

Allocating The Costs Of Parental Free Exercise: Striking A New Balance Between Sincere Religious Belief And A Child's Right To Medical Treatment

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I. INTRODUCTION

The right to practice religion freely does not include liberty to expose the community or the 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 legal discretion when they can make that choice for themselves.¹

It has been almost fifty years since the United States Supreme Court wrote these presumably unambiguous words in *Prince v. Massachusetts*. Yet children in this country are still being martyred on the altar of their parents' religious beliefs. Parents cloaking themselves in the first amendment and its free exercise clause are denying their children medical treatment and those children are dying.²

Robyn Twitchell was such a child. He died on April 8, 1986, at the age of two. Robyn died as a result of an obstructed bowel, a medical condition which is readily remedied by surgery with little risk to the

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1. *Prince v. Massachusetts*, 321 U.S. 158, 166-67, 170 (1944).

2. See *infra* text accompanying note 23. The free exercise clause of the first amendment reads, "Congress shall make no law . . . prohibiting the free exercise [of religion] . . ." U.S. CONST. amend. I.

patient. Robyn's parents were not poor nor were they uneducated. They lived in Boston, within minutes of the nation's best teaching hospitals. Yet when Robyn became seriously ill, his parents failed to make use of those hospitals and the lifesaving technology they offered.

Robyn's parents are Christian Scientists. Christian Scientists rely on spiritual healing as opposed to medical science as the primary treatment for disease and illness. Rather than calling a physician when Robyn was ill, the Twitchells called a Christian Science practitioner. They also called a Church official who indicated that continued use of prayer alone was lawful. Had they inquired further as to their legal obligation to obtain medical care for Robyn, the Church would have told them that they had none.³

A. A Proposal for Judicial, Legislative, and Regulatory Reform

The Church bases its position that the Twitchells had no legal duty to provide Robyn with medical treatment upon an exemption under the Massachusetts child neglect law.⁴ That exemption prevents the state from prosecuting a parent for the misdemeanor of child neglect for the sole reason that a parent relies on treatment by spiritual means instead of seeking medical attention for a child. Similar exemptions can be found in virtually every state in the country.⁵ The

3. The Christian Science publication, *LEGAL RIGHTS AND OBLIGATIONS OF CHRISTIAN SCIENTISTS IN MASSACHUSETTS* (1983), instructs parents that they can never suffer the "imposition of criminal liability as a negligent parent for failure to provide medical care because of religious beliefs" as a result of MASS. GEN. LAWS ANN. ch. 273, § 1(4) (West 1990), despite the fact that this statute has never been authoritatively construed by a court of law. *Just. Rep. on Inquest Relating to the Death of Robyn Twitchell*, Commonwealth of Massachusetts, District Court Department, Suffolk County, West Roxbury Division, Inquest No. 1 of 1986, at 23, [hereinafter *Just. Rep. on Inquest*]. The District Court Inquest Report was based on evidence received during six days of hearings held in December 1986. Justice Lawrence D. Shubow's findings are included in the Report.

4. That exemption provides:

A child shall not be deemed to be neglected or lack proper physical care for the sole reason that he is being provided remedial treatment by spiritual means alone in accordance with the tenets and practice of a recognized church or religious denomination by a duly accredited practitioner thereof.

(MASS. GEN. LAWS ANN. ch. 273, § 1(4) (West 1990)).

5. See ALA. CODE § 26-14-1(2) (1986); ALASKA STAT. § 11.51.120(b) (1987); ARIZ. REV. STAT. ANN. § 8-531.01 (1989); ARK. STAT. ANN. § 12-12-502(3) (1987); CAL. PENAL CODE § 270 (West 1988). See also CAL. WELF. & INST. CODE §§ 300, 300.5 (West 1984 & Supp. 1990); COLO. REV. STAT. § 19-3-103(1) (Supp. 1989) (amended in 1989 to provide that the religious rights of a parent shall not limit a child's access to medical care in a life-threatening situation or when the condition will result in a serious handicap or disability); CONN. GEN. STAT. ANN. § 17-38d (West 1988); DEL. CODE ANN. tit. 11, § 1104 (1974); FLA. STAT. ANN. § 415.503(9)(f) (West Supp. 1990); HAW. REV. STAT. § 350-4 (1985); IDAHO CODE § 18-401(2) (1987); ILL. ANN. STAT. ch. 23, § 2054 (Smith-Hurd 1988 & Supp. 1990); IND. CODE ANN. § 35-46-1-4(a),-5(c) (Burns 1985); IOWA CODE ANN. § 726.6(1) (West 1979 & Supp. 1990); KAN. STAT. ANN. § 21-3608(1)(c) (1981); KY. REV. STAT. ANN. § 600.020(1) (Baldwin Supp. 1990); LA. REV. STAT. ANN. § 14:403(B)(5)

United States Supreme Court has never squarely addressed the validity of these exemptions. It is time for the Court to breathe new life into its decision in *Prince*⁶ and strike down such exemptions on public policy grounds. In the meantime, state legislatures and the Department of Health and Human Services should take the initiative in repealing these statutory exemptions.

Robyn Twitchell's parents were subsequently tried and convicted of manslaughter. Other courts have recently found parents who practice spiritual healing guilty of manslaughter or felony child endangerment.⁷ These parents have relied on the exemptions under state

(West Supp. 1990); ME. REV. STAT. ANN. tit. 22, § 4010 (Supp. 1988); MD. FAM. LAW CODE ANN. § 5-701(n)(2) (Supp. 1990); MASS. GEN. LAWS ANN. ch. 273, § 1(4) (West 1990); MICH. COMP. LAWS ANN. § 722.634 (West Supp. 1990); MINN. STAT. ANN. § 609.378(1)(a)(1) (West 1987); MISS. CODE ANN. § 43-21-105(1)(i), (m) (1972 & Supp. 1988); MO. ANN. STAT. § 210.115(3) (Vernon 1983); MONT. CODE ANN. § 41-3-102(4) (1987); NEV. REV. STAT. § 200.5085 (1987); N.H. REV. STAT. ANN. § 169-C:3,(XIX)(c) (Supp. 1988); N.J. STAT. ANN. § 9:6-1 (West 1976); N.M. STAT. ANN. § 32-1-3(L)(5), -3(M)(4) (1978); N.Y. PENAL LAW § 260.15 (McKinney 1989); N.C. GEN. STAT. § 7A-517(21) (1989); N.D. CENT. CODE § 50-25.1-05.1(2) (1989); OHIO REV. CODE ANN. § 2919.22(A) (Baldwin 1987) (statute was invalidated in *State v. Miskimins*, 22 Ohio Misc. 2d 43, 490 N.E.2d 931 (C.P. Coshocton 1984); see also *infra* notes 136-56 and accompanying text)), § 2151.03, .421(A)(1) (Anderson 1990); OKLA. STAT. ANN. tit. 21, § 852 (West 1983 & Supp. 1990) (amended to read "provided, that medical care shall be provided where permanent physical damage could result to such child"); OR. REV. STAT. § 419.500(1) (1989); PA. STAT. ANN. tit. 11, § 2203 (Purdon Supp. 1990); R.I. GEN. LAWS § 40-11-15 (1984); S.C. CODE ANN. § 20-7-490(C)(3) (Law. Co-op 1976); S.D. CODIFIED LAWS ANN. § 26-10-1.1 (1984 & Supp. 1990) (amended in 1990 to provide that medical treatment may be ordered by the court for a child being treated solely by spiritual means); TENN. CODE ANN. § 37-1-157(c) (1984); UTAH CODE ANN. § 78-3a-19.5 (1987); VT. STAT. ANN. tit. 33, § 682(3)(C) (Supp. 1989); VA. CODE ANN. § 16.1-228(2) (1988); WASH. REV. CODE ANN. § 26.44.020(3) (Supp. 1990); W. VA. CODE § 49-1-3(g)(2)(A) (1986); WIS. STAT. ANN. § 48.981(3)(c)(4) (West 1987); WYO. STAT. § 14-3-202(a)(vii) (1978). In Maryland, Montana, Nevada, North Carolina, South Carolina, and Tennessee, the statutes use such phrases as "non-medical remedial care" rather than spiritual healing.

6. See *supra* note 1 and accompanying text.

7. See *Hermanson v. State*, 570 So. 2d 322 (Fla. 1990) (parents convicted of felony child abuse and third degree murder where parents treated daughter suffering from juvenile diabetes solely with spiritual means and daughter subsequently died from diabetic ketoacidosis); *Funkhauser v. State*, 763 P.2d 695 (Okla. Crim. App. 1988) (parents convicted of manslaughter in the second degree where their three-month-old son died of pneumonia after parents relied on religious healing), *cert. denied*, 109 S. Ct. 2066 (1989); *Hall v. State*, 493 N.E.2d 433 (Ind. 1986) (parents convicted of reckless homicide and neglect of a dependent when son died of acute bronchial pneumonia after being treated solely with prayer); *Bergmann v. State*, 486 N.E.2d 653 (Ind. Ct. App. 1985) (parents convicted of reckless homicide where nine-month-old daughter died from bacterial meningitis after being treated solely with prayer); *Commonwealth v. Bainhart*, 345 Pa. Super. 10, 497 A.2d 616 (1985) (parents convicted of both involuntary manslaughter and child endangerment where child died from untreated tumor), *appeal denied*, 517 Pa. 620, 538 A.2d 814 (1988), *cert. denied*, 488 U.S. 817 (1988).

child abuse and neglect statutes as a defense to these criminal charges.⁸ More often than not, their reliance on spiritual healing has resulted in their children's deaths and their own anguish. While this Article does not address the validity of such convictions, it does suggest that the only way to avoid such unnecessary deaths and subsequent parental prosecutions in the future is to abolish statutory exemptions to child abuse and neglect laws through judicial, legislative, or regulatory means, or through a combination of such means.

This Article first lays out the brutal facts of Robyn Twitchell's death. Any discussion of this issue must be grounded in a clear understanding of the unnecessary pain and suffering that children often endure when their parents practice spiritual healing to the exclusion of medical science. It then discusses the origins of the exemptions and how various courts have ruled on this issue both before and after the exemptions were enacted.

The Article then explores the premise that not only are these exemptions not constitutionally required but in fact they may be constitutionally defective. The Article concludes that the only way to prevent the unnecessary deaths of children who suffer from disease that is readily and effectively treatable by medical science is by the repeal of the statutory exemptions. Abolition of the exemptions will prevent confusion as to the nature of the parental duty to provide medical assistance to seriously ill children. The primary goal of this Article is to establish that such abolition does not run afoul of a parent's constitutional right to free exercise of religion.

Absent such a direct approach to the issue of whether parents who practice spiritual healing may be held liable for their children's deaths, judicial attempts to reconcile the statutory exemptions and the criminal law are doomed to incoherence and confusion, and children will continue to die needlessly. The issue calls for an unflinching appreciation of the interests at stake. In furtherance of such an understanding, what follows is an account of the last illness and death of two-year-old Robyn Twitchell.

B. The Twitchell Case

David and Ginger Twitchell are third generation members of the First Church of Christ, Scientist. In 1986, they were living with their two sons, Jeremy and Robyn, in Hyde Park, a middle-class Boston neighborhood. Boston is also the home of the Christian Science Church, founded in 1879 by Mary Baker Eddy.

Christian Science is a religious system of thought which empha-

8. For a list of statutory exemptions, see *supra* note 5.

sizes spiritual healing as a practical expression of Christian living.⁹ However, "while Christian Scientists *prefer* spiritual healing there is no positive ban on resort to medical (surgical, dental) care, under some circumstances at least."¹⁰ Christian Science as an institution also "calls upon its adherents to be law-abiding . . . when the meaning of the law is unambiguously clear."¹¹

David and Ginger Twitchell were committed to raising their children without medical attention. They relied on spiritual healing to cure any illnesses the children might have.¹² Despite this commitment to spiritual treatment for their children, a medical doctor attended Ginger Twitchell at Robyn's birth, and David Twitchell had been to a dentist for treatment.¹³ Ginger Twitchell also wears glasses and has had cataract surgery.¹⁴

Robyn Twitchell's fatal illness began on April 3, 1986, and ended in his tragic death five days later. What follows is a brief summary of the events leading up to his death.

Thursday, April 3, 1986.

After dinner Thursday evening, Robyn began to scream and vomit and appeared to be in severe pain. He continued to vomit during the night and was unable to sleep well.¹⁵

Friday, April 4, 1986.

Ginger Twitchell called Nancy Calkins, a Christian Science Practitioner, and Nathan Talbot, a Christian Science Church official. Robyn had pain in his lower abdomen and was still vomiting. He continued to vomit when fed during the day.¹⁶

Saturday, April 5, 1986.

Robyn continued vomiting. Mrs. Calkins went to the Twitchell home to pray. Robyn was quiet during the day and the practitioner

9. *Just. Rep. on Inquest, supra* note 3, at 11.

10. *Id.* at 12.

11. *Id.* at 13.

12. *Id.* at 4.

13. *Id.* at 4. Like many Christian Scientists, David Twitchell grew up seeing dentists. According to church spokesman Nathan Talbot, dental care is a "gray area" in which Christian Scientists may seek treatment without feeling that doing so is a tremendous breach of faith. "Other gray areas include setting broken bones and getting fitted for eyeglasses. Christian Scientists may also have a doctor or midwife attend childbirth." See, *Twitchell Tells of Test of Faith*, Boston Globe, Aug. 8, 1990, (Metro/Region) at 1.

14. *Just. Rep. on Inquest, supra* note 3, at 4.

15. *Id.* at 4.

16. *Id.*

spoke with Ginger Twitchell by telephone that evening.¹⁷

Sunday, April 6, 1986.

Ginger Twitchell again called the Christian Science practitioner twice to report that Robyn was not holding his food down. The practitioner then called Nathan Talbot to report Robyn's condition. She also gave the Twitchells the name of a Christian Science nurse, whom they then called. The practitioner came to the house to pray again that evening.¹⁸

Monday, April 7, 1986.

The Christian Science nurse, Linda Blaisdell, came to the house. She suggested bland foods and liquid. (In the opinion of the medical witnesses who testified at the Inquest, feeding Robyn was the wrong thing to do in light of the blockage. It produced more vomiting and dehydration). The nurse left and Robyn later had a painful bowel movement. Ginger Twitchell again called the practitioner to report that Robyn was not holding down his food.¹⁹

Tuesday, April 8, 1986.

Robyn began vomiting at 8:00 p.m. The vomiting had a strange smell. Robyn gave his mother a pleading look. She became alarmed and called the practitioner whose telephone line was busy. She then called Nathan Talbot. He urged her to keep trying the practitioner whom she finally reached.²⁰

The practitioner came to the home to pray. The nurse was also called. Robyn began to have spasms at 10:00 p.m. His eyes rolled up and he lost consciousness. The practitioner called Nathan Talbot and told him that she thought "the baby had passed." He recommended that they call an undertaker.²¹

David Twitchell called Waterman's Funeral Home at 10:10 p.m. They suggested that he call 911, and then called the medical examiner's office, which sent an emergency medical services ambulance to the Twitchell home. The ambulance arrived at 10:59 p.m.²²

The Emergency Medical Technicians (EMT's) found Robyn alone on a rug, in cardiac arrest and with no vital signs. Rigor mortis had already set in. The EMT's administered CPR to Robyn and then transported him to the Carney Hospital. He was pronounced dead at 11:27 p.m. The physician on call stated that the underlying cause of Robyn's death was bowel obstruction. In his opinion, had medical assistance been sought earlier, the obstruction in the bowel could

17. *Id.* at 5.

18. *Id.*

19. *Id.* at 5-6.

20. *Id.* at 6.

21. *Id.* at 6-7.

22. *Id.* at 7.

have been readily corrected by surgery with an almost one hundred percent chance of success. Additionally, in the opinion of the medical examiner who later performed the autopsy on Robyn, had David Twitchell called the EMT's immediately, Robyn could have been resuscitated up to one-half hour after cardiac arrest.²³

The story of Robyn Twitchell is not unique. Cases and newspapers have reported dozens of instances where children have died from readily treatable diseases because their parents eschewed medical care in favor of spiritual healing.²⁴ These are not hard cases. For the most part they involve diseases which readily respond to medical science or which involve routine surgery or treatment. Robyn Twitchell's obstructed bowel could have been cured by relatively painless surgical intervention. However, in defense of these spiritual methods of treatment, the Christian Science Church proffers the argument that children whose parents provide medical treatment for them still die from disease every day.²⁵ This is in fact correct; however, the point is inapposite. What the legal community is facing here are cases where children are dying from readily treatable diseases, rather than diseases where the prognosis is dim even when the children are provided with the best medical care that society can offer.

Justice Lawrence Shubow, who prepared the Report on Inquest Relating to the Death of Robyn Twitchell,²⁶ found that the facts surrounding Robyn's death warranted the prosecution of his parents for involuntary manslaughter.²⁷ David and Ginger Twitchell were convicted of that crime on July 4, 1990, and sentenced to ten years' probation.²⁸ In the past two years, there have been four similar

23. *Id.* at 7-8.

24. See, e.g., Clark, *Religious Accommodation and Criminal Liability*, 17 FLA. ST. U. L. REV. 559 (1990); Note, *California's Prayer Healing Dilemma*, 14 HASTINGS CONST. L.Q. 395, 401 nn.53-55 (1987); Dobbin, *In Treating Sick Children, Says California, Prayer Is Not Enough; When a State Takes Aim at Faith Healing*, U.S. News & World Rep., Mar. 24, 1986, at 22; Ostling, *Matters of Faith and Death; Courts Move Against Parents Who Deny Children Medical Care*, Time, Apr. 16, 1984, at 42; Dolnick, *When Faith and Medicine Collide*, Wash. Post, Sept. 25, 1990, (Religion), at 14 (Health Supp.); Lewin, *Ideas & Trends; When It's One Absolute Right Against Another*, N.Y. Times, May. 29, 1988, § 4, at 18, col. 1; Shaw, *Children Are Suffering as Faith Healers Hide Behind Religious-Exemption Shield*, L.A. Times, Mar. 23, 1988, Part II (Metro), at 7, col. 1 (home ed.).

25. See Talbot, *Christian Science and the Care of Children: The Position of the Christian Science Church*, 309 NEW ENG. J. OF MED., No. 126, at 1641-44 (Dec. 29, 1983); Johnsen, *Christian Scientists and the Medical Profession: A Historical Perspective*, MED. HERITAGE, at 70-77 (Jan./Feb. 1986); Dolnick, *supra* note 24, at 14.

26. *Just. Rep. on Inquest, supra* note 3.

27. *Id.* at 28.

28. In Massachusetts, a manslaughter conviction can carry a penalty of up to

convictions of Christian Scientist parents who failed to seek medical treatment for their children.²⁹ These convictions raise a myriad of issues, including civil and criminal liability, free exercise of religion, fair notice and due process, and the fundamental issue of a child's right to life. However, a recurring theme in these cases is the parents' belief that the spiritual healing exemption under the state's child abuse and neglect statute protects them from prosecution as a result of their child's death. The justice who conducted the Inquest into Robyn Twitchell's death said of the exemption at issue:

G. L. c. 273, § 1, as amended in 1971 is ambiguous. Only legalistic analysis renders its reach clear. On its face, it could easily lead a religious family to believe its beliefs to have won public endorsement and validation To the extent the local statutes preserve the confusion they should be reviewed and corrected so that all concerned can receive a clear view of their rights and obligations to replace the hazy one now prevailing.³⁰

It remains to be seen whether the Twitchells' conviction will withstand scrutiny at the appellate level.³¹ However, it is clear from this and other recent convictions that parents are being misled by the statutory exemptions and that their children are at risk of injury and

twenty years in prison. The Twitchells were also ordered to take their three other children for regular medical examinations. *Christian Scientists Are Given Probation for Death of Child*, N.Y. Times, July 7, 1990, § 1 (Nat'l Desk), at 8, col. 5. Defense counsel in the Twitchell case argued that ordering the Twitchells to take their children for such exams was a "separate sentence on the children, in violation of their constitutional rights." Wong, *Twitchell Sentence: 10 Years' Probation*, Boston Globe, July 7, 1990, (Metro/Region), at 2 (city ed.). Defense counsel's fees were paid by the Christian Science Church. Chambers, *Deliberating Faith, Law and a Life*, THE NAT'L L.J., July 2, 1990, (sua sponte) at 13.

29. Sanders, *Convicted of Relying on Prayer; A Manslaughter Case Tests the Limits of Religious Liberty*, Time, July 16, 1990, (Law) at 52. Over the last two years, Christian Scientist parents have been convicted of criminal conduct in four other cases. Instead of sentencing them to prison, courts in Florida, California, and Arizona have placed the parents on probation with the requirement that they provide medical treatment for their children in the future. Wong, *Christian Science Couple Convicted in Son's Death*, Boston Globe, July 5, 1990, at 1.

30. *Just. Rep. on Inquest*, supra note 3, at 31, 33.

31. Some commentators have noted that in past years prosecutors have been reluctant to prosecute parents, and courts have frequently reversed manslaughter convictions of parents who treated their children in accordance with their spiritual beliefs. For a discussion of case law showing a reluctance to impose criminal liability on parents causing a child's death, see generally 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, 872-77 (1986). See also Note, *Criminal Law—Manslaughter Conviction for Failure to Provide Medical Aid to Child Because of Religious Belief Reversed*, 9 DE PAUL L. REV. 271, 274 (1960) ("[t]he lack of manslaughter convictions in American courts is the result of a justifiably sympathetic feeling for those whose religious philosophy has caused their plight"). There are four recent state cases which have upheld the manslaughter or homicide convictions of parents who relied solely on faith healing for treatment of their children. See supra note 7 for headings of these cases. The United States Supreme Court has never addressed this issue directly. Note, *When Rights Clash: The Conflict Between a Parent's Right to Free Exercise of Religion Versus His Child's Right to Life*, 19 CUMB. L. REV. 585, 586 n.6 (1989) [hereinafter *When Rights Clash*].

death as a result. There is also the continuing dilemma facing trial judges and appellate courts as to how spiritual healing exemptions under state child abuse and neglect statutes interact with the criminal law. Before evaluating the arguments in favor of and against such exemptions, it is useful to trace their origins and to examine various judicial approaches to this problem.

II. EARLY JUDICIAL APPROACHES TO PARENTAL FREE EXERCISE AS A DEFENSE TO FAILING TO PROVIDE MEDICAL CARE

A. *The British Approach*

*Regina v. Wagstaffe*³² is often cited for the common law rule that a parent cannot be convicted of manslaughter for treating his or her child by spiritual means alone. In fact, the decision in this case did no more than leave to the jury the question of whether the religious belief of the parent was reasonable. In *Wagstaffe*, the jury returned a verdict of not guilty³³ and the case, which involved a religious sect in England called the "Peculiar People" who relied on Providence rather than medical assistance to treat illness, came to stand for the proposition that parents could not be held criminally liable when they chose spiritual healing to the exclusion of medical science.³⁴

In response to *Regina v. Wagstaffe*, Parliament amended the Poor Law Amendment to include the words "medical aid."³⁵ The revised law read:

[W]hen any Parent shall willfully neglect to provide adequate Food, Clothing, Medical Aid, or Lodging for his child . . . whereby the Health of such Child shall have been injured . . . he shall be guilty of an Offense . . .³⁶

Seven years after passage of the Poor Law Amendment Act, *Regina v. Downes*³⁷ held that parents were subject to criminal liability for failure to provide medical treatment even if such failure was based upon a sincere religious belief. In that case, two of the judges involved expressed the view that the conviction could not have been upheld in the absence of the Poor Law Amendment Act.³⁸ The holding of *Regina v. Downes* remains unchallenged by subsequent cases.³⁹

32. 10 Cox Crim. Cas. 530 (1868).

33. Trescher & O'Neill, *Medical Care for Dependent Children: Manslaughter Liability of the Christian Scientist*, 109 U. PA. L. REV. 203, 206 (1960).

34. *Id.* at 205-06.

35. 31 & 32 Vict. c. 122, § 37.

36. Trescher & O'Neill, *supra* note 33, at 207.

37. L.R. 1 Q.B. 25 (1875).

38. *Id.* at 29-30.

39. Trescher & O'Neill, *supra* note 33, at 207.

This approach to criminal liability for parents who rely on spiritual rather than medical means of treatment was subsequently adopted in several cases in this country.⁴⁰

B. American Cases

Prior to the widespread enactment of exemptions to the child abuse and neglect statutes, courts in this country recognized that the failure to provide a child with medical treatment could result in criminal liability for the child's parents. In *Craig v. State*,⁴¹ the Maryland Court of Appeals concluded that religious belief was not a defense to a prosecution under the child protection law for failure to provide medical treatment.⁴² Similar holdings were made by the New York Court of Appeals in *People v. Pierson*,⁴³ and the Oklahoma Court of Criminal Appeals in *Owens v. State*⁴⁴ and *Beck v. State*.⁴⁵ However, the Florida Supreme Court, in *Bradley v. State*,⁴⁶ took a contrary view and held that the state's definition of manslaughter did not include death by denial of medical treatment.⁴⁷

While the Oklahoma Court of Criminal Appeals had found in *Owens* and *Beck* that parents could be criminally liable for relying solely on spiritual healing, the same court found to the contrary *after* a spiritual healing exemption was added to the Oklahoma statute. In 1983, in *State v. Lockhart*,⁴⁸ the court held that parents could not be criminally liable for first degree manslaughter when the underlying misdemeanor charge contained a religious exemption.⁴⁹ However, the court explicitly stated that the result would have been different

40. See *infra* notes 41-47 and accompanying text.

41. 220 Md. 590, 155 A.2d 684 (1959) (parents convicted of involuntary manslaughter of infant daughter who died of pneumonia).

42. *Id.* at 600, 155 A.2d at 690. However, the court reversed the parents' conviction on the grounds that their behavior was not the proximate cause of their child's death. *Id.* at 599, 155 A.2d at 689.

43. 176 N.Y. 201, 68 N.E. 243 (1903) (court held that child endangerment statute making the failure to provide medical care an offense did not violate the New York State Constitution's free exercise of religion clause).

44. 6 Okla. Crim. 110, 116 P. 345 (1911) (court cited *Pierson* and upheld conviction of father who relied on prayer and who failed to provide medical treatment to his child stricken with typhoid fever, holding that religious belief was no defense to child endangerment prosecution).

45. 29 Okla. Crim. 240, 233 P. 495 (1925) (court followed *Owens* rule and upheld the conviction of a father who relied on prayer and failed to provide medical treatment for his son who subsequently died from tetanus).

46. 79 Fla. 651, 84 So. 677 (1920) (father acquitted of manslaughter where his epileptic daughter suffered a seizure, fell into a fire and subsequently died from her burns).

47. *Id.* at 655-56, 84 So. at 679.

48. 664 P.2d 1059 (Okla. Crim. App. 1983) (parents acquitted of first degree manslaughter where their nine-year-old son died from peritonitis).

49. *Id.* at 1060.

prior to the enactment of the exemption in 1975.⁵⁰

Thus, state courts in this country have historically been willing to hold that religious belief is not a defense to criminal liability for parents who practice spiritual healing to the exclusion of medical treatment.⁵¹ In some cases, the same courts that had found criminal liability prior to the enactment of an exemption felt compelled to prohibit parental prosecutions after the enactment of a statutory exemption in their state.⁵² However, in the last few years, several other state appellate courts have upheld the homicide or manslaughter convictions of parents under such circumstances.⁵³ In *Walker v. Superior Court*,⁵⁴ the California Supreme Court recently held that the state's statutory exemption did not extend to the felony child endangerment and manslaughter statutes and that the state could prosecute a parent whose child died where only spiritual healing was rendered.⁵⁵ Despite the existence of statutory exemptions to child neglect statutes, these decisions indicate an increased acceptance of criminal prosecution as an appropriate societal response to the problem of parental reliance on spiritual healing to the exclusion of medical treatment. But as Justice Shubow noted, the interplay between the statutory exemptions and the criminal law is confusing and this disparity should be reconciled.⁵⁶

It is this author's belief that such reconciliation should come through the outright repeal of the exemptions rather than by the

50. *Id.* at 1060. In a later case, the same court did not allow the exemption as an absolute defense to a charge of second — as opposed to first — degree manslaughter. See *Funkhouser v. State*, 763 P.2d 695, 697-698 (1988), *cert. denied*, 109 S. Ct. 2066 (1989), which was decided after the Oklahoma exemption was amended in 1983 to provide that medical care shall be provided where permanent physical damage could result to the child. Although the case was decided after amendment of the 1983 exemption, the court applied pre-1983 law because the defendants were charged prior to enactment of the amendment.

51. However, these courts have used alternative theories to exculpate parents from liability. See, e.g., *Craig v. State*, 220 Md. 590, 155 A.2d 684 (1959) (conviction of involuntary manslaughter reversed on grounds of lack of proximate cause). Presumably, those courts felt that such parents did not intentionally kill their children and were otherwise caring and loving parents. Thus, while rejecting the defense of religious belief, these courts searched for alternative grounds to exculpate such parents under the criminal law.

52. See *State v. Lockhart*, 644 P.2d at 1060.

53. See *supra* note 7 and accompanying text.

54. 47 Cal. 3d 112, 763 P.2d 852, 253 Cal. Rptr. 1 (1988), *cert. denied*, 109 S. Ct. 3186 (1989) (in accordance with the tenets of the mother's religion, ailing child received prayer in lieu of medical treatment and subsequently died from meningitis).

55. *Id.* at 144, 763 P.2d at 873, 253 Cal. Rptr. at 22.

56. See *supra* note 30 and accompanying text.

amendment of the exemptions to provide that medical care should be provided to children where serious or permanent bodily injury may result if such care is not provided.⁵⁷ Such partial amendment of the statutory exemptions still forces parents to guess at the line between protection from prosecution and criminal liability for failing to provide their child with medical care. As Rita Swan noted in the *New England Journal of Medicine*:

[A]buse and neglect laws should be revised so that parents have a duty to provide medical care for sick children, regardless of their religious beliefs; states should have the ability to prosecute parents who refuse to meet their duty. . . . [C]ourt orders have protected many children of Jehovah's Witnesses, but they are inadequate to protect children in sects that object to all medical treatment and refuse even to have sick children brought to medical attention. Christian Science practitioners usually have no knowledge of the disease they are treating and do not report disease to the state. How will the courts discover these sick children in time to save their lives?⁵⁸

The underlying policy goal of the state's regulatory scheme in this area should be that parents clearly understand the need to provide regular and consistent medical care to their children and to require parents to err on the side of obtaining such care rather than waiting until it is too late, as did David and Ginger Twitchell.⁵⁹ That result can only come through holding all parents to the same standard of care, regardless of their religious beliefs. That is precisely the standard that existed in most states prior to the widespread enactment in 1974 of statutory exemptions for parents who practice spiritual healing. In 1947, in *Mitchell v. Davis*,⁶⁰ the Texas Court of Civil Appeals articulated that standard when it stated:

[O]pposition to medical treatment because of religious belief does not constitute a defense to a prosecution for breach of a statutory duty to furnish a child with such treatment. Conscientious obedience to what the individual may consider a higher power or authority must yield to the law of the land where duties of this character are involved, and since a wicked intent is not an essential element of the crime, peculiarities of belief as to the proper form of treatment, however honestly entertained, are not necessarily a lawful excuse.⁶¹

III. THE RECENT ORIGINS OF THE STATUTORY EXEMPTIONS

Statutory exemptions which protect parents who practice spiritual

57. For an example of such an amendment, see OKLA. STAT. ANN. tit. 21, § 852(A) (West Supp. 1990) (exemption amended to read, "medical care shall be provided where permanent physical damage could result to such child").

58. See Swan, *Faith Healing, Christian Science, and the Medical Care of Children*, 309 NEW ENG. J. OF MED., No. 26, at 1639-41 (1983).

59. The repeal of the exemptions would not make spiritual healing *per se* child neglect. Rather, it would have the effect of bringing the issue of children in need of medical treatment to the attention of the courts at an earlier stage. Parents would still have the opportunity in that forum to demonstrate that the care that they are providing to their child is adequate and appropriate under the circumstances. If not, the court could order medical treatment necessary to save a child like Robyn Twitchell.

60. 205 S.W.2d 812 (Tex. Civ. App. 1947).

61. *Id.* at 815 (citing 39 AM. JUR. § 115, at 781 (1942)).

healing are of fairly recent vintage. Ironically, they did not exist in most states prior to the enactment of the Child Abuse Prevention and Treatment Act of 1974.⁶² Due in part to lobbying by the Christian Science Church,⁶³ this federal law was interpreted to require states to amend their child abuse and neglect statutes to include an exemption for spiritual healing.⁶⁴ If states failed to amend their statutes to include such exemptions, they would be ineligible to receive the funds appropriated by Congress to fulfill the intent of the Act — *i.e.*, to establish preventative programs to reduce the incidence of child abuse.⁶⁵

States were required to adopt an exemption which was “the same in substance” as the one promulgated by the Secretary of the Department of Health, Education and Welfare.⁶⁶ Virtually all states in the union complied with this requirement and amended their statutes.⁶⁷ The adoption of these exemptions over the past twenty years has led to a counter campaign urging their repeal, led in large part by the American Academy of Pediatrics and by individual pediatricians.⁶⁸ Parents like Rita Swan, a former Christian Scientist who in 1977 lost her infant son to meningitis, have also joined the movement against these exemptions.⁶⁹

62. 42 U.S.C.A. § 5101-5107 (West 1983 & Supp. 1990).

63. Chambers, *supra* note 28, at 14, col. 4.

64. *When Rights Clash*, *supra* note 31, at 591. The Department of Health, Education and Welfare (HEW) was responsible for implementing and interpreting the Child Abuse Prevention and Treatment Act of 1974. HEW thus construed the Act as mandating religious exemptions for faith healers. *Id.* (citing Child Abuse and Neglect Prevention and Treatment Program, 39 Fed. Reg. 43, 935-36 (1974)).

65. *Id.* (citing Note, *Faith Healing Exemptions To Child Protection Laws: Keeping The Faith Versus Medical Care For Children*, 12 J. OF LEGIS. 243, 247 (1985)). Originally, the exemption did provide for judicial intervention with regard to ordered medical treatment “where [a child’s] health require[d] it.” *Id.* at 591 n.25 (citing Child Abuse and Neglect Prevention and Treatment, 45 C.F.R. § 1340.1-2(b)(1) (1975)). The exemption read:

[A] parent or guardian legitimately practicing his religious beliefs who thereby does not provide specific medical treatment for a child, for that reason alone shall not be considered a negligent parent or guardian; *However*, such an exception shall not preclude a court from ordering that medical services be provided to the child, where his health requires it.

45 C.F.R. § 1340.1-2(b)(1) (1975) (emphasis in original).

66. Note, *Faith Healing Exemptions to Child Protection Laws: Keeping the Faith Versus Medical Care for Children*, 12 J. OF LEGIS. 243, 247 n.45 (1985) [hereinafter *Faith Healing*] (citing 45 C.F.R. § 1340.3-3(b) (1975)).

67. Forty-seven states presently have such exemptions. See *supra* note 5 and accompanying text. See also Chambers, *supra* note 28, at 13, col. 3.

68. Chambers, *supra* note 28, at 14, col. 4.

69. See *supra* note 58.

In response to such public comment and pressure, the Department of Health and Human Services (formerly the Department of Health, Education and Welfare) issued new regulations regarding religious exemptions in 1983. These new regulations provide that nothing in the federal rule should be construed as requiring or prohibiting a finding of neglect when a parent practicing his or her religious beliefs does not, on that basis alone, provide medical treatment for his or her child. The regulation includes a proviso that if such a finding is prohibited by an exemption, that exemption shall not limit an agency or a court from ordering medical services when a child requires such services.⁷⁰ The 1983 regulations also revised the definition of negligent treatment or maltreatment to include failure to provide adequate medical care, a requirement which was not previously included in the regulations.⁷¹

In 1987, the Department of Health and Human Services sought to clarify its position even further.⁷² The Department stated that a number of comments had been received indicating confusion about the 1983 regulations. Some expressed concern that state legislators, agency officials, and members of the public had interpreted the regulation to mandate that a physician be called even when a child exhibited only mild symptoms, even though there was little or no substantial risk of harm to the child. Those comments included the concern that state officials were being urged to prosecute all families solely because they were practicing their religious beliefs by providing alternative or other remedial health care for their children.⁷³ Other comments focused on the denial of equal protection to children whose parents were not required to obtain medical treatment for them. Many of these comments called for departmental regulations which required reports to the state child protection agency of all instances of failure to provide medical care, regardless of the religious beliefs of the parents. In addition, they recommended that the de-

70. 45 C.F.R. § 1340.2(d)(2)(ii) (1983). The regulation reads in part:

Nothing in this part should be construed as requiring or prohibiting a finding of negligent treatment or maltreatment when a parent practicing his or her religious beliefs does not, for that reason alone, provide medical treatment for a child; provided, however, that if such a finding is prohibited, the prohibition shall not limit the administrative or judicial authority of the State to ensure that medical services are provided to the child when his health requires it.

71. *Id.* at § 1340.2(d)(3)(i). The regulations required that states include the failure to provide adequate medical care in their own definitions of neglect and that such failure be made a reportable condition. Thus, some commentators have noted an apparent inconsistency in the federal law. In order to receive federal funds, states must provide that the failure to provide medical treatment constitutes neglect and require that the neglect be reported. At the same time, the regulations allow a state to have an exemption for spiritual healing in its child abuse and neglect statute. *Faith Healing, supra* note 66, at 248-49.

72. 52 Fed. Reg. 3990 (1987).

73. *Id.* at 3993.

partmental regulations affirmatively require states to *abolish* "religious exception" statutes altogether.⁷⁴

The Department's response to these comments was that it is not, and was not, the Department's position that the regulations should be taken as a signal to states to prosecute or require reports on families practicing alternative or other remedial health care *except where there is harm or substantial risk of harm to the child's health or welfare*. While the requirement that states adopt religious exemptions was abolished in the final rule published January 26, 1983, the deletion of this provision reflected the Department's "approach to regulating—not a policy shift regarding state protections for parents who practice their religious beliefs."⁷⁵ Finally, the Department expressed its belief that decisions regarding medical care are best made at the state and local levels by the state child protection agency and the juvenile courts.⁷⁶

Several states have amended their statutes since the 1983 regulations.⁷⁷ For instance, the Oklahoma exemption⁷⁸ has been amended to include the proviso "that medical care shall be provided where permanent physical damage could result to such child." An Ohio court has held, in *State v. Miskimens*,⁷⁹ that the Ohio exemption is unconstitutional because it violates the establishment clause of the first amendment and the equal protection clause of the fourteenth amendment.⁸⁰ Still other courts have interpreted these exemptions in such a way as to circumvent their purpose.⁸¹ In the wake of the repeal of the federal requirement that exemptions be adopted, no state has seen fit to abolish its exemption altogether, although many

74. *Id.*

75. *Id.*

76. *Id.* at 3993-94.

77. See, e.g., CAL. WELF. & INST. CODE, § 300 (West Supp. 1990); COLO. REV. STAT. § 19-3-103(a) (1989); OKLA. STAT. ANN. tit. 21, § 852 (West Supp. 1990); S.D. CODIFIED LAWS ANN. § 26-10-1.1 (Supp. 1990).

78. OKLA. STAT. ANN. tit. 21, § 852 (West Supp. 1990).

79. 22 Ohio Misc. 2d 43, 490 N.E.2d 931 (C.P. Coshocton 1984).

80. *Id.* at 44-47, 490 N.E.2d at 934-36.

81. See *People ex rel. D.L.E.*, 645 P.2d 271, 274-75 (Colo. 1982), cited in Note, "Suffer The Little Children . . .": *Toward a Judicial Recognition of a Duty of Reasonable Care Owed Children by Religious Faith Healers*, 16 HOFSTRA L. REV. 165, 171 n.35 (1987). In that case, the Supreme Court of Colorado upheld the dependency adjudication of a child for the sole reason that the parents relied on spiritual means alone to cure a child with a life-endangering condition. The court interpreted the phrase "for that reason alone" in the child neglect statute, which did not allow a finding of neglect when the child was being treated safely by spiritual means, to mean that "other reasons" could be considered, such as deprivation of medical care to the point of life endangerment. *People ex rel. D.L.E.*, 645 P.2d at 274-75.

state legislatures are under pressure to repeal such statutes.⁸²

These statutory exemptions for spiritual healing are not deeply rooted in our nation's legal history. They are of very recent vintage, given over two-hundred years of jurisprudential history in this country. They are also clearly the result of lobbying efforts by a very powerful special interest group, the Christian Science Church.⁸³ This lobbying effort at the federal level in fact resulted in state agencies being forced to ask their state legislatures to pass statutory exemptions in order to qualify for federal funding. The widespread existence of these exemptions cannot be traced to a groundswell of feeling in individual state legislatures that the needs of parents who practice spiritual healing were an important interest that needed protection. Finally, the federal government has retracted the requirement that states enact such statutes in order to qualify for funding. The federal government now states that in cases where there is harm or substantial risk of harm to the child's health or welfare, its policy is not neutral but requires that such cases should be reported to the local child protection agency.

This Article has established three basic premises upon which a discussion of the repeal of statutory exemptions must rest. The first premise is that children whose parents practice spiritual healing to the exclusion of medical treatment are dying unnecessarily. The second is that, historically, many state courts have refused to hold that a parent's constitutional right to free exercise of religion is a defense to a criminal prosecution for failure to provide medical care to a child who subsequently dies. The third premise is that such statutory exemptions, upholding a parent's free exercise rights in the face of his or her child's need for medical treatment, are not part of a longstanding jurisprudential tradition in this country.

Given these three basic premises, this Article next analyzes the constitutional framework in which conflicts arise between the child, the parent, and the state as to whether the free exercise rights of the parents or the medical needs of the child should prevail.

IV. FREE EXERCISE VERSUS A CHILD'S RIGHT TO MEDICAL TREATMENT

A. *Are Statutory Exemptions Constitutionally Mandated?*

Why should statutory exemptions from child abuse and neglect laws exist in the first place? Parents whose religions have spiritual healing as a fundamental tenet might argue that absent such exemptions the state child abuse and neglect statutes, which require parents

82. Wong, *supra* note 28, at 14.

83. Chambers, *supra* note 28.

to provide medical care for their children, would be unconstitutional. In the absence of such exemptions, these statutes are arguably unconstitutional where they compel medical treatment in direct conflict with a parent's belief that spiritual healing, to the exclusion of medical treatment, is essential to curing the child and necessary for the parents' and the child's ultimate salvation.

Prince v. Massachusetts,⁸⁴ decided in 1944, is one of the most significant cases in the line of United States Supreme Court decisions which embrace the conflict between a parent's right to free exercise of religion and state legislation which inhibits free exercise by restricting the parents' autonomy in making child-rearing decisions. In *Prince*, the Court upheld the state statute at issue even though it clearly impinged on parental free exercise.⁸⁵ However, twenty-eight years later, in *Wisconsin v. Yoder*,⁸⁶ the Court rendered its most expansive reading of parental free exercise to date. There, the Court upheld a parent's right to practice religion in the face of a state statute which arguably inhibited such free exercise. An examination of the two cases demonstrates why statutory exemptions which protect parents who practice spiritual healing are within the ambit of the Court's analysis in *Prince* rather than in *Yoder*.

In perhaps the most powerful Supreme Court case supporting the proposition that such statutory exemptions are not constitutionally mandated, the Court in *Prince* directly confronted the issue of whether a parent/guardian's free exercise rights should yield in the face of a child's health and welfare.⁸⁷ Sarah Prince, a Jehovah's Wit-

84. 321 U.S. 158 (1944).

85. *Id.* at 170-71.

86. 406 U.S. 205 (1972).

87. 321 U.S. 158, 166-67, 170. The line of United States Supreme Court cases which establishes the point at which the state's interest in fact overrides an individual's free exercise right begins with *Reynolds v. United States*, 98 U.S. 145 (1878). In *Reynolds*, the Court directly addressed the issue of whether religious belief can serve as justification for an act which is otherwise made criminal by the state. The case involved the prosecution of George Reynolds, a practicing Mormon, for bigamy in violation of Utah's antipolygamy law. *Id.* at 146. Reynolds argued that his prosecution was barred by the free exercise clause of the first amendment. A unanimous Court rejected this position and upheld the conviction of Reynolds, stating that its acceptance of the argument "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Id.* at 167. Chief Justice Waite, writing for the Court, seemed to be especially troubled by the slippery slope problem inherent in Reynolds' position:

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

ness, was convicted of violating two Massachusetts statutes restricting the conditions under which a child could sell newspapers and magazines on a street or in a public place.⁸⁸ She had allowed her niece, nine-year-old Betty Simmons, to accompany her during an evening's preaching on the streets of Brockton. The child carried and offered pamphlets for sale.⁸⁹

The Massachusetts Supreme Judicial Court upheld the conviction of Sarah Prince.⁹⁰ She appealed to the United States Supreme Court on the grounds that the two Massachusetts statutes violated the first and fourteenth amendments of the United States Constitution. Sarah Prince argued that the statutes abridged her freedom to practice her religion as guaranteed by the first amendment and applied to the states through the fourteenth amendment.⁹¹ She buttressed this argument with a claim of parental right as guaranteed by the due process clause of the fourteenth amendment.⁹²

The Court was called upon to perform a delicate balancing of interests. On one side, there was the "earnest claim for freedom of conscience and religious practice," coupled with a parent's decision-making authority in child-rearing.⁹³ This claim of parental control embraced not only secular matters but also religious interests. Where implicated, religious convictions serve to heighten the conflict between state regulation and religious freedom.⁹⁴ The countervailing interest was society's interest in protecting the welfare of children and the state's assertion of authority to that end.⁹⁵

The *Prince* Court acknowledged that it had previously recognized the right of parents to give their children religious training and the right of children to free exercise of their religion in the face of state regulation and contrary public sentiment.⁹⁶ It reiterated its position "that the custody, care and nurture of the child reside first in the

dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

Id. at 166.

88. 321 U.S. at 159-60.

89. *Id.* at 162. The record indicated that Betty had asked to accompany her aunt, who was her legal guardian, on the trip downtown that night. *Id.*

90. *Id.* at 160.

91. *Id.* at 164.

92. *Id.*

93. *Id.* at 165.

94. *Id.*

95. *Id.*

96. *Id.* at 165-66. The Court referred to *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (state may not compel Jehovah's Witness to salute American flag in violation of religious beliefs); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (state may not mandate attendance at public schools in violation of a child's right to receive and a parent's authority to provide both religious and secular schooling); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (sustaining a child's right to receive teaching in foreign languages as against state encroachment).

parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."⁹⁷

While reciting its position that parental rights were cardinal, the Court went on to articulate the general principle that "the family itself is not beyond regulation in the public interest."⁹⁸ The state, in its role as *parens patriae*, may limit the parent's control by, for example, mandating attendance at school,⁹⁹ and developing child labor laws.¹⁰⁰ Accordingly, the Court emphasized that the state's "authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience."¹⁰¹

The Court articulated the rule that the "[s]tate's authority over children's activities is broader than over like actions of adults."¹⁰² The activity involved in *Prince*, a child selling religious literature on the street, was admittedly within the state's regulatory control even though a parent's freedom to exercise her religious beliefs and to raise her children was restricted. Legislation appropriately designed to combat the "crippling effects of child employment" was within the state's police power, even in the face of the "parent's claim to control of the child," or the parent's claim that religious scruples dictate action contrary to the child labor law.¹⁰³

Prince established the principle that, while free exercise may require that religious practices which affect adults may stand in the face of secular statutes which impinge upon those practices, the same religious practices must yield when they affect the health and welfare of children. Parental rights are not absolute when a parent's religious beliefs cause him or her to act contrary to legislative enactments which reflect societal norms regarding what is essential to a child's well-being.

In *Wisconsin v. Yoder*,¹⁰⁴ the Court pointed out that its holding in *Prince* was limited to cases where the child's physical or mental health was in danger of harm. Citing its decision in *Sherbert v. Ver-*

97. *Prince*, 321 U.S. at 166 (citing *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)).

98. *Id.* (citing *Reynolds v. United States*, 98 U.S. 145 (1878); *Davis v. Beason*, 133 U.S. 333 (1890)).

99. *Id.* (citing *State v. Bailey*, 157 Ind. 324, 61 N.E. 730 (1901)). Compare *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

100. *Prince*, 321 U.S. at 166 (citing *Sturges & Burn Mfg. Co. v. Beauchamp*, 231 U.S. 320 (1913)). Compare *Muller v. Oregon*, 208 U.S. 412 (1908).

101. *Prince*, 321 U.S. at 166.

102. *Id.* at 168.

103. *Id.* at 168-69.

104. 406 U.S. 205 (1972).

ner,¹⁰⁵ the Court in *Yoder* stated:

On the other hand, the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for 'even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions.' The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order.¹⁰⁶

The *Yoder* Court concluded that, unlike *Prince*, the *Yoder* case was not one which involved "any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare."¹⁰⁷

Respondents in *Yoder* were members of the Old Order Amish religion and the Conservative Amish Mennonite Church. Wisconsin's compulsory school-attendance law required respondents to send their children to school until the age of sixteen. The children - Frieda Yoder, age fifteen, Barbara Miller, age fifteen, and Vernon Yutzy, age fourteen - had all graduated from the eighth grade of public school. Their parents refused to send them to public school after that time and were convicted of violating Wisconsin's compulsory-attendance statute.¹⁰⁸ The convictions were reversed by the Wisconsin Supreme Court on the grounds that the state had failed to make an adequate showing that its interest in "establishing and maintaining an educational system overrides the defendants' right to the free exercise of their religion."¹⁰⁹ The state appealed the reversal to the United States Supreme Court.

Respondents argued that compulsory high school attendance conflicted with both the Amish religion and the Amish way of life. Sending their children to high school would precipitate censure by the church community and would endanger the parents' and the children's salvation.¹¹⁰ The Court accepted this argument and affirmed the reversal of the convictions. It applied a balancing test whereby the state must establish that either the statute does not violate the free exercise of religion or that the state has a sufficiently compelling interest to justify infringement of the free exercise clause.¹¹¹ Chief Justice Burger, writing for the majority, stated that:

[I]n order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state

105. 374 U.S. 398 (1963).

106. 406 U.S. at 230 (citing *Sherbert v. Verner*, 374 U.S. at 402-03).

107. *Id.*

108. *Id.* at 207-08.

109. *Id.* at 213 (citing the decision of the state supreme court, 49 Wis. 2d 430, 447, 182 N.W.2d 539, 547 (1971)).

110. *Id.* at 209.

111. *Id.* at 214.

interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.¹¹²

In deciding the case in favor of the Amish parents, the Court also rejected the state's asserted distinction between regulation of "beliefs" and regulation of "conduct."¹¹³ The Court stated that in cases of this sort, "belief and action cannot be neatly confined in logic-tight compartments."¹¹⁴ The Court also rejected the state's argument that because the statute was neutral on its face and did not discriminate among groups it could not be unconstitutional.¹¹⁵ The Court found that a facially neutral regulation may be found unconstitutional in its application where it unduly infringes upon the free exercise of religion.¹¹⁶

Thus, while *Prince* involved a law intended to protect the physical safety and well-being of children, *Yoder* involved a state statute whose intent was to ensure the education of the state's children. The cases are thus clearly distinguishable in terms of the level of the compelling state interest at stake. The physical safety of a child is of greater concern and significance than the training of the child to become a productive citizen. The Court has shown a willingness to protect parental rights to free exercise where the religious beliefs of the parents are in direct conflict with state statutes mandating compulsory education.¹¹⁷ However, in *Prince*, the Court has clearly drawn the line between a parent's right to inculcate his or her child with the parent's religious beliefs and enactment of a state statute protecting the physical safety of children. While the state must yield in the former case, the parent's free exercise must yield in the latter.¹¹⁸

112. *Id.*

113. *Id.* at 219-20.

114. *Id.* at 220.

115. *Id.*

116. *Id.* (citing *Sherbert v. Verner*, 374 U.S. 398 (1963)).

117. See generally *Wisconsin v. Yoder*, 406 U.S. 205 (1972), *supra* notes 104-16. See also *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (sustaining parents' authority to provide religious schooling).

118. The issue of training also arguably relates more closely to religious beliefs, which have traditionally been more fully protected, than to actions taken as part of religious practice. However, after the Court made the distinction between belief and practice in *Reynolds v. United States*, 98 U.S. 145, 166-67 (1878), the line between the two has become increasingly blurred. As the Court stated in *Yoder*, the two cannot be separated into "logic-tight compartments." *Yoder*, 406 U.S. at 220. In the case of Christian Science, the issues of medical treatment and the physical safety of the child strike very close to a basic tenet of Christian Science as a religion because they implicate the Church's central belief that spiritual healing is the preferred method of dealing with disease and illness.

B. The Case Against a Constitutional Requirement for Statutory Exemptions

Under what circumstances has the United States Supreme Court established a doctrinal necessity to "carve out" exemptions in statutes which infringe upon a citizen's free exercise of religion? In *Sherbert v. Verner*,¹¹⁹ the United States Supreme Court held that a Seventh-Day Adventist could be eligible for unemployment compensation even though she did not agree to work on Saturday.¹²⁰ The Court held that in the absence of a compelling state interest, the state could not require an applicant for unemployment compensation to satisfy even a legitimate condition, *e.g.*, that a recipient be available to work on Saturdays, if such a condition conflicted with the recipient's sincere religious practices.¹²¹ As Justice Harlan stated in his dissent, the decision in *Sherbert* effectively forced the state to carve out a religious exception to the offending statute.¹²²

Since the *Sherbert* case, the concept of forcing the state to carve out religious exemptions has drawn fire. Chief Justice Rehnquist has stated that when "a State has enacted a general statute, the purpose and effect of which is to advance the State's secular goals, the free exercise clause does not . . . require the State to conform that statute to the dictates of religious conscience of any group."¹²³ Justice Stevens has also expressed disapproval of such exemptions in stating that there is "virtually no room for a constitutionally required exemption on religious grounds from a valid . . . law that is entirely neutral in its general application."¹²⁴ Other leading first amendment scholars agree.¹²⁵ In fact:

Some twenty-five years after *Sherbert*, the legitimacy of [the religious exemptions] doctrine has increasingly come under attack, and the survival of the principle of free exercise exemptions is very much in doubt. Since 1972, the Court has rejected every claim for a free exercise exemption to come before

119. 374 U.S. 398 (1963).

120. *Id.* at 409-10.

121. *Id.* at 406-09.

122. *Id.* at 420 (Marean, J., dissenting). See also McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1412 (1990).

Other United States Supreme Court cases which have effectively created exemptions from statutes which infringed upon the religious beliefs of some citizens include: *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (state may not compel Jehovah's Witnesses to salute the American flag in violation of their religious beliefs); *Torcaso v. Watkins*, 367 U.S. 488, 495-96 (1961) (state may not require a religious oath as a condition for public office).

123. *Thomas v. Review Bd.*, 450 U.S. 707, 723 (1981) (Rehnquist, J., dissenting).

124. *United States v. Lee*, 455 U.S. 252, 263 (1982) (Stevens, J., concurring).

125. McConnell, *supra* note 122, at 1418 (citing P. KURLAND, *RELIGION AND THE LAW* (1962)); Kurland, *The Irrelevance Of the Constitution: The Religious Clauses Of the First Amendment And the Supreme Court*, 24 VILL. L. REV. 3 (1978); Tushnet, "Of Church and State and the Supreme Court": *Kurland Revisited*, 1989 SUP. CT. REV. 373 (1989)).

it, outside the narrow context of unemployment benefits governed strictly by *Sherbert*.¹²⁶

Most recently in *Employment Div., Dep't of Human Resources v. Smith*,¹²⁷ Justice Scalia, writing for the majority, reiterated the principle that the free exercise clause does not require that the state create an exemption for citizens whose religious beliefs may conflict with a generally applicable law.¹²⁸ The case involved the denial of unemployment compensation benefits to petitioners who used peyote, an illegal drug, for religious purposes. The United States Supreme Court addressed the question of whether Oregon's prohibition of the religious use of peyote was permissible under the free exercise clause. The Court concluded that it was and that no exception need be made to Oregon's general law prohibiting peyote use for those persons who used the drug for religious reasons.¹²⁹ Justice Scalia noted the limited scope of *Sherbert v. Verner*, and declined to use the test established therein to require an exemption from the generally applicable Oregon law.¹³⁰

Justice Scalia noted that the only decisions in which the Court had held that the first amendment prohibited the application of a neutral, generally applicable law were cases like *Pierce v. Society of Sisters* and *Wisconsin v. Yoder*, which involved the free exercise clause in conjunction with other constitutional protections such as the right of parents to direct the education of their children.¹³¹ However, the Court affirmed the soundness of *Prince v. Massachusetts*, which involved such a hybrid of constitutional interests, but which implicated the health and welfare of a child as opposed to the right of parents to educate their children in conformance with their religious beliefs.¹³²

Both federal and state courts have relied on *Prince* in refusing to carve out exceptions for parental free exercise in the face of state action which inhibits a parent's right to refuse medical treatment for a child because of religious beliefs. *Jehovah's Witnesses v. King County Hospital*¹³³ was decided in June 1967 by a United States District Court in the state of Washington. The case arose when a group

126. *Id.* at 1417.

127. 110 S.Ct. 1595 (1990).

128. *Id.* at 1606.

129. *Id.*

130. *Id.* at 1602-03.

131. *Id.* at 1601. The Court also cited *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (the Court rejected a flat tax on the solicitation and dissemination of religious ideas); see also *Follett v. McCormick*, 321 U.S. 573 (1944).

132. 110 S. Ct. at 1600.

133. 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd*, 390 U.S. 598 (1968) (per curiam).

of Jehovah's Witnesses brought suit seeking to enjoin a broad range of judicial and medical entities from administering blood transfusions to their minor children against the plaintiffs' wills and without their consent.¹³⁴ In addition to various statutory, common law, and constitutional challenges, plaintiffs argued that because their religion absolutely prohibits the ingestion or absorption of blood,¹³⁵ the defendants' administration of blood transfusions to their minor children constituted a violation of the free exercise clause of the first amendment.¹³⁶

Relying explicitly upon the Supreme Court's decision in *Prince*, the District Court rejected the plaintiffs' free exercise clause claim and, ultimately, dismissed the entire complaint.¹³⁷ The District Court specifically quoted the *Prince* case for the general proposition that: "The right to practice religion freely does not include liberty to expose . . . the child . . . to ill health or death."¹³⁸ On appeal, the Supreme Court, citing *Prince*, affirmed the District Court's decision *per curiam*.¹³⁹

In *People v. Labrenz*,¹⁴⁰ the Supreme Court of Illinois was asked to review an Illinois State Circuit Court order appointing a guardian for an eight-day old child suffering from erythroblastosis fetalis and authorizing the guardian to consent to a blood transfusion.¹⁴¹ The parents were Jehovah's Witnesses and they challenged the actions of the circuit court as violative of the free exercise clause of the first amendment.¹⁴² The Illinois Supreme Court determined that *Reynolds v. United States*¹⁴³ and *Prince* were controlling precedent, and thereby ruled that neither the circuit court's actions, nor the Illinois statute on which the circuit court relied, were in conflict with the requirements of the first amendment.¹⁴⁴

In *Walker v. Superior Court*,¹⁴⁵ the Supreme Court of California held, in an interlocutory appeal from a decision of the trial court, that despite the existence of California's statutory exemption, the state could prosecute Laurie Walker, a Christian Scientist.¹⁴⁶ The state charged Walker with involuntary manslaughter and felony

134. *Id.* at 491.

135. *Id.* at 504.

136. *Id.* at 502.

137. *Id.* at 505, 508.

138. *Id.* at 504 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944)).

139. 390 U.S. 598 (1968) (*per curiam*).

140. 411 Ill. 618, 104 N.E.2d 769, *cert. denied*, 344 U.S. 824 (1952).

141. *Id.* at 619-20, 104 N.E.2d at 771.

142. *Id.* at 625, 104 N.E.2d at 773.

143. 98 U.S. 145 (1878). *See supra* note 87 for discussion.

144. *Labrenz*, 411 Ill. at 625-26, 104 N.E.2d at 774.

145. 47 Cal. 3d 112, 763 P.2d 852, 253 Cal. Rptr. 1 (1988), *cert. denied*, 109 S. Ct. 3186 (1989).

146. *Id.* at 129, 763 P.2d at 862, 253 Cal. Rptr. at 11-12.

child-endangerment, following the death of her four-year-old daughter from acute meningitis after Walker responded to her daughter's illness with spiritual healing in lieu of scientific medical treatment.¹⁴⁷ Walker challenged the legal propriety of the prosecution on a number of grounds,¹⁴⁸ including an assertion that the statutory exemption should be extended to the manslaughter and child endangerment statutes,¹⁴⁹ and that her conduct under the circumstances was absolutely protected from criminal liability by the free exercise clause of the first amendment.¹⁵⁰

As did the federal district court in *Jehovah's Witnesses v. King County Hospital*,¹⁵¹ and the Illinois Supreme Court in *People v. Labrenz*,¹⁵² the California Supreme Court in *Walker* looked to *Prince* for guidance and rejected the defendant's free exercise claim.¹⁵³ The court stated: "As the court in *Prince* recognized, parents have *no* right to free exercise of religion at the price of a child's life, regardless of the prohibitive or compulsive nature of the governmental infringement."¹⁵⁴

147. *Id.* at 118-19, 763 P.2d at 855-56, 253 Cal. Rptr. at 4-5.

148. Laurie Walker eventually entered into a settlement with the state whereby the district attorney agreed to submit the question of guilt or innocence to a superior court judge who would make the determination based on the evidence presented at a preliminary hearing in September 1984. Under California law, this arrangement enabled Laurie Walker to appeal her conviction. As part of the settlement, Walker was found guilty of involuntary manslaughter and was given a sentence of up to six-hundred hours of community service but no jail term. *The Christian Science Monitor*, June 25, 1990, at 8.

149. *Walker*, 47 Cal. 3d at 123, 763 P.2d at 858, 253 Cal. Rptr. at 7.

150. *Id.* at 138-39, 763 P.2d at 869, 253 Cal. Rptr. at 18.

151. 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd*, 390 U.S. 589 (1968) (per curiam). For a discussion of the case, see *supra* notes 127-33 and accompanying text.

152. 411 Ill. 618, 104 N.E.2d 769, *cert. denied*, 344 U.S. 824 (1952). For a discussion of the case, see *supra* notes 134-38 and accompanying text.

153. *Walker*, 47 Cal. 3d at 139-41, 763 P.2d at 869-71, 253 Cal. Rptr. 18-20.

154. *Id.* at 139-41, 763 P.2d at 869-71, 253 Cal. Rptr. 18-20. The court went on to dismiss the argument that the omission/act distinction should be given weight in this kind of case. It noted that the church argued at length over the "purportedly pivotal distinction between the governmental compulsion of a religiously objectionable act and the governmental prohibition of a religiously motivated act." *Id.* The court stated that, even accepting that there was some force to the distinction, such a distinction had no relevance in this case because *Prince* established "that parents have *no* right to free exercise at the price of a child's life, regardless of the prohibitive or compulsive nature of the infringement." The court further cited United States Supreme Court cases which upheld laws resulting in the compulsion of religiously prohibited conduct where the state exhibited an interest no more compelling than that asserted in the *Walker* case. *Id.* (citing *Jacobson v. Mass.*, 197 U.S. 11, 39 (1905) (law compelling vaccination of children for communicable diseases upheld despite religious objections by parents); *Gillette v. United States*, 401 U.S. 437, 462 (1971) (government's right to compel conscientious objectors to make war upheld despite religious objections)).

C. *The Constitutional Defects of Statutory Exemptions*

It is well established that when a fundamental right such as the right to free exercise of religion is at stake, the Court will apply strict scrutiny to the statute which purportedly violates that right. In order for the statute to withstand scrutiny, the state must show that a compelling state interest exists in order to override the individual's fundamental constitutional right. In addition, the state must establish that the statute at issue is narrowly tailored to achieve the state's interest. Even with the distinction and narrowing of *Prince* that occurred in *Sherbert* and *Yoder*, the protection of the health and welfare of children through child abuse and neglect statutes should still rise to the level of a compelling state interest. Child abuse and neglect statutes clearly fall within the narrow groove, carved out in *Sherbert* and reiterated in *Yoder*, which contains statutes to protect children from harm to their physical or mental health.

The compelling interest that the state has in protecting children from injury or death also cannot be consistently achieved by any less restrictive means, *e.g.*, by including some version of a spiritual healing exemption which requires parents to provide medical treatment if their child is in danger of serious or permanent injury. Many parents, like the Twitchells or Laurie Walker, are not able to recognize the symptoms of a life-threatening illness like a bowel obstruction or meningitis. Apparently, neither were Christian Science practitioners or nurses in those cases. A more restrictive exemption requiring medical care only where a child is in danger of serious or permanent physical injury would not have saved Robyn Twitchell's life. Neither Robyn's parents, the Christian Science practitioner, nor the nurse who attended him recognized that Robyn was in a life-threatening situation. Only a statute which unequivocally stated that the Twitchells had an absolute duty to provide Robyn with medical care would have caused them to take him to a physician who was trained to recognize and treat the medical problem that killed Robyn. Such a clear-cut statute would have been the least restrictive means by which the state's compelling interest in preserving Robyn's life would have been achieved.

The statutory exemptions at issue are often restricted to parents who practice spiritual healing as a result of belief in a "recognized religion."¹⁵⁵ The first amendment of the United States Constitution prohibits the making of laws which result in the establishment of religion.¹⁵⁶ In *Walker v. Superior Court*,¹⁵⁷ Justice Mosk in his con-

155. See, *e.g.*, MASS. GEN. LAWS ANN. ch. 273, § 1(4) (West 1990). For text of the Massachusetts' exemption, see *supra* note 4.

156. The establishment clause of the first amendment reads: "Congress shall make no law respecting an establishment of religion . . ." U.S. CONST. amend. I.

currence noted that there are two broad categories of legislation under this constitutional proscription: laws "[a]ffording a uniform benefit to *all* religions," and laws "[t]hat discriminate *among* religions."¹⁵⁸ Mosk stated that laws affording a uniform benefit to all religions have traditionally been scrutinized for constitutional validity under the test enunciated by the Supreme Court in *Lemon v. Kurtzman*.¹⁵⁹ In order to satisfy the *Lemon* test, a law: (1) must have a secular purpose; (2) its principal effect must neither advance nor inhibit religion; and (3) it must not foster excessive entanglement with religion.¹⁶⁰

The second group of laws, those discriminating among religions, "strike closer to the heart of the establishment clause prohibition and thus require more demanding scrutiny."¹⁶¹ As the court stated in *Larson v. Valente*, "the clearest command of the establishment clause is that one religious denomination cannot be officially preferred over another."¹⁶² The governmental policy in enacting a law is presumptively suspect and subject to strict scrutiny where such a law effectuates a preference among religions.¹⁶³ Justice Mosk concluded that the spiritual healing exemption itself was constitutionally defective because it violated the establishment clause of the United States Constitution.¹⁶⁴ The state's only arguable interest in such differential treatment of religions was to "facilitate the administration of the statute" by readily "identifying indicia of sincere religious belief."¹⁶⁵ Even though subject to the strictest scrutiny, such discrimination among denominations could not be justified simply by administrative convenience.¹⁶⁶ In addition, Justice Mosk concluded that the spiritual healing exemption failed the three part test set out in *Lemon v. Kurtzman*.¹⁶⁷

Thus, not only is there no mandate under the first amendment for

157. 47 Cal. 3d 112, 763 P.2d 852, 253 Cal. Rptr. (1988), *cert. denied*, 109 S. Ct. 3186 (1989). For a discussion of the case, see *supra* notes 145-54 and accompanying text.

158. 47 Cal. 3d at 145, 763 P.2d at 873, 253 Cal. Rptr. at 22 (Mosk, J., concurring) (citing *Larson v. Valente*, 456 U.S. 228, 252 (1982)) (emphasis in original).

159. *Id.* at 145, 763 P.2d at 873-74, 253 Cal. Rptr. at 23 (citing *Lemon v. Kurtzman*, 403 U.S. 602 (1971)).

160. *Id.*

161. *Id.* at 145, 763 P.2d at 874, 253 Cal. Rptr. at 23.

162. *Id.* (quoting *Larson v. Valente*, 456 U.S. 228, 244 (1982)).

163. *Id.* (citing *Larson v. Valente*, 456 U.S. at 246).

164. *Id.* at 148, 763 P.2d at 876, 253 Cal. Rptr. at 25.

165. *Id.* at 149-50, 763 P.2d at 877, 253 Cal. Rptr. at 26.

166. *Id.*

167. *Id.* at 150, 763 P.2d at 877, 253 Cal. Rptr. at 26.

such statutory exemptions, but they are arguably constitutionally defective under the very same amendment. Because they discriminate among religions by preferring "recognized religions" over "non-recognized religions," and because they necessarily engage the courts in an evaluation of the nature of the basic tenets of religious sects, they should fail as constitutionally defective.

A similar approach was adopted in *State v. Miskimens*,¹⁶⁸ in which the court defined and analyzed the constitutional issues posed by statutory exemptions in a clear and concise manner. Larry and Roberta Miskimens were charged with violating the Ohio child endangerment law in the death of their child, Seth. They had practiced spiritual healing to the exclusion of medical treatment. Both the state and the parents in *Miskimens* attacked the constitutionality of the Ohio statutory exemption.¹⁶⁹ In an interesting twist, the Christian Science Church, in its role as *amicus curiae*, was the only party which took the position that the statutory exemption was constitutional.¹⁷⁰

The court first addressed the state's challenge to the exemption as unconstitutional because it was a law respecting an establishment of a religion or giving preference to certain religions.¹⁷¹ In concurring with the state's argument, the court cited *Walz v. Tax Commission*¹⁷² and *Lemon v. Kurtzman*¹⁷³ to support its finding that the statute as written caused an impermissible entanglement with religion.¹⁷⁴ The court stated that the statute:

hopelessly involves the state in the determination of questions which should not be the subject of governmental inquisition . . . such as what is a "recognized religious body," by whom must it be "recognized," for how long must it have been "recognized," what are its tenets, did the accused act in accordance

168. 22 Ohio Misc. 2d 43, 490 N.E.2d 931 (C.P. Coshocton 1984).

169. OHIO REV. CODE ANN. § 2919.22(A) (Baldwin 1987). That statute read in pertinent part:

No person, being the parent, guardian, custodian, person having custody or control, or person *in loco parentis* of a child under eighteen or a mentally or physically handicapped child under twenty-one years of age, shall create a substantial risk to the health or safety of such child, by violating a duty of care, protection, or support. It is not a violation of a duty of care, protection, or support under this division when the parent, guardian, custodian, or person having custody or control of a child treats the physical or mental illness or defect of such child by spiritual means through prayer alone, in accordance with the tenets of a recognized religious body.

The *Miskimens* case is unusual in that the state was challenging the constitutionality of its own statute. The court addressed the issue of whether the state had standing to challenge the statute and found that it did. *Miskimens*, 22 Ohio Misc. 2d at 44 n.2, 490 N.E.2d at 933 n.2.

170. *Id.* at 44, 490 N.E.2d at 933.

171. *Id.*

172. *Id.* at 45, 490 N.E.2d at 934-35 (citing *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)).

173. *Id.* (citing *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971)).

174. *Id.*

with those tenets, what are "spiritual means," and what is the effect of combining some prayer with some treatment or medicine.¹⁷⁵

Secondly, the *Miskimens* court rejected the position of the *amicus curiae* that the statute was a valid effort to accommodate the needs of minority religions.¹⁷⁶ The court cited *Prince* and found that "the right to hold one's own religious beliefs, and to act in conformity with those beliefs, does not and cannot include the right to endanger the life or health of others including his or her children."¹⁷⁷

Thirdly, the court adopted the state's argument that the statute violated the fourteenth amendment's equal protection guarantee. The court reasoned that, "if the real purpose of [the neglect statute] is to protect children from parental defalcation, then the prayer exception creates a group of children who will never be so protected, through no fault or choice of their own."¹⁷⁸ To bolster its equal protection argument, the court noted the protection afforded an unborn but viable fetus in *Doe v. Bolton*¹⁷⁹ and *Roe v. Wade*.¹⁸⁰ The court analogized the rights of the unborn child to the rights of children born but unable to medically care for themselves. In both situations the court determined that equal protection must be afforded.¹⁸¹

Finally, the court accepted the defendant's argument that the statute was unconstitutionally vague.¹⁸² The court reiterated the tests for vagueness — a statute is void for vagueness if it "fail[s] to provide fair notice,"¹⁸³ it "result[s] in arbitrary and unequal enforcement,"¹⁸⁴

175. *Id.* at 45, 490 N.E.2d at 934. Note that the *Miskimens* court did not engage in the more sophisticated analysis provided by Justice Mosk's concurrence in *Walker v. Superior Court*. See *supra* notes 145-54 and accompanying text for a discussion by Justice Mosk of the constitutional standards applicable to laws which afford a uniform benefit to all religions and those which discriminate among religions. Justice Mosk noted that the strict scrutiny analysis is the proper standard for laws that discriminate among religions. See *supra* notes 161-63 and accompanying text. However, the less stringent test of *Lemon v. Kurtzman* is applicable to laws affording a uniform benefit to all religions. See *supra* notes 157-60 and accompanying text. Presumably, if a law such as the Ohio exemption were unconstitutional under the *Lemon* test, it would also be unconstitutional under the tougher strict scrutiny analysis.

176. *Miskimens*, 22 Ohio Misc. 2d at 45-46, 490 N.E.2d at 935. Counsel for *amicus curiae* gave examples of such statutes that have previously been upheld in the past including, "selective service laws, tax laws, school laws, Sunday closing laws, [and] medical practice laws." *Id.* at 45, 490 N.E.2d at 935.

177. *Id.* at 45, 490 N.E.2d at 934.

178. *Id.* at 46, 490 N.E.2d at 935.

179. *Id.* at 46, 490 N.E.2d at 936 (citing *Doe v. Bolton*, 410 U.S. 179 (1973)).

180. *Id.* (citing *Roe v. Wade*, 410 U.S. 113 (1973)).

181. *Id.* at 46-47, 490 N.E.2d at 936.

182. *Id.* at 48-49, 490 N.E.2d at 937-38.

183. *Id.* at 47, 490 N.E.2d at 936 (citing *State v. Sammons*, 48 Ohio St. 2d 460, 462, 391 N.E.2d 713, 714 (1979), *appeal dismissed*, 111 U.S. 1008 (1980)).

and it "proscribe[s] conduct that is, by modern standards, normally innocent."¹⁸⁵ The court felt that the statutory exemption failed, in particular, to provide fair notice to the defendants.

The court dismissed the charges against the Miskimens because the statutory exemption was unconstitutionally vague.¹⁸⁶ In so doing, however, the court stated:

At the request of the mother, this court permitted her to absent herself from the trial during the autopsy phase of the trial. Perhaps that was a serious mistake on my part because the sad, brutal fact is that Seth Miskimens died. From what started as a common childhood illness, from what started as a simple, easily recognizable, well-known bacterial infection which responds to the most basic of modern antibiotics . . . Seth Miskimens died. First came illness, then more serious illness, then suffering, and then as valiant a struggle as his tiny heart and his weakened lungs would permit. And then after enduring for as long as he could the tremendous pain inherent in the multiple diseases that were attacking him, and then with a raging infection in his tiny chest, he weakened, he faltered, and he died. There is no more gentle way to describe it.¹⁸⁷

While the court felt compelled to dismiss the criminal charges against the Miskimens, it warned parents that, "as of June 15, 1984, a new standard of parental duty will prevail in this jurisdiction and they should exercise their beliefs with prudent awareness of that fact and its potential secular consequences."¹⁸⁸

The *Miskimens* court did not flesh out the equal protection argument as clearly as it did the first amendment and vagueness defects in the Ohio statutory exemption. However, the court might have grounded its finding that the statutory exemption violated the fourteenth amendment in the following analysis. The exemptions discriminate on their face against a particular class of children, those whose parents practice spiritual healing. Statutes which have discriminated against classes of children such as illegitimates, have, in the past, been struck down under an equal protection analysis.¹⁸⁹ It is not likely that such a class of children, those whose parents practice spiritual healing, would, under current United States Supreme Court doctrine, rise to the level of a "suspect class." If it did meet requirements for suspect classification however, strict scrutiny would apply to the statutory exemptions and would require the state to

184. *Id.*

185. *Id.*

186. *Id.* at 47-49, 490 N.E.2d at 937-38.

187. *Id.* at 49, 490 N.E.2d at 938.

188. *Id.* at 50, 490 N.E.2d at 939.

189. *See, e.g.,* *Trimble v. Gordon*, 430 U.S. 762 (1977); *Weber v. Aetna Casualty & Sur. Co.*, 406 U.S. 164 (1972) (worker's compensation statute violated equal protection clause where unacknowledged illegitimate children are denied equal recovery rights); *Glonn v. American Guarantee & Liab. Ins. Co.*, 391 U.S. 73 (1968); *Levy v. Louisiana*, 391 U.S. 68 (1968) (wrongful death statute violated equal protection clause where it prohibited recovery by parents for death of an illegitimate child). The test the Court has used in these cases is a rational relation test "with teeth." *Trimble*, 430 U.S. at 767.

have a compelling state interest in order to discriminate against such a class of children.¹⁹⁰ If this group of children is not a suspect class, then the court would apply a lower level of scrutiny to the statutory exemption and would only have to find that it was "rationally related" to the state's purpose in enacting it.¹⁹¹

Arguably, the purpose behind the states' enactment of child abuse and neglect statutes, within which the exemptions are found, is to protect children by requiring their parents to provide them with adequate food, shelter and medical care.¹⁹² Given this purpose, the exemptions are not rationally related; they in fact thwart the purpose of the abuse and neglect statutes because they result in certain children being deprived of the kind of medical treatment necessary to preserve their lives.

Those defending the exemptions might argue that in fact, the purpose which should be evaluated in this context is not the purpose of the overall statute in which the exemption resides, but rather the purpose of the exemption itself, which is to protect the parents' free exercise rights. They might claim that the statutory exemption is not only rationally related to the parent's free exercise rights but also that the state has a compelling interest in protecting the constitutional rights of those citizens who believe in spiritual healing to the exclusion of medical science. As suggested above, however, this purpose is by no means constitutionally mandated; in fact, the statutory exemptions run afoul of the very constitutional provision which they purport to protect. The statutory exemptions force the courts to evaluate the nature of religious sects and to decide which religions come within the ambit of the statutory protection. They are not supported by the compelling state interest necessary to justify a statute which discriminates among religions. Thus, they are in themselves constitutionally defective.¹⁹³

190. See *Plyler v. Doe*, 457 U.S. 202, 216-17 & n.14 (1982).

191. *Id.* at 216. The Court also explained the role of "intermediate scrutiny" for certain types of cases. *Id.* at 218 n.16.

192. *But see* *Walker v. Superior Court*, 47 Cal. 3d 112, 763 P.2d 852, 253 Cal. Rptr. 1 (1988), *cert. denied*, 109 S. Ct. 3186 (1989), for the majority's view that the statute at issue was a support statute. The court seemed forced to adopt this view in order to achieve the result of not extending the statutory exemption to the endangerment and manslaughter statutes. But in his dissent, Justice Broussard argued that clearly the primary purpose of the statute was not support, but rather was to protect the child from injury. *Id.* at 154-55, 763 P.2d at 880, 253 Cal. Rptr. at 29 (Broussard, J., concurring and dissenting).

193. See *United States v. Ballard*, 322 U.S. 78 (1944), *cert. granted*, 327 U.S. 773, *rev'd*, 329 U.S. 187 (1946) (indictment dismissed because grand jury was drawn from an

Some commentators have noted that judicial invalidation of statutes under the equal protection clause of the fourteenth amendment is more acceptable when the class which is being discriminated against is not likely to be effectively represented in the political process.¹⁹⁴ The argument that courts should not usurp the will of the people as represented by the legislature is weakened where the judiciary is affording its special protection to persons inadequately represented in the legislature.¹⁹⁵ This is certainly the case where the interests of children are at issue. The Christian Science Church has a powerful lobby at both the federal and state levels.¹⁹⁶ For children whose parents practice spiritual healing, there is no concomitant method to lobby state legislatures in opposition to such statutory exemptions.

Finally, there is merit to the argument that these statutory exemptions, when read together with the criminal law, are unconstitutionally vague and do not give parents fair notice of their potential liability.¹⁹⁷ Such exemptions are misleading in a legal community where parents have previously been convicted of manslaughter in the death of their child. In many cases, sentences are levied after parents have been informed by their church that, because of the existence of a statutory exemption in their state,¹⁹⁸ they cannot be held liable for failure to provide medical care to their children. These parents face not only the anguish of their child's death but also the pain of a crim-

improper panel). The respondents were indicted and convicted of mail fraud based on their solicitation of donations for a religious movement whose fundamental tenets, the indictment charged, the respondents "well knew" were false. *Id.* at 79-80. In deciding whether it was necessary for the government to prove that the religious representations made by the respondents were false, Justice Douglas, writing for the majority, stated that the freedom of religion guaranteed by the first amendment:

[E]mbraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. 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.

In their treatise on constitutional law, Professors Rotunda, Nowak, and Young state flatly that: "It is clear that the religion clauses forbid an inquiry by any branch of government, including the courts, into the truth or falsity of asserted religious beliefs." 3 R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE, § 21.11 at 421 (1986).

194. See *Plyler v. Doe*, 457 U.S. at 218 n.14 (citing *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 2 (1973); *Graham v. Richardson*, 403 U.S. 365, 372 (1971)).

195. See *id.*

196. See *supra* note 63 and accompanying text.

197. But see *Walker v. Superior Court*, 47 Cal. 3d 112, 143-44, 763 P.2d 852, 873, 253 Cal. Rptr. 1, 22 (1988), *cert. denied*, 109 S. Ct. 3186 (1989), where the court found that the statutes at issue were not unconstitutionally vague.

198. For an example of such an assertion see *supra* note 3.

inal trial, where their motives and their character are subject to the daily scrutiny of the media and the public. Repealing the statutory exemptions will provide parents with a much clearer direction regarding the nature of the legal duties owed to their children. Such clarity is a laudable goal in a legal system which aspires to deter, as well as punish, such behavior.

The court in *Miskimens* approached the question of the constitutionality of the Ohio statutory exemption in a straightforward way, mindful not only of the fundamental principles involved but also mindful that a child had died. The fact that it felt compelled to dismiss the charges against these parents makes it clear that statutory exemptions operate to thwart justice and endanger children. The court in *Walker*¹⁹⁹ felt compelled, in the face of the California exemption, to enter into a tortured analysis as to the purpose of the statutes at issue in order to avoid dismissing criminal charges against Laurie Walker for failure to provide her daughter with medical care.²⁰⁰ The legal community should support a national effort to repeal these exemptions which force courts to either dismiss such charges or to engage in a convoluted analysis in order to allow prosecutions to go forward.²⁰¹

V. CONCLUSION

A national effort to repeal statutory exemptions for parents who practice spiritual healing to the exclusion of medical treatment for

199. For a discussion of the case, see *supra* notes 145-54.

200. See *When Rights Clash*, *supra* note 31, at 615, where the author raises the question of whether the *Walker* opinion is "founded on sophistry and semantics."

201. Another argument in favor of outright repeal of these exemptions follows from the fact that all the parents who have recently been convicted of their children's deaths have not been given jail terms but rather have been given probation and required to perform community service. See *Wong*, *supra* note 29. Judges appear reluctant to sentence otherwise caring and loving parents to jail. In a society where we rely on general respect for the criminal justice system in order to maintain law and order, such convictions and sentences tend to reduce rather than enhance respect for the legal system.

For example, Michael Czaja was recently convicted of welfare fraud and sentenced to a five-year jail term by Justice Sandra Hamlin, the same judge who sentenced the Twitchells and gave them probation as opposed to a jail term. Mr. Czaja and his wife lied to welfare authorities and told them that he was not living with his family in their home. If he had been living there, the family would have been ineligible for welfare benefits. Mr. Czaja argued that he had to both work and collect welfare in order to have enough money to provide for his four children. After his sentencing, Mr. Czaja said: "How could [Judge Hamlin] let the Twitchells go, after they killed their kid, and then do this to me when all I wanted to do is try to feed my kids?" *Boston Globe*, August 27, 1990, at 14, col. 4.

their children could proceed on three fronts; the judicial, the legislative, and the regulatory. Such reform should begin immediately at both the state and federal levels. However, should the issue be timely presented the United States Supreme Court could most swiftly and effectively eliminate these exemptions by adopting the analysis presented in both the *Miskimens* decision and the concurring opinion of Justice Mosk in *Walker*. The Court should adopt the approach in *Miskimens* and clearly state that child abuse and neglect statutes serve a legitimate state interest, that exemptions thereto for spiritual healing are not mandated by the free exercise clause of the first amendment and may moreover violate the establishment clause of the first amendment and the equal protection clause of the fourteenth amendment.

In addition to federal and state judiciaries adopting the *Miskimens* analysis and declaring these statutes unconstitutional, state legislatures should repeal the exemptions. These statutory exemptions are not constitutionally mandated and it is within the purview of the state legislatures to abolish them. There is already pressure on many state legislatures to repeal these exemptions,²⁰² and the deaths of children like Robyn Twitchell should provide the impetus for this statutory reform movement to succeed. States should also move to strengthen mandatory child abuse and neglect reporting laws so that these cases are brought to the attention of the courts before it is too late to order life-saving medical treatment.

Finally, because it bears some responsibility for the states' enactment of statutory exemptions, the Department of Health and Human Services should regulate them out of existence. Since the Department required states to adopt these exemptions in order to be eligible for federal funding, it should now prohibit them as being injurious to some children's very survival. Ideally, the Department should condition the receipt of funds under the Federal Child Abuse Prevention and Treatment Act on abolition of these exemptions.²⁰³

There is little doubt that Ginger and David Twitchell loved their son Robyn. There is also little doubt that Robyn Twitchell would probably be alive today if Massachusetts did not have a statutory exemption which led the Twitchells to believe they were immune from prosecution for failure to provide medical treatment to their son. And in the end, that is the strongest argument for abolition.

202. See *supra* note 69 and accompanying text.

203. See *supra* text accompanying note 66.