations, Christian Scientists and others, echoing Benjamin Rush, argued that their constitutional rights to the free exercise of religion and to equal protection of the laws would be infringed.<sup>579</sup> But by the early decades of the twentieth century, state laws routinely prohibited a healer from practicing medicine without first obtaining a license, and state courts upheld these regulations as valid expressions of state police

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can judge of the qualifications of learning and skill which he possesses. Reliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he possesses the requisite qualifications. Due consideration, therefore, for the protection of society may well induce the State to exclude from practice those who have not such a license, or who are found upon examination not to be fully qualified.

Dent v. West Virginia, 129 U.S. 114, 122 (1889).

577. SHYROCK, *supra* note 551, at 1.

578. Hodgson, *supra* note 3, at 647.

579. CLIFFORD P. SMITH, CHRISTIAN SCIENCE: ITS LEGAL STATUS 36 (1914).



powers.<sup>580</sup> Courts generally construed these statutes very broadly so as to cover all forms of healing activities.<sup>581</sup> Judicial opinion varied, however, as to whether the practice of medicine, as defined by statute, included religious forms of healing.<sup>582</sup>

Legislators responded to the uncertainty in licensing coverage and to the influence from interested parties by enacting specific exclusions for religious healers.<sup>583</sup> Some medical practice acts prohibited interference with "the practice of the religious tenets of any church,"<sup>584</sup> and other jurisdictions protected healing accomplished by "prayer or spiritual means."<sup>585</sup>

Limited statutory protection for religious healers from the application of medical licensing laws remains the rule throughout the nation today. In the past, courts have generally analyzed three variables in determining whether the practice of religious healing falls within the safe harbor of legislative exemptions: the commercial nature of the healing operation; the relationship of the healer to the organized practice of religion; and the spiritual nature of the means of treatment.<sup>586</sup> In light of First Amendment concerns discussed above, religious

580. See *Smith v. People*, 117 P. 612 (Colo. 1911) (citing cases in which courts around the nation upheld medical practice acts as a valid expression of state police power).

581. See generally Mark A. Hall, Comment, *Health Care Cost Containment*, 137 U. PENN. L. REV. 431, 453 n.80 (1988).

582. See, e.g., *State v. Buswell*, 58 N.W. 728 (Neb. 1894) (Christian Science practitioners convicted of violating medical practice acts); *State v. Marble*, 73 N.E. 1063 (Ohio 1905) (Christian Science practitioners convicted of violating medical practice acts). But see *Bennett v. Ware*, 61 S.E. 546 (Ga. Ct. App. 1908) (hands-on-healing does not fall within the medical practice act).

583. See, e.g., 1907 CAL. STAT. chs. 212, 252. California's law, as revised in 1907, is typical. It provided that anyone practicing medicine "or any other system or mode of treating the sick or afflicted" was required to have a certificate or face prosecution for a misdemeanor. *Id.* But the act went on to declare that licensing was not "to interfere in any way with the practice of religion; [and it] provided that nothing herein shall be held to apply or to regulate any kind of treatment by prayer." *Id.*

584. See, e.g., NEW YORK PUBLIC HEALTH LAW § 173 (McKinney 1910), cited in *People v. Cole*, 113 N.E. 790 (N.Y. 1916) (reversing conviction of Christian Science practitioner under medical practice act); FLOR. STAT. ch. 458.13 (1941), cited in *Curley v. State*, 16 So. 2d 440, 441 (Fla. 1943); see also IND. CODE § 25-22-5-1-2(f) (1987), cited in *Stetina v. State*, 513 N.E.2d 1234, 1240-41 (Ind. Ct. App. 1987) (upholding conviction of healer).

585. See, e.g., *People v. Estep*, 97 N.E.2d 823 (Ill. 1951), cert. denied, 345 U.S. 970 (1953), citing ILL. MEDICAL PRACTICE ACT § 37 (1949).

586. See *infra* part V.B.2.a.-c. (discussing the religious healer as a business person, the relationship of the healer and organized religion, and the healer's means of treatment).

healers ought to qualify for MPA exemptions when their spiritual means are harmless in themselves and their services are rendered in a religious context. This proposed standard will be discussed further following a description of the three traditional factors courts have employed.

*a. The Religious Healer as Business Person*

Some courts early in this century concluded that religion and business were mutually exclusive. Hence, unlicensed religious healing could not be practiced as a business despite statutory exemptions that arguably appeared to so allow.<sup>587</sup> In 1908, for example, the Colorado Legislature enacted a law regulating the practice of medicine, which provided that "nothing in the act shall be construed to prohibit . . . the practice of the religious tenets or general beliefs of any church whatsoever, not prescribing or administering drugs."<sup>588</sup> Edward C. Smith, a preacher and healer of the Divine Scientific Healing Mission was tried and convicted, however, for violating the medical practice act.<sup>589</sup> At trial, the judge excluded uncontroverted evidence that a tenet of the incorporated church was the belief "in healing the suffering [of] humanity by laying on of hands."<sup>590</sup> The prosecution did not offer any evidence that the defendant prescribed or administered drugs.<sup>591</sup> On appeal, the Colorado Supreme Court, despite the religious exemption, pointed out the differences between "commercial healing as a money-making occupation" and "religion or religious devotions."<sup>592</sup>

A more liberal interpretation of religious statutory exemptions, however, was soon to become the majority rule protecting sincere religious practitioners. In 1913, the New York Court of Appeals issued its much-cited opinion in *People v. Cole*,<sup>593</sup> affirming the right of Christian Scientists to practice religious healing as a profession.<sup>594</sup>

Willis V. Cole, a Christian Science practitioner, had main-

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587. See, e.g., *Smith v. People*, 117 P. 612 (Colo. 1911) (religion and healing business held mutually incompatible).

588. *Id.* at 614 (citing COLO. REV. STAT. ch. 127, § 6069 (1908)).

589. *Id.* at 615.

590. *Id.*

591. *Id.* at 614.

592. *Smith*, 117 P. at 614-15.

593. 113 N.E. 790 (N.Y. 1916).

594. *Id.* at 794-95.

tained his office in New York City for seven years when he was charged with violating New York's MPA.<sup>595</sup> On appeal, Cole successfully contended that a professional healer could fall within the MPA's exception for one practicing the tenets of a church.<sup>596</sup> The court stated:

When a person claims to be practicing the religious tenets of any church, particularly where compensation is taken therefor and the practice is apart from a church edifice or the sanctity of the home of the applicant, the question whether such person is within the exception should be left to a jury as a question of fact.<sup>597</sup>

Accordingly, evidence of the profit motive has continued to cast doubt on healers' claims that their activities are sincerely religious and thereby qualify for licensing exemptions. Even healers who avoid a business-like appearance by accepting donations rather than charging fees, or by conducting their activities in the "sanctity of the home," have not been free from suspicion.

Such suspicion was clearly evident in the midcentury trials of William and Dora Estep and Esther O. Handzik.<sup>598</sup> These defendants were arrested in the largest religious-healer raid reported in twentieth-century appellate opinions. A grand jury named fifteen members of the Central Baptist Church of Chicago in an indictment charging the defendants with conspiracy to violate the medical practice act, perpetrate a confidence game, and obtain money under false pretenses.<sup>599</sup> The case received public attention and trial proceedings were regularly reported in the *Chicago Tribune*.<sup>600</sup>

All of the defendants claimed to believe in and practice divine healing as Christian Psycho-Physicians.<sup>601</sup> But the fact-finders looked behind defendants' contentions that no fees were charged for their healing services and found that

595. *Id.* at 792.

596. *Id.* at 794-95.

597. *Id.* The following year, the court reiterated its position that a religious healer may conduct a business. Justice Benjamin Cardozo, affirming the conviction of a healer for illegal medical practices, wrote that it was error, albeit harmless, for a trial court to charge the jury that "the defendant had not the right to practice his religion for pay." *People v. Vogelgesang*, 116 N.E. 977, 978 (N.Y. 1917).

598. *People v. Estep*, 104 N.E.2d 562, 565 (Ill. App. Ct. 1952); *People v. Handzik*, 102 N.E.2d 340 (Ill. 1951), *cert. denied*, 343 U.S. 927 (1952).

599. *Estep*, 104 N.E.2d at 563.

600. *Id.* at 566.

601. *Id.* at 564.

amounts for voluntary contributions were actually fixed.<sup>602</sup> In the Esteps' prosecution, one appellate court wrote as follows:

Fixed charges were made for everything, including attendance at classes, the purchase of the machines and for the treatments. Ostensibly, all these were voluntary contributions. However, the contribution for a specific service or machine was always the same. Defendant, William Estep, referred to the "twenty dollar treatment" when talking to one of his patients.<sup>603</sup>

In *People v. Handzik*,<sup>604</sup> Ester O. Handzik was also convicted despite her testimony that she earned her living as a tailor and merely accepted donations for her services. Handzik's "sanctity of the home" defense failed as well. She was found guilty of unlawfully maintaining "an office for examination or treatment of persons afflicted . . . with any ailment," despite the fact that she practiced her healing trade exclusively in the privacy of her own home.<sup>605</sup>

At the present time, religious healing may be practiced as a legitimate business. Courts continue to entertain doubts, however, about religious healers who charge for their services or who operate outside of church or home. Healers functioning apart from the organized practice of religion are also subject to increased suspicion.

#### *b. The Relationship of the Healer to the Organized Practice of Religion*

As noted above, state statutes frequently provide that licensing is not intended to interfere with either the practice of religion<sup>606</sup> or with the religious tenets of a church.<sup>607</sup> Courts have generally construed these legislative exemptions to require that both healer and healing practices be closely associated with a recognizable religious organization.<sup>608</sup> Still other

602. *Id.* at 563.

603. *Id.* at 565.

604. 102 N.E.2d 340 (Ill. 1951), *cert. denied*, 343 U.S. 927 (1952).

605. *Id.* at 343. In finding that the home was used as a business office, the court relied on the facts that Ms. Handzik passed out business cards using the title "Dr." and listing her home address and "office hours." *Id.*

606. *See, e.g.*, *State v. Verbon*, 167 Wash. 140, 8 P.2d 1083 (1932). *See also supra* note 583.

607. *See supra* note 584.

608. The New York Court of Appeals explained the religious tenet exemption in this way:

The tenets of a church are the beliefs, doctrines, and creeds of the church.

courts have indicated that the patient, as well as the healer and the healing activity, must be church-affiliated to qualify for the exemption.<sup>609</sup>

The requirement that healers be part of an organized religion is constitutionally suspect. Legislative<sup>610</sup> and judicial<sup>611</sup> preferences for members of organized or recognized religious groups acting in accordance with church tenets is contrary to contemporary First Amendment thinking. Admittedly, the United States Supreme Court has not specifically held that actions motivated by individual religious belief fall within a statutory exemption that applies to "the practice of religion" or to those practices that are in accord with "the religious tenets of any church." To exclude sincere religious practitioners from such exemptions, however, runs afoul of the First Amendment's prohibition against religious discrimination.

Three Supreme Court decisions forbid such religious discrimination. In *United States v. Seeger*,<sup>612</sup> the Court broadly construed the term religion to avoid governmental preference for one form of religious expression over another.<sup>613</sup> In *Seeger*, the Court held that conscientious objectors to military service need not be members of organized religious groups.<sup>614</sup> And more recently, in *Frazee v. Illinois Department of Employment Security*,<sup>615</sup> the Court declared that religious action unsupported by a "tenet, belief, or teaching of an established religious body" nonetheless enjoys First Amendment protection.<sup>616</sup> In *Frazee*, the Supreme Court awarded unemployment benefits to a claimant whose refusal to work on Sundays was not based on a tenet of a particular church.<sup>617</sup> Furthermore, in

The exception relates to the tenets of the church as an organized body as distinguished from an individual. It does not relate to or except persons practicing in accordance with individual belief.

*People v. Cole*, 113 N.E. 790, 794 (N.Y. 1916).

609. See, e.g., *Northrup v. Superior Court*, 237 Cal. Rptr. 255, 258-59 (Cal. Ct. App. 1987); *Stetina v. State*, 513 N.E.2d 1234, 1241 (Ind. Ct. App. 1987).

610. See, e.g., *Cole*, 113 N.E. 790.

611. See, e.g., *Northrup*, 237 Cal. Rptr. 255.

612. 380 U.S. 163 (1965).

613. *Id.* at 183 (reflecting the "broad spectrum of religious beliefs found among us").

614. *Id.* at 172.

615. 489 U.S. 829 (1989) (granting unemployment benefits to a worker who lost his job because he refused to work on Sunday).

616. *Id.* at 831-32.

617. The Court declared:

Undoubtedly, membership in an organized religious denomination, especially one with a specific tenet [authorizing the religious action], would simplify the

*Employment Division, Oregon Department of Human Resources v. Smith*,<sup>618</sup> the Court emphasized that the judiciary must avoid examining the tenets of religious bodies because these inquiries impermissibly entangle the government in religious affairs.<sup>619</sup> Accordingly, it may be argued that courts which exempt only healers acting in accordance with church tenets are violating the Establishment Clause of the First Amendment. Such a policy involves the government in unnecessary determinations of religious doctrine and discriminates against less organized forms of religious expression.

In addressing questions of religious exemptions in the context of healthcare, lower courts have similarly concluded that statutory exemptions in immunization laws limited to members of recognized denominations unfairly discriminate against individual religious practitioners.<sup>620</sup> To remedy this injustice, several courts have broadly construed the statutory exemptions to allow unaffiliated individuals to exercise their religious preferences.<sup>621</sup> A similar course is called for in the interpretation of medical licensing exemptions.

Although some courts reviewing vaccination statutes saw fit to eliminate the religious exemptions in their entirety, this result is unwarranted in dealing with medical licensing laws. In the context of immunizations, it may be argued that broadening the exemptions subjects the public to the increased risk of epidemic. Expanding licensing exemptions, however, does not expose the public-at-large to danger. Only the individual patient is placed at risk. Moreover, this risk is minimal because the healer is limited to the use of harmless means employed in a religious context, as discussed below. Thus, the course of action recommended here offers the advantage of

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problem of identifying sincerely held religious beliefs, but we reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization.

*Id.* at 834.

618. 494 U.S. 872 (1990).

619. *Id.* at 887.

620. See, e.g., *Davis v. State of Maryland*, 451 A.2d 107 (Md. 1982); *Dalli v. Board of Educ.*, 267 N.E.2d 219 (Mass. 1971); *Board of Educ. of Mountain Lakes v. Maas*, 152 A.2d 394 (N.J. Super. Ct. App. Div. 1959), *aff'd*, 158 A.2d 330 (N.J. 1960).

621. See, e.g., *Maier v. Besser*, 341 N.Y.S.2d 411 (N.Y. Sup. Ct. 1972) (upholding preliminary injunction prohibiting exclusion from school of non-immunized children who practiced faith similar to Christian Science); *Kolbeck v. Kramer*, 202 A.2d 889 (N.J. Super. Ct. Law Div. 1964) (compelling state university to accept a non-immunized student who belonged to no recognized religious group when Christian Scientists were exempted from vaccination).

promoting religious liberty on an equal basis to all without unnecessarily jeopardizing public health.

Although courts have generally viewed church affiliation with favor, some healers have nonetheless faced prosecution for practicing their trade on church members in accordance with the church's tenets. For example, in 1976, Carey Reams of the Interfaith Christian Church in Georgia was enjoined from practicing medicine without a license.<sup>622</sup> Pastor Reams employed urine and saliva tests to diagnose illness, and he prescribed dietary measures as a cure.<sup>623</sup> At trial, the pastor argued that he had been practicing his religious beliefs, not medicine, and that those he treated were well aware of this fact.<sup>624</sup> To support his contentions, Reams produced church membership applications completed by his patients prior to treatment.<sup>625</sup> Nonetheless, the Georgia Supreme Court found that Pastor Reams had not been practicing *religious tenets* because he regularly diagnosed and prescribed remedies as part of his cure.<sup>626</sup> Limitations on a religious healer's means of treatment is the next topic of concern.

*c. The Religious Healer's Means of Treatment*

Medical practice acts around the nation uniformly prohibit diagnosis, treatment, or prescription of remedies by unlicensed practitioners. Many of these acts provide, as noted above, that licensing is not intended to interfere with the practice or tenets of religion. Other acts specifically exempt treatment by prayer or spiritual means. No matter which approach to religious exemptions legislatures have taken—and some have combined them—most courts have narrowly construed the exemptions, affording protection only to healers who treat by prayer or spiritual means alone.<sup>627</sup> Accordingly, appellate courts have consistently upheld convictions of religious healers who diagnose, prescribe remedies, or employ medical, material, or psychological means of treatment.<sup>628</sup> But, as indicated

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622. *Reams v. Composite State Bd. of Med. Examiners*, 227 S.E.2d 346 (Ga. 1976).

623. *Id.*

624. *Id.*

625. *Id.*

626. *Id.* at 347.

627. For examples of these approaches, see *People v. Vogelgesang*, 116 N.E. 977 (N.Y. 1917) (healer employing physical agencies does not fall within MPA exception); *People v. Cole*, 113 N.E. 790 (N.Y. 1916) (Christian Science practitioner may fall within MPA exemption).

628. See generally RUBENSTEIN, *supra* note 2, at 40-41.

below, some courts have given more leeway to healers with close connections to established religions.<sup>629</sup>

The following subsections describe court treatment of religious healers employing (1) drugs and devices, (2) non-physical agencies, (3) midwifery, and (4) laying-on-hands. A suggested approach to determine the legitimacy of the religious healer's means immediately follows.

#### i. Drugs and Devices

Justice Benjamin Cardozo, writing for the New York Court of Appeals in 1917, authored an influential opinion strictly limiting religious treatment to spiritual means alone. In *People v. Vogelgesang*,<sup>630</sup> a healer recognized by the Spiritualist Church was convicted at trial of practicing medicine without a license.<sup>631</sup> Vogelgesang treated his patients with medicines he himself had patented as well as with prayer.<sup>632</sup> He used a massage liniment of angle worms, turpentine, sweet oil, and benzine, and he prescribed a compound of wine, beef tea, and citrate of iron for internal use.<sup>633</sup> Cardozo wrote in upholding Vogelgesang's conviction:

He combined faith with patent medicine. If he invoked the power of spirit, he did not forget to prescribe his drugs. "It is beyond all question or dispute," said Voltaire, "that magic words and ceremonies are quite capable of most effectually destroying a whole flock of sheep, if the words be accompanied by a sufficient quantity of arsenic." . . . While the healer inculcates the faith of the church as a method of healing, he is immune. When he goes beyond that, puts his spiritual agencies aside and takes up the agencies of the flesh, his immunity ceases.<sup>634</sup>

A more recent example in which the courts affirmed the distinction between permissible spiritual and illegitimate material agencies is the prosecution of William and Dora Estep, Christian Psycho-Physicians, discussed above.<sup>635</sup> The Esteps

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629. See *People v. Klinger*, 11 N.E.2d 40 (Ill. App. Ct. 1937). Discussed *infra* in text accompanying notes 675-77.

630. 116 N.E. 977 (N.Y. 1917).

631. *Id.*

632. *Id.* at 977-78.

633. *Id.*

634. *Id.* (citation omitted)

635. *People v. Estep*, 104 N.E.2d 562 (Ill. App. Ct. 1952). See *supra* note 598 and accompanying text.



were convicted of conspiring to violate the Illinois Medical Practice Act.<sup>636</sup> The Act, by its own terms, did not apply to "persons treating human ailments by prayer or spiritual means as an exercise or enjoyment of religious freedom."<sup>637</sup>

The defendants did not deny employing physical instruments as part of their treatment: an *estemeter* ascertained vitamin deficiencies; a *roto-ray* created atomic water using colored light rays; and a *vita-ray* delivered electricity to parts of patients' bodies.<sup>638</sup> But the defendants argued that these instrumentalities were subordinate to the spiritual means employed.<sup>639</sup>

During each treatment, patients were requested to pray in order to join their will with the will of God.<sup>640</sup> Further, the Esteps explained to their patients that the various instruments were not used for diagnosis of disease nor for cure.<sup>641</sup> They taught that the equipment merely ascertained the condition of the patient's life energy and that "God alone cures disease and no man or remedy ever cured any ailment whatsoever."<sup>642</sup> Prior to treatment each patient signed a document acknowledging his or her understanding of the church's tenets regarding healing.<sup>643</sup> Despite these efforts to bring the sufferer's mind into submission with the infinite mind and to obtain the patients' informed consent, the court rejected the defendants' claim for protection within the prayer and spiritual means exclusion and affirmed their criminal convictions.<sup>644</sup>

## ii. Non-Physical Agencies

Whereas courts have had little difficulty in distinguishing purely spiritual treatment from practices involving drugs or devices, more disagreement has arisen in drawing the line between spiritual and mental means. In *Crane v. Johnson*,<sup>645</sup> the Supreme Court held that California's prayer exemption did not unfairly discriminate against a drugless practitioner who did not use prayer, but rather who employed faith, hope,

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636. *Estep*, 104 N.E.2d at 563.

637. *Id.* at 564.

638. *Id.*

639. *Id.*

640. *Id.*

641. *Estep*, 104 N.E.2d at 564.

642. *Id.*

643. *Id.*

644. *Id.* at 565, 567.

645. 242 U.S. 339 (1917).

mental suggestion, and mental adaptation in his healing.<sup>646</sup> The Court declared that the drugless practitioner's trade was "one in which skill is to be exercised, and the skill can be enhanced by practice."<sup>647</sup> Hence, the Court reasoned, the petitioner had not been denied the equal protection of the law because the legislature had a rational basis in seeking to regulate mental skills while at the same time exempting prayer treatment.<sup>648</sup> Many early appellate courts followed similar reasoning in affirming convictions of healers who relied on mental therapeutics.<sup>649</sup>

Some courts, however, have interpreted the prayer or spiritual means exemption more broadly to include the activities of those employing mental therapeutics. This more liberal construction has been especially apparent when religious healers have shown close affiliations with established religions.

For example, the New York Court of Appeals laid the groundwork for broadening the concept of spiritual means when it reversed the conviction of Willis Cole, the Christian Science practitioner mentioned above.<sup>650</sup> The court emphasized Cole's affiliation with a recognized and well-established religious organization.<sup>651</sup> Uncontradicted evidence was adduced at trial that Cole had advised a patient to remove a "porous plaster" from her back, to remove her glasses, and to remove her child's glasses.<sup>652</sup> Cole further told this patient that she could cure herself, and that if she "would study and purify her life and her thoughts and cleanse from her consciousness fear and inharmony and false thoughts . . . she could apply the principle and law of Christian Science as well as anyone else."<sup>653</sup> The court found that Cole did not diagnose his patient's illness, but he did "treat" her.<sup>654</sup> Nonetheless, such treatment fell within the religious-tenet exemption in New

646. *Id.* at 343-44.

647. *Id.* at 343.

648. *Id.* at 343-44.

649. See RUBENSTEIN, *supra* note 2, at 40 n.30. See also Board of Med. Quality Assurance v. Andrews, 260 Cal. Rptr. 133 (Cal. Ct. App. 1989) (finding healer employing prayer, laying-on-hands, rest, natural diet, and hygiene to be in violation of MPA).

650. *People v. Cole*, 113 N.E. 790 (N.Y. 1916).

651. *Id.* at 795.

652. *Id.* at 792.

653. *Id.* at 793.

654. *Id.* at 794.

York law.<sup>655</sup>

The New Jersey Supreme Court's ruling in *State v. Maxwell*<sup>656</sup> provides a clearer instance in which a mental healer was exempted from licensing. Relying on the MPA exemption for those who ministered to the sick or suffering by prayer or spiritual means without the use of drugs or material remedy, the court reversed the conviction of a healer who preached mind over physical ills.<sup>657</sup>

Courts have generally sought to distinguish between healers employing mental means and those using spiritual methods to treat their patients. Although the difference between the two approaches may not always be readily apparent, only spiritual treatment is exempted from regulation under state medical practice acts. In *Crane*, the Supreme Court sought to distinguish mental from spiritual healing by declaring that the former requires a skilled and experienced practitioner, while the latter—in its total reliance upon divine intervention—does not. This distinction reveals a theistic bias, however, and should be discarded.<sup>658</sup> Courts should instead rely on a contextual analysis to determine whether the patient could reasonably have understood that the healing services provided were of a spiritual nature. This approach is developed further below.

### iii. Midwifery

Contrary to the majority rule limiting religious healers to the use of purely spiritual means, one California court interpreted the religious practice exemption in the state's licensing law to extend protection to religious midwives.<sup>659</sup> Midwifery is commonly regulated by medical licensing acts, and at least one court has specifically held that a midwife who practices prayer during childbirth will not be excused from complying with that law and may be criminally convicted for its violation.<sup>660</sup>

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655. *Cole*, 113 N.E. at 794.

656. 181 A. 694 (N.J. 1935).

657. *Id.* at 694.

658. Although simple prayers by the untutored and inexperienced may be recognized as effective in some religious traditions, it is clear that other forms of spiritual healing require more extensive qualifications. The New Testament itself suggests that the prayers of elders be offered to heal the sick. For a list of such instances, see *supra* note 10.

659. *Northrup v. Superior Court*, 237 Cal. Rptr. 255 (Cal. Ct. App. 1987).

660. See *People v. Cosper*, 245 P. 466 (Cal. Dist. Ct. App. 1926).

In *Northrup v. Superior Court*,<sup>661</sup> however, the court ordered dismissal of informations charging unlicensed religious childbirth helpers with violating the medical practice act.<sup>662</sup> The midwives were members of the Church of the First Born—a church dating back to the seventeenth century in this country—whose tenets forbid use of traditional medical care.<sup>663</sup> The court repeatedly emphasized that this church was well-established and did not merely represent an effort to escape licensing laws.<sup>664</sup>

In dismissing the charges, the court reasoned that the midwives were exempt from licensing because the terms of the California MPA—not unlike the language in other MPAs around the nation—were absolute, forbidding interference “in any way” with the practice of religion.<sup>665</sup> The appellate court limited the application of its holding by emphasizing three related points already touched on in the previous two subsections. Specifically, the court pointed out that: (1) “[t]here has been no suggestion the Church of the First Born is pretextual or a subterfuge designed to circumvent the licensing statutes”;<sup>666</sup> (2) opposition to medical care was a central tenet of the religion;<sup>667</sup> and (3) the childbirth helpers treated only members of the faith.<sup>668</sup> The *Northrup* court also noted that despite the exemption from licensing requirements, the midwives were still subject to other generally applicable criminal laws.<sup>669</sup>

#### iv. Laying-On-Hands

Judicial opinion has been divided as to whether healers who lay-on-hands qualify for religious exemption under MPAs. Some courts have interpreted laying-on-hands as purely spiritual treatment. Early in the century, the Georgia Court of Appeals declared that hands-on-healing and the closely related

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661. 237 Cal. Rptr. 255 (Cal. Ct. App. 1987).

662. *Id.* at 260.

663. *Id.* at 256.

664. *Id.* at 258-60. Two years later in *Board of Med. Quality Assurance v. Andrews*, 260 Cal. Rptr. 113 (Cal. Ct. App. 1989), another California court picked up on this point and agreed that MPA exemptions only apply to bona fide religious practices and not to religious practices created as a mere subterfuge to regulation.

665. *Northrup*, 237 Cal. Rptr. at 258.

666. *Id.*

667. *Id.*

668. *Id.*

669. *Id.* at 260. See *infra* text accompanying notes 718-20.

practice of magnetism were simply not within the purview of the medical practice act.<sup>670</sup> Two years later, a California appellate court also implied that those who lay-on-hands were excluded from the licensing requirement.<sup>671</sup> Although declaring that the exemption for prayer included "only a reverent petition to some divinity or object of worship," the court provided the following New Testament example as illustration: "For instance, where Peter's wife's mother lay sick of a fever we are told that the Savior 'touched her hand and the fever left her, and she arose and ministered unto them.'"<sup>672</sup>

Judicial approval of hands-on-healing was apparent twenty-three years later in the matter of *State v. Miller*.<sup>673</sup> In this case, the Iowa Supreme Court found that a faith healer laying-on-hands, "or at most administering a slight massage," but without providing a diagnosis or promise of cure, was exempt from regulation.<sup>674</sup> Similarly, in *People v. Klinger*,<sup>675</sup> an Illinois appellate court overturned the conviction of a Spiritualist healer despite the fact that the lower court had concluded that the "defendant gave the witness a treatment, manipulating the shoulder muscles with her hands and also worked on the back of her neck."<sup>676</sup> After recounting at some length defendant Valerie Klinger's close affiliation with, and certification by, a well-established Spiritualist church, the court simply declared that:

The evidence in this case clearly shows that defendant's method of curing was by prayer; that defendant was a duly authorized member of the First Spiritualist Church of Cicero; and that her license was issued by the Spiritualist Association of Illinois, Inc., which was incorporated under the laws of the state of Illinois, and defendant was one of their regular healers.<sup>677</sup>

Most appellate courts, however, have been unwilling to construe spiritual means exemptions so liberally, and they

670. See *Bennett v. Ware*, 61 S.E. 546 (Ga. Ct. App. 1908).

671. See *Ex parte Bohannon*, 111 P. 1039 (Cal. Ct. App. 1910).

672. *Id.*

673. 249 N.W. 141 (Iowa 1933).

674. *Id.* at 141.

675. 11 N.E.2d 40 (Ill. App. Ct. 1937).

676. *Id.* at 41-42.

677. *Id.* For a gallant judicial defense of the legality of laying-on-hands, see *Curley v. State*, 16 So. 2d 440 (Fla. 1944) (Buford, C.J., and Terrell and Brown, J.J., dissenting).

have offered a variety of reasons to support their positions. One court, for example, relied on a close analysis of the defendant's healing technique. In *State v. Pratt*,<sup>678</sup> the Supreme Court of Washington upheld a healer's conviction based on a distinction between "prayer, accompanied by the laying on of hands" and the defendant's practice of moving his hands from one place on the body to another "after the warmth of [the] hands had become noticeable."<sup>679</sup>

Another court openly expressed its disbelief in hands-on-healing generally. In *State v. Robinson*,<sup>680</sup> the Supreme Court of Iowa overruled without comment its earlier holding in *Miller* discussed above.<sup>681</sup> At trial, the defendant testified that his treatment consisted of laying-on-hands and that he gained his power to heal "from the silent, invisible God."<sup>682</sup> The trial court refused to enjoin the defendant from his healing activities, but the supreme court reversed.<sup>683</sup> The court deemed testimony by the defendant's witnesses "evidence of gullibility" and concluded that "the very confidence which [the healer] thus engendered in his patrons is a part of the fraud and imposition against which the [licensing] statute seeks to protect gullible innocence."<sup>684</sup>

#### v. Proposed Approach

In construing medical practice acts that limit religious healers to prayer and spiritual means alone, courts have revealed a theistic bias. Outside the practice of Christian Science, treatments other than passive reliance on divine intervention have rarely been considered spiritual. The Supreme Court repudiated a theistic understanding of religion, however, in the 1960s. In *Torcaso v. Watkins*,<sup>685</sup> Justice Hugo L. Black wrote that "[n]either a State nor the Federal Government can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."<sup>686</sup>

In line with this broader view of religion, a few courts

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678. 92 Wash. 200, 158 P. 981 (1916).

679. *Id.* at 201-02, 158 P. at 981.

680. 19 N.W.2d 214 (Iowa 1945).

681. *See supra* note 673 and accompanying text.

682. *Robinson*, 19 N.W.2d at 216.

683. *Id.*

684. *Id.*

685. 367 U.S. 488 (1961).

686. *Id.* at 495.

have since recognized that there may be other legitimate forms of religious treatment besides prayer. The decisions in *Founding Church*<sup>687</sup> and *Article*<sup>688</sup> support the conclusion that, so long as religious healers employ harmless means in a religious context, the First Amendment requires courts to treat such activities as the equivalent of prayer. A contrary conclusion would impermissibly discriminate against one form of religious expression (e.g., auditing) in favor of another (e.g., Christian prayer).<sup>689</sup>

This proposal to broaden the legitimate means a religious healer may employ—from “prayer or other spiritual means” to include “all harmless means”—will not endanger public health. As discussed in Section III, the state’s interest in protecting an individual from harm must be balanced against its duty to protect patient autonomy.<sup>690</sup> These dual obligations are best met by requiring a healer to use harmless means in a religious context. This requirement both protects the patient from direct injury by the religious means employed and puts the patient on notice that the means employed are not sanctioned by the medical establishment.

Some courts have reasoned that the state may forbid religious treatment that is “harmless in itself” to protect patients from a resultant failure to seek medical care.<sup>691</sup> Still, a competent adult has the right to refuse medical intervention for religious reasons in most instances, even if such intervention will lead to a cure and said refusal will result in death.<sup>692</sup> Accordingly, so long as the patient makes an informed decision not to pursue medical care, courts should honor that wish.

The patient who employs a healer in a religious context has arguably made an informed decision. The religious context puts the patient on notice that no medical claims are made for the treatment. Although it may be contended that the patient has not been adequately diagnosed nor informed of specific

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687. *Founding Church of Scientology v. United States*, 409 F.2d 1146 (D.C. Cir.), cert. denied, 396 U.S. 973 (1969).

688. *United States v. Article or Device, etc.*, 333 F. Supp. 357 (D.D.C. 1971).

689. See generally *Larson v. Valente*, 456 U.S. 228 (1982) (finding that charitable registration law discriminating against certain forms of religious organization violates First Amendment).

690. See *supra* part III.A.

691. See, e.g., *Church of Scientology v. Department of Health, Educ. and Welfare*, 341 F. Supp. 563 (D. Minn. 1971) (finding that misbranded E-meters constitute danger to gullible public even if “harmless in themselves”).

692. Regarding patient autonomy, see *supra* part III.A.

medical services waived by choosing a religious healer, the risk undertaken is no greater than that assumed by the individual who chooses not to seek out any care at all. The state's interest in protecting the patient should give way to the individual's right to refuse medical care in favor of religious healing, and courts should construe statutory language that exempts healing by "prayer or spiritual means" to include any harmless means employed in a religious context.

#### *d. Conclusion*

Many judicial decisions over the course of the twentieth century have narrowly construed religious exemptions in medical practice acts, legitimating little other than prayer and Christian Science treatment. Healers who operated outside of organized Christian religions and who relied on laying-on-hands, mental therapeutics, or similar procedures, have routinely been convicted of violating the medical acts amidst allegations that they or their means were not truly religious.

Recent litigation has shed additional light, however, on the protection to be accorded religious healers under the First Amendment. Judicial opinions concerning religious fraud, food and drug laws, and patient autonomy pay heed to modern Supreme Court precedent and provide direction for the future interpretation of religious exemptions. Three conclusions—corresponding to the medical licensing factors discussed above—may be drawn from this material:

- (1) Religious healers may not be disqualified from religious practice exemptions because they heal as a business, nor because their healing claims are false, so long as the healers function in a religious context;<sup>693</sup>
- (2) Religious healers need not be affiliated with a recognized religious organization, nor be acting in accord with church tenets, so long as they operate in a religious context; and
- (3) Religious healers may use means other than prayer, so long as these means are harmless in themselves and the healers operate in a religious context.

All three conclusions require healers to function in a religious context if they are to qualify for exemption from medical

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693. Regarding the evaluation of religious healers' claims, see discussion *supra* part V.A.1.



licensing. The Scientology decisions examined previously<sup>694</sup> provide the best evidence of the manner in which recent courts have sought to identify a religious healing context. In these cases, the courts chose to define a religious context primarily by indicating what it is not.

In *Founding Church*, Judge Skelly Wright stated that, to come within the protection of the First Amendment, the defendant "must have explicitly held himself out as making religious, as opposed to medical, scientific or otherwise secular, claims."<sup>695</sup> In a like manner, Justice Gesell required that every participant be given adequate warning that the religious healing had no "medical or scientific basis."<sup>696</sup> Further, in *Christofferson*, the court noted that "wholly secular" healing representations were actionable.<sup>697</sup> And finally, in *Van Schaick* the court ruled that the use of terms such as "scientifically guaranteed" might expose religious healers to liability.<sup>698</sup>

These decisions suggest that a religious healing context may be defined simply as one that the parties should understand to be neither secular, nor scientific, nor medical. Judge Gesell's opinion—legitimizing the practice of religious healing so long as the means employed are harmless and the parties involved can recognize the religious nature of the healing enterprise—thus provides a coherent model for future application of religious exemptions in medical licensing laws.

### C. Personal Injury Liability

Religious healers have been successful recently in gaining First Amendment protection in personal injury litigation. Because of society's interest in preserving religious liberty, the courts have, thus far, refused to impose civil liability on healers who treat patients—including minor patients—by spiritual means.<sup>699</sup> Consistent with the interpretation of spiritual means

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694. *Founding Church of Scientology v. United States*, 409 F.2d 1146 (D.C. Cir.), cert. denied, 396 U.S. 963 (1969); *United States v. Article or Device, etc.*, 333 F. Supp. 357 (D.C. Cir. 1971); *Van Schaick v. Church of Scientology, Inc.*, 535 F. Supp. 1125 (D. Mass. 1982); *Christofferson v. Church of Scientology*, 644 P.2d 577 (Or. Ct. App.), cert. denied, 459 U.S. 1206 (1982).

695. *Founding Church*, 409 F.2d at 1164.

696. *Article*, 333 F. Supp. at 364.

697. *Christofferson*, 644 P.2d at 602.

698. *Van Schaick*, 535 F. Supp. at 1141.

699. See, e.g., *Baumgartner v. First Church of Christ, Scientist*, 490 N.E.2d 1319 (Ill. App. Ct. 1986); *Brown v. Laitner*, No. 73903, 2, 3 (Mich. Ct. App.), summary judgment aff'd, Dec. 17, 1986, leave to appeal denied, 435 N.W.2d 1 (Mich. 1989).

proposed above in regard to MPAs, courts in these civil cases have defined spiritual means to include not only prayer but limited diagnosis and the prescription of harmless remedies as well.<sup>700</sup>

Mary Baumgartner brought a wrongful death action against a Christian Science practitioner, a Christian Science nurse, and the First Church of Christ, Scientist, itself, following the death of her husband in 1974.<sup>701</sup> The plaintiff claimed that the defendants' religious treatments amounted to medical malpractice, Christian Science malpractice, negligence, and intentional or reckless disregard for the decedent's health and safety.<sup>702</sup> The following allegations were accepted as true for purposes of ruling on the defendants' motion to dismiss the action: the practitioner had given the decedent hot baths and had massaged and manipulated his prostate gland as part of the spiritual treatment; in addition, the nurse had warned the decedent that he would die if he sought medical care.<sup>703</sup>

The trial court dismissed the complaint and an Illinois appellate court affirmed the decision.<sup>704</sup> Despite the defendants' alleged use of baths and massage, the reviewing court found that the defendants had employed spiritual, not medical, means of treatment.<sup>705</sup> Hence, there was no basis for the medical malpractice claim. With regard to the remaining claims of action, the appellate court declared that the First Amendment prohibits the judiciary from determining "whether certain religious conduct conforms to the standards of a particular religious group."<sup>706</sup> And the court concluded that "adjudication of the present case would require the court to extensively investigate and evaluate religious tenets and doctrines: first to establish the standard of care of an 'ordinary' Christian Science practitioner; and second to determine whether [the practitioners] deviated from those standards."<sup>707</sup>

In 1986, less than ten months later, a Michigan appellate court reached similar conclusions in a wrongful death suit also

700. *Id.*

701. *Baumgartner*, 490 N.E.2d 1319.

702. *Id.* at 1322.

703. *Id.* at 1321.

704. *Id.* at 1322.

705. *Id.* at 1323.

706. *Baumgartner*, 490 N.E.2d at 1323.

707. *Id.* at 1324.

brought against Christian Scientists.<sup>708</sup> This matter arose from the death of a sixteen-month-old child who received only Christian Science treatment up until the last week of life.<sup>709</sup> Jeanne Laitner, a Christian Science practitioner, urged Matthew Swan's parents to "try not to notice whether the [child's] fever was up or down," and she also "speculated that Matthew might be suffering from roseola."<sup>710</sup> A second practitioner, June Ahearn, advised the Swans that medicine would not help Matthew and, in fact, would induce disease.<sup>711</sup> When Ahearn did recommend that he be taken to a hospital for x-rays, she told the parents: "Don't tell them about the fever and all this other."<sup>712</sup>

The plaintiffs' claims of Christian Science malpractice, negligence, and misrepresentation against the practitioners and the church were ultimately dismissed.<sup>713</sup> In reaching its decision, the appellate court upheld the trial judge's determination that two principles governed the litigation:

1. A statement of a sincerely-held religious belief cannot be the basis for a cause of action for misrepresentation.
2. A cause of action which necessitates competing testimony as to what church doctrine was and what it required of a person cannot be the basis of imposing civil liability.<sup>714</sup>

The plaintiffs argued that no evaluation of church doctrine was needed to impose liability because the defendants had violated "an objective standard of reasonableness established by society."<sup>715</sup> But the appellate court declined to impose such a standard in the absence of a specific statute designed to protect children from the defendants' conduct.<sup>716</sup>

#### *D. Criminal Prosecutions*

Although they have escaped civil liability for their healing endeavors, religious practitioners are not immune from crimi-

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708. *Laitner*, No. 73903 at 2, 3.

709. *Id.* at 2-4.

710. *Id.* at 2-3.

711. *Id.* at 3.

712. *Id.* at 4.

713. *Laitner*, No. 73903 at 13.

714. *Id.* at 6.

715. *Id.* at 8.

716. *Id.* at 6. At least one legislature has specifically provided that spiritual treatment shall not be the basis for a medical malpractice cause of action. See *Lyon v. Hasbro Industries, Inc.*, 509 N.E.2d 702, 705 (Ill. App. Ct. 1987).

nal sanctions. Courts have indicated that conviction for homicide, assault and battery, and zoning violations are possible.<sup>717</sup>

As one California appellate court has pointed out, medical licensing exemptions available to religious healers do not excuse conduct in violation of other criminal laws.<sup>718</sup> Even in the absence of actual malice, said the court, a religious healer may be convicted of second degree murder if the healer performs "an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard to life."<sup>719</sup> The court's authority for this proposition, however, did not involve the conviction of religious healers.<sup>720</sup>

On the other hand, the California Supreme Court has specifically held that the felony-murder rule may not be employed against a healer who commits the underlying felony of practicing medicine without a license.<sup>721</sup> Although the rule generally provides that death resulting from the commission of a felony will be treated as murder, the modern trend is to apply the rule only when the underlying felony is inherently dangerous. In *People v. Burroughs*,<sup>722</sup> the supreme court found that practicing medicine without a license is not inherently dangerous.<sup>723</sup> The court added, however, that a healer may be convicted of involuntary manslaughter if the treatment rendered was the proximate cause of the patient's death.<sup>724</sup> In *Burroughs*, the patient died of a massive abdominal hemorrhage following a deep stomach massage.<sup>725</sup>

While a religious healer's affirmative action that unintentionally causes death may provide the basis for a manslaughter conviction, the healer's failure to provide conventional care

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717. See *infra* notes 719, 731, 734 and accompanying text.

718. *Northrup v. Superior Court*, 237 Cal. Rptr. 255 (Cal. Ct. App. 1987).

719. *Id.* at 259 (quoting *People v. Phillips*, 414 P.2d 353, 363 (Cal. 1966)).

720. *Id.* at 259-60.

721. *People v. Burroughs*, 678 P.2d 894 (Cal. 1984). Practicing medicine without a license is commonly a misdemeanor, but may be elevated to a felony if there is a risk of great bodily harm. See, e.g., CAL. BUS. & PROF. CODE § 2053, 2153 (1990). In other jurisdictions, however, it is always a felony. See, e.g., OR. REV. STAT. § 677.990(2) (1991).

722. 678 P.2d 894 (Cal. 1984).

723. *Id.* at 900.

724. *Id.* See also *State v. Karsunky*, 197 Wash. 87, 84 P.2d 390 (1938) (drugless practitioner who prescribed drugs and told diabetic to change diet and stop taking insulin was convicted of manslaughter and the unlicensed practice of medicine).

725. *Burroughs*, 678 P.2d at 896.

will not lead to criminal liability of this sort.<sup>726</sup> Nor will counseling another to use religious rather than medical treatment amount to manslaughter if the patient dies. Although legal commentators have cited Canadian law for the proposition that manslaughter charges should lie under the latter circumstances,<sup>727</sup> apparently no appellate courts in the United States have so held. In the recent case of *People v. Stephanski*,<sup>728</sup> a "self-professed minister" was charged with criminally negligent homicide in the death of Pamela Robbins. Jerry Stephanski was accused of "counseling, urging, suggesting and directing" Robbins to refrain from insulin and to rely on God to heal her diabetes.<sup>729</sup> Robbins later lapsed into a diabetic coma and died. The indictment against Stephanski was dismissed for failure to state an offense, and the appellate court upheld the dismissal.<sup>730</sup>

Aside from homicide, two rather unusual matters involving criminal sanctions against religious healers have received judicial attention. The first case involved a charge of assault and battery brought against one professing to be a magnetic healer.<sup>731</sup> As a general rule, consent to treatment will constitute a defense to such a charge,<sup>732</sup> but in this instance, the court concluded that the patient's consent to treatment was vitiated by the healer's fraud. At the defendant's request, the patient had disrobed to receive a massage. The trial court concluded that there was no basis for massaging a nude patient other than to satisfy the healer's prurient interests. The appellate court affirmed the conviction.<sup>733</sup>

A second dispute concerned the propriety of animal sacrifices practiced by Santeria priests in Florida.<sup>734</sup> As part of their faith-healing rites, Santeria priests ritually sacrifice an

726. See Laughran, *supra* note 3, at 421. Religious healers, however, may have statutory duties to report certain types of diseases, disabilities, or child abuse unless specifically exempted therefrom.

727. See RUBENSTEIN, *supra* note 2, at 55; Cawley, *supra* note 2, 69.

728. 443 N.Y.S.2d 1016 (N.Y. App. Div. 1981).

729. *Id.* at 1017.

730. *Id.* at 1019. See also *Commonwealth v. Konz*, 450 A.2d 638 (Pa. 1982) (reversing manslaughter convictions of spouse and friend who urged patient to refrain from taking medication).

731. *Bartell v. State*, 82 N.W. 142 (Wis. 1900).

732. See Laughran, *supra* note 3, at 404 n.38.

733. *Bartell*, 82 N.W. at 142-43.

734. *Church of Lukumi Babalu Aye v. Hialeah*, 723 F. Supp. 1467, 1474 (S.D. Fla. 1989), *aff'd without opinion*, 936 F.2d 586 (11th Cir. 1991), *cert. granted*, 112 S. Ct. 1472 (1992).

animal, such as a chicken, pigeon, dove, duck, guinea fowl, goat, sheep, or turtle.<sup>735</sup> The patient's illness "is considered to have then passed to the animal."<sup>736</sup> Priests also offer sacrifices on other ceremonial occasions.<sup>737</sup>

The Church of the Lukumi Babalu Aye and several of its members brought a civil rights action in federal court, asserting that the city of Hialeah passed certain zoning ordinances in order to stop the sacrificial practices. The plaintiffs contended, in part, that the laws violated their free exercise of religion.<sup>738</sup> The federal district court upheld the regulations, however, as an appropriate exercise of the government's power to preserve animal welfare, to prevent health hazards from animal carcasses, and to protect the welfare of children who might suffer psychological harm from witnessing the sacrifices.<sup>739</sup>

In sum, a religious healer may be prosecuted for homicide for performing an act that causes the patient's death. If the practitioner employs only harmless means and the patient dies from the lack of conventional medical care, however, no charges will lie. Unless vitiated by fraud, the patient's consent provides a complete defense to assault and battery when harmless touching is involved. But in enforcing a zoning ordinance banning ritual sacrifice, courts have concluded that harm to animals, juvenile witnesses, and public health outweighs healers' and patients' rights to religious free exercise.

### *E. Conclusion*

Whereas judicial interpretation of the First Amendment has shielded religious healers from civil liability and from most criminal charges, some courts have not adequately protected healers charged with violations of medical practice acts. Courts must endeavor to "scrupulously avoid"<sup>740</sup> religious discrimination and persecution in these cases.

Despite extensive healthcare regulations promulgated in the twentieth century, most medical licensing acts retain exemptions for religious healers. Since the second decade of this century, the majority rule has been that these practition-

735. *Id.* at 1471.

736. *Id.* at 1474.

737. *Id.*

738. *Id.* at 1482.

739. *Hialeah*, 723 F. Supp. at 1485.

740. *National Ass'n for Better Broadcasting v. F.C.C.*, 591 F.2d 812, 818 n.33 (D.C. Cir. 1978).

ers may receive compensation for their services. Furthermore, so long as they confine their healing activities to prayer, they need not fear prosecution. In addition, religious healers are not liable for negligence or malpractice. Courts have determined that formulating a civil standard of reasonable care for religious healers would violate the First Amendment by entangling the government in the evaluation of protected religious beliefs and conduct. Thus, even if the patient is advised not to seek medical treatment and then dies following spiritual care, the religious healer is not guilty of negligently causing the death.

But when religious healers employ other means besides prayer—such as laying-on-hands, anointing with oil, or other verbal or material aids—their immunities frequently vanish. This outcome is even more likely if the healer is not closely affiliated with an *organized religious group*. As argued in this section, however, religious healers, whether or not affiliated with a recognized denomination, should fall within MPA exemptions so long as they use harmless means in a religious context.

## VI. CONCLUSION

This Article has surveyed the liberties and liabilities surrounding the practice of religious healing as reflected in twentieth century judicial opinions from around the nation. Statutory exemptions for religious healers and parents, healers' First Amendment immunity from civil suit, and the award of disability benefits to claimants who rely on religious rather than medical treatment bespeak a limited governmental accommodation of religious expression. In most instances, religious healing may be chosen at the patient's own risk. By so choosing, the patient relinquishes the right to recover damages against the religious healer. And in an action against any other tortfeasor, the patient's damages are limited to those that could not reasonably have been avoided.

For those without the capacity to choose for themselves (e.g., minors), the law imposes on their guardians the duty to make reasonable healthcare decisions. Authorities will intervene when this care strays too far from the norm. In such cases, the child will often be forced to receive medical care, or if the child dies without receiving medical treatment, the parent will be subject to criminal prosecution. It has been sug-

gested in the preceding pages that the determination of reasonable care in these situations—as well as in those cases where a religious plaintiff confronts the doctrine of avoidable consequences—be made after consideration of all competent evidence concerning the efficacy of religious treatment. This approach helps to avert religious persecution in a criminal context while forcing the religious plaintiff to act reasonably to recover civil damages. The proposal was also made that courts refrain from coercing anything but life-saving medical intervention.

And finally, as to the statutory exemptions for religious healers and religious parents noted above, one fundamental constitutional argument has been developed in this work. Although the Free Exercise Clause of the First Amendment—as interpreted presently by the Supreme Court—does not require that religious healing be permitted as a matter of individual right, the Establishment Clause nonetheless prohibits the government from preferring one form of religious expression over another. Accordingly, religious healing conducted by “recognized” religious organizations should not be preferred over similar activities performed by individuals or less well-organized religious groups. Moreover, more-familiar types of religious healing techniques cannot be preferred over less common varieties. Hence, theistic prayer, for instance, must not be favored over other spiritual means such as laying-on-hands, anointing with oil, auditing, etc. The crucial factors in determining whether such activities constitute spiritual means are whether (1) they are harmless in themselves, and (2) the patient has been led to understand that healing depends on religious rather than scientific or medical factors. Defining the scope of religious exemptions in healthcare regulations in this manner is consistent with the trend toward greater patient autonomy, and it also helps to fulfill the government’s obligations to promote public health, preserve religious liberty, and guarantee equal protection under the law.