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SPIRITUAL TREATMENT EXEMPTIONS TO CHILD
MEDICAL NEGLECT LAWS: WHAT WE
OUTSIDERS SHOULD THINK

*James G. Dwyer**

There are strongly opposing views as to whether parents should be exempted from the normal legal responsibility to secure medical treatment for sick or injured children when the parents have religious objections to medical care. There are some who advocate an absolute exemption,¹ even in life-threatening situations, and some who argue that no exemption whatsoever should exist.² Still others take an inter-

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1 See John Dwight Ingram, *State Interference with Religiously Motivated Decisions on Medical Treatment*, 93 DICK. L. REV. 41, 41 (1988) (arguing that “[t]he constitutional protections of religious freedom prohibit the state from interfering with religiously motivated decisions regarding the rendering of medical care”).

2 See Henry J. Abraham, *Abraham, Isaac and the State: Faith-Healing and Legal Intervention*, 27 U. RICH. L. REV. 951, 977 (1993) (arguing for repeal of spiritual treatment exemptions because this “would send the unambiguous message that, in the context of a medical emergency, prayer and faith-healing efforts, however laudable, caring and arguably efficacious they may be, are acceptable to the state only if a child’s life or safety is also protected by the provision of any needed medical treatment”); Elizabeth A. Lingle, *Treating Children by Faith: Colliding Constitutional Issues*, 17 J. LEGAL MED. 301, 330 (1996) (opposing exemptions); Ann MacLean Massie, *The Religion Clauses and Parental Health Care Decisionmaking for Children: Suggestions for a New Approach*, 21 HASTINGS CONST. L.Q. 725, 739 (1994) (arguing that spiritual treatment exemptions violate the Establishment Clause); Paula A. Monopoli, *Allocating the Costs of Parental Free Exercise: Striking a New Balance Between Sincere Religious Belief and a Child’s Right to Medical Treatment*, 18 PEPP. L. REV. 319, 322 (1991) (arguing that lifting spiritual treatment exemptions would not abridge parents’ rights to free exercise of religion); Rita Swan, Ph.D., *On Statutes Depriving a Class of Children of Rights to Medical Care: Can This Discrimination be Litigated?*, 2 QUINNIPIAC HEALTH L.J. 73, 92–94 (1998) (positing that spiritual treatment exemptions are unconstitutional); Jennifer Trahan, *Constitutional Law: Parental Denial of a Child’s Medical Treatment for Religious Reasons*, 1989 ANN. SURV. AM. L. 307, 340 (1990) (proposing medical neglect statute that expressly precludes exemption on the grounds of religious belief); see also American Academy of Pediatrics, *Religious Objections to Medical Care*, 99 PEDIATRICS 279, 279 (1997) (stating AAP opposition to spiritual treatment exemptions); Andrew Skolnick, *Religious Exemptions to Child Neglect Laws Still Being Passed Despite Convictions of Parents*, 264 JAMA 1226, 1233 (1990)

mediate position—for example, that there should be an exemption in all but life-threatening situations.³ The division of opinion is not simply between the members of religious groups who want such an exemption for themselves and the rest of the world. There is division even among us “outsiders,” we who are not members of a religious group with beliefs opposed to medical care and who therefore have no personal stake in the issue. I will discuss in this Essay only what position outsiders should take on the issue. I assume nearly all members of the legal academic community are outsiders, and I believe we who are outsiders come at the issue from a perspective that is to a large extent similar as amongst ourselves, yet fundamentally different from that of the parents whose legal obligations are in question. In addition, the relevant legal question—whether the State should decide to confer a particular legal power on certain people—is necessarily one that must be addressed from the State’s perspective, and the State’s perspective is also an outsider perspective, since the State does not hold the religious beliefs of those who request that legal power.

I. WHY WE OUTSIDERS DISAGREE AMONGST OURSELVES

Outsiders on both sides of the issue are motivated primarily, I think, by compassion for the insiders in these religious groups—the parents, the children, perhaps even the group as a whole, which is striving to preserve its way of life. Why is it, then, if outsiders have no personal stake in the issue, but rather take an interest out of concern

(stating opposition of American Medical Association to spiritual treatment exemptions).

³ See Janna C. Merrick, Ph.D., *Christian Science Healing of Minor Children: Spiritual Exemption Statutes, First Amendment Rights, and Fair Notice*, 10 ISSUES IN L. & MED. 321, 341–42 (1994) (arguing for abrogation of spiritual treatment exemptions but cautioning that courts should order treatment over the objection of parents “only in cases of very serious illness where reliable and proven therapies can effectively manage the disease”); Barry Nobel, *Religious Healing in the Courts: The Liberties and Liabilities of Patients, Parents and Healers*, 16 U. PUGET SOUND L. REV. 599, 603 (1993) (taking the position that “[c]ourts should refrain from interfering with the parent-child relationship absent life-threatening circumstances accompanied by the probability—rather than the possibility—of medical cure”); LaDonna DiCamillo, Comment, *Caught Between the Clauses and the Branches: When Parents Deny Their Child Nonemergency Medical Treatment for Religious Reasons*, 19 J. JUV. L. 123, 157 (1998) (“The state’s interest is sufficiently compelling only when the risk associated with foregoing medical treatment is at a point when the child’s life is immediately endangered, and the proposed treatment offers probable cure with minimal risk.”); Jennifer L. Hartzell, Comment, *Mother May I . . . Live? Parental Refusal of Life-Sustaining Medical Treatment for Children Based on Religious Objections*, 66 TENN. L. REV. 499, 528 (1999) (proposing that spiritual treatment exemptions be permitted except in cases where “the child’s life may be threatened” or “the child’s condition may result in a permanent disability”).

for the experience of people inside these minority religious communities, that there is such a sharp division of opinion? Is it simply because we disagree about empirical issues so that differing assumptions about relevant facts lead us to translate our common concern into disparate legal and policy recommendations? I do not think so. I do not think we outsiders disagree significantly amongst ourselves regarding the facts.

There is, for instance, no real dispute among us outsiders about the efficacy of modern medicine. We all believe that it is quite effective for certain things, though less so for others, that its efficacy is simply uncertain for some conditions, and that certain kinds of evidence reliably inform conclusions about efficacy. And when *our* children become seriously ill or injured, we take them to a doctor. We do not do that because it is some sort of cultural ritual we just happen to have been brought up to perform, without reflection or without subjecting the practice to rigorous empirical scrutiny. We do it because we have good reason to believe that for many physical problems it works better than any available alternative. We have no doubt, for example, that if a child has diabetes, the most effective treatment available is administration of insulin.

There is, additionally, no disagreement among us outsiders about the usefulness of positive thinking, about the ability of the mind to support physical responses to disease and injury, and about the possibility of using prayer and religious teaching as one form of such positive thinking.⁴ But there is also no disagreement among us that positive thinking alone is not sufficiently efficacious for many physical problems, particularly with children too young for their mental processes to work in this way. We outsiders all agree that medical care *coupled with* positive thinking, where that is possible, is the most effective approach, generally much more effective than positive thinking alone. Thus, we all try to comfort our children when they are seriously ill and assure them that they will soon be better, but we also give them medicine, if there is medicine with demonstrated ability to cure the disease or ameliorate suffering without causing negative side effects that outweigh the benefits.

Finally, there is no disagreement among us outsiders about the potential psychological consequences of one legal rule or another on

⁴ I am not suggesting here that people who pray for healing believe they are simply engaging in positive thinking. Rather, I assume that the State, from its secular perspective, may view prayer as efficacious in healing because of the positive psychological states it entails, but may not assume prayer is efficacious because God responds to it. The latter assumption would involve the State deciding religious questions.

the adults and children in these religious groups. Parents may experience great anxiety, fear, and anger if forced to secure medical treatment for their children in violation of their sense of religious obligation and contrary to what they believe to be best for their children. Other adult members of the religious community may also be affected by compelled medical treatment, perhaps by experiencing a sense of threat to, or violation of, their chosen way of life by the outside world. And children, too, might experience some anxiety, fear, and/or anger as a result of the State preventing their parents from fulfilling religious commands.

Importantly, though, adults and children in these religious communities may also experience great anxiety and fear if the State *does not* compel medical care and if the child's condition does not improve. I doubt that members of the Church of Christ Scientist watch their children suffer and die with equanimity, and the children themselves might be terrified, in addition to suffering physical pain. Sometimes people are relieved to be compelled to do things their religion precludes them from doing voluntarily. And sometimes religious groups adapt doctrinally to the legal environment in which they live by excusing adherents from moral responsibility for doing that which the State commands.⁵ The psychological effects of compelled medical care are therefore complex, cutting in both directions.

There may be other categories of relevant facts, but those are the major ones. If, then, there is no real disagreement among us outsiders as to factual issues, why is there such disagreement among us as to what the law should be? One explanation is that we sometimes fail to give proper consideration to all the interests at stake. We focus on just a subset of all the affected interests and ignore or under-value others. Some might think only about the affront to parents and to religious groups and the anxiety that members of a family or community might experience as a result of compelled medical care. They may give insufficient attention or weight to the physical and mental suffering of the children who fail to receive medical care for their illness or injury. That is clearly inappropriate. Others might think

⁵ See, e.g., *In re* President of Georgetown Coll., Inc., 331 F.2d 1000, 1007 (D.C. Cir. 1964) (relating view of adult Jehovah's Witness patient that if a court ordered a blood transfusion, "it would not then be her responsibility"); *United States v. George*, 239 F. Supp. 752, 753 (D. Conn. 1965) (relating statement by an adult patient that his "conscience was clear" because the responsibility for receiving medical care would be "upon the Court's conscience"); *In re* E.G., 515 N.E.2d 286, 289 (Ill. App. Ct. 1987), *aff'd in part and rev'd in part*, 549 N.E.2d 322 (Ill. 1989) (noting an assertion by the State that the patient's church would view the transfusion as "the court's transgression, not her own, and would support rather than punish her").

only about the suffering and danger that the children might incur as a result of not receiving medical care, having little sympathy for the parents and other members of the religious group and disregarding the potential psychological consequences for children of compelling medical care. This is also deficient, at least in terms of personal moral outlook, though I will offer reasons below for thinking that it is appropriate for the State to disregard the adults' interests in its decision making process.

Perhaps the greatest cause of the disagreement among outsiders, however, is confusion about the significance of the insiders' perspective.⁶ Supporters of exemptions point out that the insiders' perspective differs from ours in at least two ways. First, insiders perceive certain spiritual interests, of their own and of their children, that we outsiders do not perceive because we do not share their religious beliefs.⁷ Those spiritual interests count against medical care for their children, and insiders assign great weight to those spiritual interests. Second, some groups disagree with us outsiders on the relative efficacy of medical treatment in general. They think prayer is more effective in curing illness or healing injury and may even believe medical treatment to be counter-productive, because seeking it makes them less able to secure, or less worthy of, divine healing assistance.⁸ Many outsiders who support religious exemptions believe insider parents are entitled to act on the basis of their beliefs or that the State ought to defer to the insiders' perspective.⁹

Disagreement among us outsiders thus stems principally from two sources—a disparity as to whose interests we emphasize and a disparity as to what role we assign to the insiders' perspective. The remainder of this Essay will support the following two positions: first, the interests

6 For description of the beliefs of particular religious groups that oppose medical care and the effects these beliefs have had on children, see generally Seth M. Asser, M.D. & Rita Swan, Ph.D., *Child Fatalities from Religion-Motivated Medical Neglect*, 101 PEDIATRICS 625 (1998); Rita Swan, *Children, Medicine, Religion, and the Law*, 44 ADVANCES IN PEDIATRICS 491 (1997).

7 See, e.g., Ingram, *supra* note 1, at 62; DiCamillo, *supra* note 3, at 143–44; Anne D. Lederman, Note, *Understanding Faith: When Religious Parents Decline Conventional Medical Treatment for Their Children*, 45 CASE W. RES. L. REV. 891, 918 (1995).

8 See, e.g., Lederman, *supra* note 7, at 892–93 (1995); Deborah Sussman Steckler, Note, *A Trend Toward Declining Rigor in Applying Free Exercise Principles: The Example of State Courts' Consideration of Christian Science Treatment for Children*, 36 N.Y.L. SCH. L. REV. 487, 488, 502 (1991) (describing beliefs of Christian Scientists).

9 See, e.g., Ingram, *supra* note 1, at 65 (“The first amendment prohibits the state from prescribing that physical life on earth is more important than life hereafter. Every person has the right to make that critical decision. Similarly, parents have the right to make that decision for their children . . .”); see also *infra* Parts II.B.2, II.C.

of the children involved should be decisive; second, the State must not defer to the insiders' perspective as to what the children's interests are, but rather must decide what the legal rule will be on the basis of the State's own judgment regarding the children's interests. These two positions support a conclusion that if it is ever permissible for parents to fail, for religious reasons, to secure medical care for a sick or injured child, it is only in cases of illness or injury that are so minor that failure to provide medical treatment ordinarily would not trigger state action anyway, even in the absence of a spiritual treatment exemption. Because spiritual treatment exemptions would operate in practice only in cases where, I conclude, the State should not permit parents to deny children medical care, spiritual treatment exemptions to medical neglect laws are unwarranted.

I will preface my brief arguments for these two positions by emphasizing that what is at issue in this debate is state decision-making. Supporters of spiritual treatment exemptions, and of religious exemptions to parental legal responsibilities in other contexts, tend to overlook the facts that the State makes legal rules (laws do not fall out of the sky) and that asking for an exemption from the usual parental legal responsibilities therefore means asking the State to make a certain decision. Consequently, they also overlook the fact that any argument for an exemption must appeal to considerations the State may properly take into account in its decision making. This means, most importantly, that supporters of exemptions cannot appeal to the truth of certain religious beliefs, since the State may not assume that any particular religious beliefs are true.¹⁰ It also means, for the same reason, that supporters of exemptions cannot expect the State itself to *adopt* the insiders' perspective, insofar as it is based on religious beliefs.

10 See *County of Allegheny v. ACLU*, 492 U.S. 573, 593–94 (1989) (“The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief.”); Kathleen M. Sullivan, *Parades, Public Squares and Voucher Payments: Problems of Government Neutrality*, 28 CONN. L. REV. 243, 258 (1996) (“Government itself may espouse any viewpoint a democratic majority wishes *except* a religious viewpoint.”). In *McGowan v. Maryland*, Justice Frankfurter stated:

The Establishment Clause withdrew from the sphere of legitimate legislative concern and competence a specific, but comprehensive, area of human conduct: man's belief or disbelief in the verity of some transcendental idea and man's expression in action of that belief or disbelief. Congress may not make these matters, as such, the subject of legislation, nor, now, may any legislature in this country.

McGowan v. Maryland, 366 U.S. 420, 465–66 (1961) (Frankfurter, J., concurring).

II. HOW THE STATE SHOULD GO ABOUT DECIDING

The first question that must be answered, then, is how the State should go about deciding whether to grant some parents an exemption from the normal legal responsibility to secure medical care for a sick or injured child. The two leading theories of state decision making favor a utilitarian approach or a rights-based approach. Below is a brief sketch of how those two approaches would apply to the matter of spiritual treatment exemptions.

A. *A Utilitarian Approach*

Under this approach, the State would take into account the interests of every person who might be affected by its decision, assigning relative weights to the various interests and balancing them to reach its decision. In favor of exemptions, from the State's perspective, would be principally the interest of adult members of the religious group in having their preferences for the children's lives satisfied and in avoiding all the bad feelings mentioned above—*anxiety, fear, anger, offense, and sense of threat to their way of life.* Also counting in favor of the exemptions would be the children's interest in avoiding whatever bad feelings compelled medical care might produce in them. This interest of children would vary considerably, depending on the children's ages and on the extent to which their parents attempted to insulate them from such effects, as one might expect loving parents to do. Counting against exemptions would be the anxiety and fear the adults might experience as a result of the children's continued suffering and, most importantly, the interests of the children in receiving medical care—*interests in avoiding not merely anxiety and fear, but also pain and other forms of physical discomfort, loss or impairment of functioning body parts, and heightened risk of death.*

Balancing those competing interests would most likely lead the State to establish guidelines requiring parents to secure medical care for some illnesses and injuries but not for others. For very minor ailments—a cold, perhaps, or a small cut—the State might rationally conclude that compelling violation of religious commands would cause more harm than it prevented, when everyone's interests are taken into account. At the other extreme, where life-threatening, but treatable, problems arise—*meningitis or a serious accident*—the state would rationally conclude that it would do more good than harm,

when everyone's interests are taken into account, to require parents to secure medical care.¹¹

11 I speak here of requiring parents to secure medical care, but if there were some alternative way to ensure a child receives medical care that is just as effective and that avoids some of the religious conflict for the parent, then I see no reason not to take that approach—for example, if there might be some way to ensure the State is notified whenever a child is sick or injured, so that it could assume a temporary and limited guardianship for purposes of authorizing treatment. What is important is that the children receive the care, not how exactly that is made to happen. Several commentators have proposed a reporting requirement as an alternative to civil and criminal neglect proceedings. See, e.g., Abraham, *supra* note 2, at 977; Stephen L. Carter, *The Free Exercise Thereof*, 38 WM. & MARY L. REV. 1627, 1653–54 (1997); Jennifer L. Rosato, *Putting Square Pegs in a Round Hole: Procedural Due Process and the Effect of Faith Healing Exemptions on the Prosecution of Faith Healing Parents*, 29 U.S.F. L. REV. 43, 117 (1994); Daniel J. Kearney, Note, *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, 885 (1986); Eric W. Treene, Note, *Prayer-Treatment Exemptions to Child Abuse and Neglect Statutes, Manslaughter Prosecutions, and Due Process of Law*, 30 HARV. J. ON LEGIS. 135, 171–76 (1993). However, imposing a reporting duty on parents and “faith healers” has proven ineffective as a means of accomplishing this purpose, because members of these religious groups flout reporting requirements just as readily as they flout the basic duty to secure medical care for a child themselves. See, e.g., *Walker v. Superior Court*, 763 P.2d 852, 871 (Cal. 1988) (“Under ordinary circumstances, . . . the case of a true believer in faith healing will not even come to the attention of the authorities, unless and until someone dies.”); Christine A. Clark, *Religious Accommodation and Criminal Liability*, 17 FLA. ST. U. L. REV. 559, 566, 576, 580 (1990) (describing a case in Florida in which parents and Christian Scientist practitioners allowed a child to die of a treatable medical condition without notifying state officials of her illness despite the existence of a state statute requiring Christian Science practitioners to notify a state agency when a sick child is being treated only with prayer); Kearney, *supra*, at 885–86 (same); Lederman, *supra* note 7, at 923 (explaining why threat of legal punishment has little deterrent effect on Christian Science parents). For some religious groups, such as the Christian Science church, it is just as wrong to acknowledge the existence of a disease as it is to get medical treatment for it. “It is no more Christianly scientific to see disease than it is to experience it.” MARY BAKER EDDY, *SCIENCE AND HEALTH WITH KEY TO THE SCRIPTURES* 421 (First Church of Christ, Scientist 1994) (1875).

If it becomes necessary to startle mortal mind to break its dream of suffering, vehemently tell your patient that he must awake. Turn his gaze from the false evidence of the senses to the harmonious facts of Soul and immortal being. Tell him that he suffers only as the insane suffer, from false beliefs.

....

... There is *no disease*.

Id. at 420–21.

Moreover, even if parents do report that their child is sick, their religious views may lead them to grossly mischaracterize the child's condition, with the result that state child protective workers are led to believe the illness is much less serious than it really is. Currently, statutory child neglect reporting requirements in many states also contain a spiritual treatment exemption making it more likely that the State will not

More refined empirical analysis would be necessary to figure out where exactly the line should be drawn between the very minor and the very serious cases.¹² I am not aware that anyone has done such an empirical analysis, least of all the legislatures that enacted spiritual treatment exemptions. I *suspect* the line would not be far above the most minor cases, because it seems likely that in any case where there is a substantial risk to the child of either substantial short-term suffering or significant long-term impairment, the child's interests in favor of receiving medical attention outweigh all other interests, which are for the most part—from the State's perspective—simply unpleasant psychological states. Additionally, the very minor cases are ones that medical neglect laws would not cover anyway—that is, ones in which

become aware of a child's illness, if at all, until after the child is dead. *See* Rosato, *supra*, at 52 n.44; Treene, *supra*, at 143. Eliminating these exemptions would be a step in the right direction, but would not be sufficient to protect the children.

It is not clear how the State can effectively compel parents to secure medical care for their children; if they are determined to follow their religious beliefs regardless of what the law is. Two possible means of doing so are (1) to eliminate all existing exemptions in civil neglect laws, so that no parent is led to believe the State tolerates this form of neglect to any degree, and (2) to impose stiff sentences under criminal neglect and involuntary manslaughter laws for parents who flout their legal responsibilities, something courts have been—as insider parents well know—reluctant to do. *See* Kearney, *supra*, at 866 (“[J]udicial recognition of the harshness of imposing criminal liability has resulted in the imposition of moderate sentences . . .”); Edward Egan Smith, Note, *The Criminalization of Belief: When Free Exercise Isn't*, 42 *HASTINGS L.J.* 1491, 1511 (1991) (noting that a “number of convictions of faith healing parents . . . have been overturned on technical grounds unrelated to the underlying charge” and suggesting judicial sympathy for these parents); Treene, *supra*, at 171–76 (discussing the conflicting messages parents receive from civil neglect laws that contain a spiritual treatment exemption and criminal neglect and involuntary manslaughter laws that do not); *id.* at 197–98 (noting the lenient sentence in a criminal conviction of parents who caused a child to die by neglecting to secure medical care).

12 In theory, the legal obligation might best be stated in terms of what response from parents is required when certain symptoms are present, rather than (or perhaps in addition to) stating it in terms of what parents must do when a child has a particular disease or when a substantial risk is present, since the latter would require parents to make medical judgments they likely are not prepared to make. In practice, though, specifying which symptoms should trigger action might be quite difficult. The practical difficulty of precisely identifying the symptoms that signal a serious or potentially serious problem provides an additional reason for excusing failure to secure medical care only in the most minor cases. *See* Clark, *supra* note 11, at 585–86, 589 (describing cases in which illnesses that appeared on the surface to be less serious turned out to be life-threatening); *cf. id.* at 589 (“Families who rely on spiritual healing need a more certain standard to guide their daily decisions.”). Clark also notes that the religious beliefs of Christian Scientist parents would make them less able to identify signs of serious illness, because those beliefs include the view that disease is an illusion. *See id.* at 586.

failure to secure medical care ordinarily would not trigger action by a state agency even when the failure is not motivated by religious objection to medical care, simply because any harm to the children is slight. As such, a religious exemption would serve no legitimate purpose. That said, if a balancing of interests is a proper approach to drawing the line, it really ought to be done by people more suited to the task than are legal academics.

That is a quick take on a utilitarian approach. I know of no one who takes such an approach to this issue, at least not self-consciously and rigorously. As noted above, outsiders who speak to the issue tend to focus just on a subset of all interests. This might be reasoning with blinders on, or it might be that they favor more of a rights-based approach, which shortcuts the decision making process somewhat by honing in on the people who have such great interests at stake that they might be said to have a right to protection of their interests. This right trumps consideration of the non-right protected interests of others. A rights-based approach is certainly a defensible one, and it is the approach typically taken to medical decision making by or for adults, so let us see what the State should conclude if it applied that approach.

B. A Rights-Based Approach

Who is the *best* candidate for being a right-holder in this context? The answer to that question is so obvious that it is bewildering how little attention is paid to these persons by supporters of exemptions. The sick or injured child is, of course, the best candidate for being a right-holder. It is the child's body and the child's life that are the subject of discussion. Imagine having legal decisions and scholarly arguments regarding the medical treatment of elderly, incompetent persons turn on the rights of family members, while largely ignoring the rights of the elderly person. We would regard that as not merely improper, but also morally offensive. Yet that is what routinely happens with children in this context (and many others).

I am not aware that any supporter of exemptions has ever explicitly denied that children have the most important interests and rights at stake in this matter, and I cannot imagine anyone doing so. Instead, many simply ignore the children, treating the conflict as one involving only parents, religious communities, and the State;¹³ perhaps suspecting that it is not possible to articulate a plausible argument that children have a right to spiritual treatment exemptions.

¹³ See, e.g., Ingram, *supra* note 1, at 65; Smith, *supra* note 11, at 1510; Steckler, *supra* note 8, at 514–15.

Ignoring the welfare and rights of the children is clearly inappropriate. Other supporters of exemptions have a different strategy for dealing with children's rights, which is to argue that the State should defer to parents' views about what the content of their children's rights is, just as they argue that the State must defer to parents' views of what their children's interests are. I address that deference argument in Section C.

1. Giving Content to Children's Rights

To say that children are the best candidates for being right-holders is not to demonstrate the correctness of any ultimate conclusion; it is necessary first to give content to the rights of the children. So what content should our legal system give to children's rights in this context?¹⁴ A comparison with the rights of adults who have never been competent is instructive. Never-competent adults, many of whom are still in the care of their parents, are entitled to have decisions about their medical care based on their interests and not on the interests of their caretakers.¹⁵ Requests by parents of mentally retarded women to have them sterilized are a case in point. For such a procedure to be undertaken, guardians must show that the benefits of the procedure for the woman outweigh its costs for her.¹⁶ The guardian's own inter-

14 I pose this primarily as a moral, rather than doctrinal, legal question, and for the purpose of critiquing existing doctrine, which gives little recognition to the rights of children in religious child-rearing contexts. See James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371, 1379-405 (1994). The argument here that analogizes children's situations to that of incompetent adults could, however, be couched in terms of legal doctrine interpreting the Equal Protection Clause of the Fourteenth Amendment. One could argue that children are similarly situated to never-competent adults and so should receive the same legal protections for their physical well-being. Further below, I advance a different sort of equal protection argument, one that argues against discrimination among groups of children based on the religious beliefs of their parents. See *infra* notes 18-19 and accompanying text.

15 See John E. Donaldson, *Reform of Adult Guardianship Law*, 32 U. RICH. L. REV. 1273, 1291-93 (1998) (describing the law of guardianship in Virginia); Hal Fliegelman & Debora C. Fliegelman, *Giving Guardians the Power To Do Medicaid Planning*, 32 WAKE FOREST L. REV. 341, 349-51 (1997).

16 See, e.g., *In re C.D.M.*, 627 P.2d 607, 612-13 (Alaska 1981); *In re Debra B.*, 495 A.2d 781, 782-83 (Me. 1985); *In re Wirsing*, 573 N.W.2d 51, 55 (Mich. 1998); *In re Grady*, 426 A.2d 467, 474-75 (N.J. 1981); *Estate of C.W.*, 640 A.2d 427, 428 (Pa. Super. Ct. 1994); see also Elizabeth S. Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, 1986 DUKE L.J. 806, 817-23 (explaining the current sterilization laws in different states, and finding that a court generally may authorize sterilization for an incompetent woman only if it finds clear and convincing evidence that sterilization would be in the woman's best interests).

ests do not factor into the determination.¹⁷ There is no good reason why children should not have the same right, a right to have decisions about their medical care based on *their* interests rather than on the interests of their caretakers—that is, their parents.

In practice, this would mean that the children in these religious groups have a right to medical care whenever the benefits for them of receiving care outweigh whatever costs such care might entail *for them*, all things considered. In other words, in establishing guidelines for parental responsibility to secure medical care, the State should balance only the children's interests. From the State's perspective, the costs of compelled medical care would include any effects on children's psychological well being from seeing their parents' wishes thwarted or from believing that such treatment will violate God's will and perhaps even harm them, if they are old enough to have such thoughts. The costs would not include a threat to the children's chances for salvation or damage to their relationship with God, since the State may not make judgments about those things. Guidelines based on a balancing of the costs the State can recognize against the psychological and physical benefits of medical care might still exclude some truly minor cases from compulsory medical care, but presumably fewer than when the interests of adults were in the mix. And as noted above, truly minor illnesses or injuries would not be covered by medical neglect laws anyway, so there would be no warrant for including a religious exemption in neglect statutes. Again, it does not appear that anyone has done such a balancing of costs and benefits in a rigorous way, and legal academics—including myself—would not appear particularly well-equipped to do it. What I aim to establish here is the moral position that children of the members of these religious groups possess a right to have decisions about their health care made solely on the basis of their interests.

Importantly, the right of incompetent adults to have decisions based on what is best for them is not affected by the religious beliefs

17 See, e.g., *In re Debra B.*, 495 A.2d at 782 (noting that the purpose of state legislation concerning sterilization of incompetent adults is "to ensure that no person who is incapable of informed consent may be sterilized unless the operation is necessary to that person's best interests"); *In re Terwilliger*, 450 A.2d 1376, 1382 (Pa. Super. Ct. 1982) ("[I]n making the decision of whether to authorize sterilization, a court should consider only the best interest of the incompetent person, not the interests or convenience of the individual's parents, the guardian or of society . . ."); see also Scott, *supra* note 16, at 821–22 (stating that current law excludes consideration of parents' interests from the sterilization decision).

of their caretakers.¹⁸ In fact, it would be unconstitutional for a State to diminish or eliminate an incompetent adult's rights because of the religious beliefs of her caretaker. The State would be affording certain incompetent adults lesser protection of the laws than it gives to others, for reasons not tied to *their* well being, and would therefore violate the Equal Protection Clause of the Fourteenth Amendment. There is no good reason why children of Christian Scientists should not have a similar equal protection right to the same legal protection of their welfare that other children receive. If spiritual treatment exemptions compromise their welfare, they violate the Equal Protection Clause.¹⁹ An Ohio court struck down the religious exemption in that state's child medical neglect laws for precisely this reason. In doing so, the court explained:

[I]f the real purpose of [the neglect law] 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. . . . Why . . . should children not be afforded special protection by our laws, each child on an equal basis with every other child, where the denial of that protection may injure or cripple the child for life or even result in that child's premature death? This special protection should be guaranteed to all such children until they have their own opportunity to make life's important religious decisions for themselves upon attainment of the age of reason. After all, given the opportunity when grown up, a child may someday choose to reject the most sincerely held of his parents' religious beliefs, just as the parents on trial here have apparently grown to reject some beliefs of their parents. Equal protection should not be

18 See, e.g., *In re Quinlan*, 355 A.2d 647, 661–62 (N.J. 1976) (rejecting a claim by the parents of an adult in a persistent vegetative state that they had a right based on their religious beliefs to decide that life support would be terminated and stating, “[w]e do not recognize an independent parental right of religious freedom to support the relief requested”).

19 For an extended argument that spiritual treatment exemptions in child neglect laws violate the equal protection rights of children who are consequently denied necessary medical care, see generally James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. REV. 1321 (1996). See also Massie, *supra* note 2, at 731–32 (noting that, although children have never been defined as a suspect class under the equal protection doctrine, courts have traditionally “regarded governmental actions specifically affecting the welfare of children with special care”); Monopoli, *supra* note 2, at 348–49 (1991) (regardless of how children whose parents practice spiritual healing are classified under the equal protection doctrine, the court must at least find the exception rationally related to the statute's purpose for enactment); Swan, *supra* note 2, at 92–94 (referring to four state court cases that hold a religious exemption statute pertaining to children violates the Fourteenth Amendment).

denied to innocent babies, whether under the label of "religious freedom" or otherwise.²⁰

To avoid the imputation of unconstitutionality, a State would need a *valid* reason for treating these children differently, and a valid reason would only be one that rested on the interests of the children themselves.²¹ To the extent that these children are similarly situated to other children—that is, have the same interests as other children—spiritual treatment exemptions cannot be saved from the equal protection charge. Children of insiders are *somewhat* differently situated, because their psychological interests are shaped to some degree by their parents' religious beliefs, but otherwise the State must regard these children as having the same interests as other children have in avoiding pain, disfigurement, impairment, and death. If the State fails to accord the same weight to the interests of insiders' children that it gives to the interests of outsiders' children, it violates the right of insiders' children to equal protection.²²

In sum, a comparison with never-competent adults suggests that children in general have a substantive moral right to medical decision making based on their interests and that children of "religious objectors" have a formal legal right to equal protection of the laws—in particular, to the protection afforded by laws guarding children's fundamental interest in physical health. A spiritual treatment exemption violates those rights unless the State can demonstrate that the exemption is really in the children's best interests, as the State sees

20 *Ohio v. Miskimens*, 490 N.E.2d 931, 935–36 (Ohio Ct. Com. Pl. 1984); *see also* *Brown v. Stone*, 378 So. 2d 218, 223 (Miss. 1979) (invalidating a religious exemption to Mississippi's child immunization law as a violation of children's right to equal protection of child welfare laws).

21 For an explanation of why parents' rights and interests cannot provide a legitimate basis for such discrimination, *see* Dwyer, *supra* note 19, at 1423–33.

22 *See* RONALD DWORKIN, *A MATTER OF PRINCIPLE* 191 (1985) ("[T]here is broad agreement within modern politics that the government must treat all its citizens with equal concern and respect . . ."); Ronald Dworkin, *What is Equality? Part 3: The Place of Liberty*, 73 *IOWA L. REV.* 1, 7 (1987) ("[W]e are now united in accepting the abstract egalitarian principle: government must act to make the lives of those it governs better lives, and it must show equal concern for the life of each."); Gregory Vlastos, *Justice and Equality*, in *THEORIES OF RIGHTS* 41, 41–42 (Jeremy Waldron ed., 1984) (noting that this notion of formal equality of consideration has been embedded in the concept of justice since its origins in Ancient Greece); *cf.* *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring) ("[W]hen Congress imposes a burden on one group, but leaves unaffected another that is similarly, though not identically, situated, . . . we should inquire whether the classification is rationally related to 'a legitimate purpose that we may reasonably presume to have motivated an impartial legislature.'" (quoting *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 181 (1980) (Stevens, J., concurring))).

them. I am not aware that any supporter of exemptions has made that case. The “as the State sees them” modifier still requires support, and this is coming in Section C, but first I must say something about parents’ rights, which preoccupy the courts and supporters of exemptions.

2. Parents’ Rights

Supporters of exemptions typically assert that parents in these religious groups have a prima facie right to withhold medical care from their children, a right that is outweighed by other considerations, if ever, only in the most extreme cases.²³ They typically do not claim the same right for other parents—that is, those for whom it is not a matter of religious principle. Rather, they conceive of the right as primarily one of religious freedom.²⁴ There is in our constitutional scheme a general right to religious freedom, though today it does not by itself support claims for exemptions from generally applicable legal obligations.²⁵ The general right is founded upon the liberal principle of self-determination, which holds that people are better off in the long run and receive the respect they are due as moral agents when the

²³ See, e.g., Ingram, *supra* note 1, at 60, 65; Nobel, *supra* note 3, at 636; DiCamillo, *supra* note 3, at 143–44; Lederman, *supra* note 7, at 907 (arguing that parents’ free exercise right is never outweighed by the interests of their children); Shelli Dawn Robinson, Comment, *Commonwealth v. Twitchell: Who Owns the Child?*, 7 J. CONTEMP. HEALTH L. & POL’Y 413, 431 (1991); Smith, *supra* note 11, at 1510; Steckler, *supra* note 8, at 519.

²⁴ See, e.g., Clark, *supra* note 11, at 587–89; Nobel, *supra* note 3, at 636 (“To promote religious liberty and family integrity, judges should rarely second-guess consensual family healthcare decisions based on religious considerations.”); *id.* at 660 (describing judicial rejection of parental claims to a free exercise right to provide “religious treatment alone” as an “aberration of free exercise jurisprudence”); Kearney, *supra* note 11, at 889; Lederman, *supra* note 7, at 894–95, 898; Robinson, *supra* note 23, at 425–29; Steckler, *supra* note 8, at 519; cf. Lainie Friedman Ross & Timothy J. Aspinwall, *Religious Exemptions to the Immunization Statutes: Balancing Public Health and Religious Freedom*, 25 J.L. MED. & ETHICS 202, 205 (1997) (arguing in favor of religious exemptions to child immunization laws, on the basis of parents’ right to religious freedom). But see Robinson, *supra* note 23, at 431 (asserting that parents should be excused for medical neglect regardless of the reason for their failure to secure medical care—or in other words, that there should be no such thing as medical neglect of children).

²⁵ See *Employment Div. v. Smith*, 494 U.S. 872, 881–82 (1990) (holding that facially neutral and generally applicable laws that incidentally burden religious practice do not violate the Free Exercise Clause, but distinguishing cases—such as religious parenting—that involve an additional constitutional right, such as a substantive due process right, by suggesting that the second right somehow enhances the free exercise claim).

State lets them live their own lives by their own lights.²⁶ The greatest restriction on the right is the harm principle—religious freedom, like freedom more generally, is properly curtailed when it threatens significant harm to other persons, as the State sees it.²⁷

The Supreme Court, in its important 1990 free exercise decision, *Employment Division v. Smith*,²⁸ treated parental free exercise rights differently from ordinary free exercise rights, as it should have. However, the Court got things backwards. The case before the Court involved claims by Native American adults, on behalf of themselves, that Oregon law prohibiting use of peyote violated their free exercise rights.²⁹ The Court held that generally applicable laws that are neutral as to religion, as Oregon's drug laws were, do not violate the Free Exercise Clause even if they incidentally burden religious practice.³⁰ Such laws do not trigger the strict scrutiny sometimes applied in the past in free exercise cases. In dictum, *Smith* suggested that parental free exercise rights are *stronger* than free exercise rights in non-child rearing contexts—specifically, that they might still trigger strict scrutiny.³¹ But clearly, the case for attributing rights is *weaker* when a person seeks protection of action directed at controlling the lives of *other* persons than when the right-holder is engaging in *self*-determination. Surely any right I have to direct my children's lives should be weaker than the right I have to control my own life, not vice versa. At best, the parental free exercise right should be a relatively weak one, insufficient to block state action that promotes the health of children.

Decisions of the Supreme Court in which child rearing was directly at issue support this conclusion. In only two of those cases—*Prince v. Massachusetts*³² and *Jehovah's Witnesses v. King County Hospital*³³—was the record deemed to support a finding that parents'

26 See JOHN LOCKE, A LETTER CONCERNING TOLERATION 38 (James H. Tully ed., Hackett Pub. Co. 1983) (1689); JOHN STUART MILL, ON LIBERTY 53-73 (Elizabeth Rapaport ed., Hackett Pub. Co. 1978) (1859); JOHN RAWLS, A THEORY OF JUSTICE 543-44 (1971); see also *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261, 287 (1990) (O'Connor, J., concurring) ("[O]ur notions of liberty are inextricably entwined with our idea of physical freedom and self-determination.").

27 See 1 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS 10-12 (1985); MILL, *supra* note 26, at 9. Legal decisions concerning refusal of medical care by competent adults are consistent with this description of rights and their limitations. See Nobel, *supra* note 3, at 616-20.

28 494 U.S. 872 (1990).

29 See *id.* at 874.

30 See *id.* at 882.

31 See *id.*

32 321 U.S. 158 (1944).

33 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd per curiam*, 390 U.S. 598 (1968).

choices would harm the children at issue, and in both cases the Court rejected the parents' free exercise claim. In *Prince*, the Court held that simply allowing a child to distribute religious pamphlets in the streets posed sufficient danger to the child's welfare as to justify a restriction on the parents' child-rearing freedom.³⁴ In *King County Hospital*, the Court affirmed without opinion³⁵ a lower court decision to order blood transfusions for a child who needed surgery over the religious objection of the child's Jehovah's Witness parents.³⁶

In fact, the State arguably should not assign any *right*—that is, any legal *entitlement*—to protect choices and actions that are not a matter of self-determination. Such a right finds no support in general liberal political principles. To view religiously-motivated child medical neglect as a First Amendment issue is as much a conceptual mistake as it would be to view religiously-motivated wife-beating as a First Amendment issue. Additionally, this right directly conflicts with a principle that is basic to our legal and moral culture—namely, that no one is *entitled* to control the life of another person in accordance with their own preferences. This principle is manifest not only in the abolition of slavery and in the demise of the coverture regime in domestic relations law, but also in the legal rules governing caretaking for incompetent adults.³⁷ Guardians for incompetent adults are not deemed entitled to direct the life of the ward in a way that furthers the guardians' own interests, nor to have a right to decide what the ward's interests are, to the exclusion of efforts by the State to constrain a guardian's discretion. Rather, they are deemed to occupy a fiduciary role as a matter of legal privilege.

This same principle supports the conclusion that parents, too, should not be deemed right-holders in this situation at all, but rather should be viewed as fiduciaries occupying a caretaking role as a matter

34 See 321 U.S. at 170. The Court also indicated in dictum that parental free exercise rights were inadequate to support a claim for exemption from child immunization laws, stating that a parent "cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. 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." *Id.* at 166–67 (citation omitted); see also *Brown v. Stone*, 378 So. 2d 218, 223 (Miss. 1979) (rejecting parental free exercise challenge to child immunization requirement and stating, "To the extent that [immunization] may conflict with the religious beliefs of a parent, however sincerely entertained, the interests of the school children must prevail").

35 See 390 U.S. at 598.

36 *King County Hosp.*, 278 F. Supp. at 504–05.

37 For an extended exposition of this point, see Dwyer, *supra* note 14, at 1405–23.

of legal privilege.³⁸ The Ohio court that invalidated that state's spiritual treatment exemption to medical neglect laws on equal protection grounds recognized this limitation on rights to self-determination when it stated:

[I]t is not the personal religious practices of these parents which are sought to be regulated. An important line must be drawn between the right of an individual to practice his religion by refusing medical treatment for his own illness and that of a parent to practice his religion by refusing to obtain or permit medical treatment for another person, i.e., his child. This court, as with any governmental entity, can neither know nor care whether someone who relies solely on faith healing for his own affliction is religiously or scripturally "correct." But 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.³⁹

At a minimum, then, parents should not be deemed holders of rights that have greater force than the rights of their children. The children's rights should therefore be dispositive.

Academic supporters of parental rights often echo the courts in reciting the syllogism that because parents have a fundamental interest in raising their children, parents should have child-rearing rights.⁴⁰ Neither these academics nor the courts seem to have much understanding of what makes an interest fundamental. It surely is not the subjective importance people assign to having their wishes fulfilled. A fundamental interest is a *basic* component of well being, fulfillment of which is prerequisite to pursuing any higher aims in life.⁴¹ Health and elementary and secondary education are interests of that sort. Child rearing is not; it is, rather, one of the higher aims that

38 For an extended argument along these lines, see *id.* For an explanation of the distinction between a right and a privilege, see *id.* at 1374-75.

39 *Ohio v. Miskimens*, 490 N.E.2d 931, 934 (Ohio Ct. Com. Pl. 1984) (emphasis added).

40 See, e.g., William Galston, *Expressive Liberty, Moral Pluralism, Political Pluralism: Three Sources of Liberal Theory*, 40 WM. & MARY L. REV. 869, 874 (1999); Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 940 (1996); see also *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (describing the ability to make decisions regarding child rearing as a "fundamental liberty interest"); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (conferring on Amish parents a constitutional right to keep their high school age children out of school by relying on "the fundamental interest of parents . . . to guide the religious future and education of their children").

41 See FEINBERG, *supra* note 27, at 37-38.

some of us choose to pursue.⁴² In any event, what is under consideration in the debate over spiritual treatment exemptions is not the prospect of denying some adults *any* opportunity to raise children, but rather simply denying parents the power to effectuate one particular choice regarding their children's lives. Surely, having that power is not fundamental to any adult's well being.⁴³

In sum, both a utilitarian approach and a rights-based approach tentatively support the conclusion that spiritual treatment exemptions are morally and legally impermissible. A more definite conclusion would require empirical investigation and analysis of a kind that has yet to be done. But it is plausible to think that if a child is likely to incur substantial suffering or significant long-term harm as a result of not receiving medical care, then the child's interests in receiving care outweigh all competing interests. When that is the case, the State should require medical care regardless of what the child's parents believe, because the child is entitled to protection of his or her basic welfare.

C. *Should the State Defer to the Insiders' Perspective?*

Some supporters of spiritual treatment exemptions recognize that they cannot simply ignore the welfare and rights of the children involved and adopt an alternative strategy to supporting the conclusion that parents in these religious groups should be able to deny their children medical care. They ask, "Who determines what a child's interests are?" and answer this question by asserting that parents have a right to do so and the State does not.⁴⁴ They then point out that the parents in these religious groups have a different perspective on human welfare and that, from the parents' perspective, the children are better off not receiving medical care.⁴⁵

42 See *id.* at 37 (including "successfully raising a family" among those human interests that are "ulterior" rather than fundamental).

43 Cf. *Kendall v. Kendall*, 687 N.E.2d 1228, 1236 (Mass. 1997) (holding that restriction on non-custodial parent's exposure of children to his religion's beliefs and services did not violate his parental or free exercise rights and concluding that "requiring only that he limit sharing certain aspects of his beliefs with his children" imposed only a minimal burden on those rights and was justified by a finding that the restriction was in the best interests of the children).

44 See, e.g., Ingram, *supra* note 1, at 65 ("The first amendment prohibits the state from prescribing that physical life on earth is more important than life hereafter. . . . [P]arents have the right to make that decision for their children"); DiCamillo, *supra* note 3, at 157; Robinson, *supra* note 23, at 415-16, 431.

45 See, e.g., Ingram, *supra* note 1, at 58, 62-65; Lederman, *supra* note 7, at 923.

This brings us, then, to the final issue—whether the State should defer to the insiders’ perspective. Essentially, what most supporters of spiritual treatment exemptions to medical neglect laws argue is not that extensive exemptions are compelled by a proper balancing of interests *as the State sees them*, but rather that the State’s view of what a child’s interests are should not be controlling. They contend that the parents’ view of what a child’s interests are and of how best to promote them should instead be controlling in children’s lives.⁴⁶

This is distinct from a claim simply for parental freedom, for non-interference with actions motivated by personal belief. I considered that claim above and concluded that it is, at best, very weak in this context, where the freedom for which protection is sought is freedom to control the lives of other persons rather than to engage in self-determination. The claim here is about spheres of authority. It is essentially a claim about the proper domain of the State. It is a claim that parental control over children’s lives is primordial, outside the public realm, and no business of the State.

Curiously, though, most proponents of this sort of “spheres of authority” position allow for state control over child rearing at the margins. The State may step in to prevent death.⁴⁷ But they provide no real explanation for this qualification of the separate spheres position, for ceding some authority to the State. Instead, they may talk of bounds of reasonableness; parents’ choices should control unless they are unreasonable, and a choice that will lead to a child’s death is unreasonable.⁴⁸ However, not only do supporters of exemptions fail to offer a coherent account of what “reasonable” means, but they also never explain why this or any other standard should limit parental authority within the private domain. If it is truly a separate domain, then how can the State *ever* legitimately intrude into child rearing? They do not tell us. Nor do they provide an argument for postulating separate spheres in the first place. Nor an explanation of why the “family as separate sphere” position would not also apply in non-religious child-rearing contexts, and indeed to relations between spouses. Should domestic violence laws contain a religious exemption on the theory that abusive husbands are entitled to determine what their

⁴⁶ See, e.g., Ingram, *supra* note 1, at 65; DiCamillo, *supra* note 3, at 143–44.

⁴⁷ See, e.g., Nobel, *supra* note 3, at 651, 710; Kearney, *supra* note 11, at 885. Several courts have also taken this position, drawing the line of permissible court intervention between life-threatening and other conditions. See Dwyer, *supra* note 19, at 1356.

⁴⁸ See, e.g., Smith, *supra* note 11, at 1523–25 (arguing that courts should judge parents’ conduct in denying medical care to children by a subjective rather than objective standard of reasonableness); Steckler, *supra* note 8, at 517 (same).

wives' best interests are, at least so long as their wives do not object?⁴⁹ If not, then supporters of spiritual treatment exemptions need to explain why not.

In any event, the reality is that the family is not a separate, primordial sphere that is or can be cordoned off from the power of the State. The law creates the family, and things could not be otherwise.⁵⁰ The State assigns legal custody to particular adults for each and every child at the time of birth, reassigns custody at later points in the lives of a large percentage of children (for example, in connection with a divorce), and attaches to custody numerous legal rights and powers. Without the law creating and protecting parent-child relationships in this way, chaos would reign. So the separate spheres argument, in addition to being theoretically ungrounded, is out of touch with reality. It therefore fails as a basis for the position that the State should defer to the views of religious parents as to what constitutes the interests and rights of their children. The State does and must establish the rules for parental control over children's lives and, in doing so, must rest its judgment on assumptions about children's interests and rights as it sees them. In doing so, the State might justifiably conclude that parents should have presumptive authority to make decisions for children in many aspects of their lives, because the State has good reason to believe that it is, in general, best for children that their par-

49 For a description and critique of cases in which criminal defendants have based a defense to charges of rape, kidnap, and other crimes against adult (usually female) victims on the defendant's holding non-western cultural beliefs, see generally Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093 (1996). Coleman points out that arguments for a cultural defense in such adult contexts have numerous problems: they overlook the fact that the primary function of the criminal law is to protect victims and the public generally from harmful conduct; excusing conduct on the basis of cultural beliefs sends the message that such conduct is acceptable, and so persons inclined to engage in such behavior have no reason to conform to majoritarian norms; basing culpability on the culture of the victim amounts to a violation of equal protection guarantees and sends a message to subordinate members of cultural minorities that they are not worthy of the protection of our laws and cannot hope to escape the oppressive practices of the culture of their upbringing; and condoning practices motivated by values and attitudes that we as a society have rejected erodes the progress we have made toward eliminating injustice and the treatment of certain classes of persons as less worthy human beings. See *id.* at 1136-44. All of these problems also afflict arguments for religious exemptions to child neglect laws.

50 See generally Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835 (1985) (demonstrating that what is generally viewed as state non-intervention in the family is actually just another kind of state intervention—namely, state creation and enforcement of legal rights for the dominant person in family relationships).

ents have that presumptive authority. What supporters of spiritual treatment exemptions need to argue is that the State has good reason to believe that it is best for children that their parents have authority to deny them medical care that the State deems necessary for the children's physical well-being whenever such care conflicts with the parents' religious beliefs. They have yet to offer any such reason.

III. RESPONSES TO OBJECTIONS

Certain objections arise with some regularity to the position that children are entitled to greater restrictions on parental child rearing freedom than currently exist. Many of these are variants on a few core ideas. I have responded above to certain variants of these ideas, but want to address other variants more explicitly here. They are the claims that (1) parents are, as an empirical matter, best positioned to decide what is best for their children, (2) parents have a greater moral claim than the State to make decisions about children's lives, (3) the State has insufficient interest in child rearing absent extreme harm to children, and (4) the State may not assume that parents' religious beliefs are false.

A. *Parents Are in the Best Position to Decide*

A common refrain among those who endorse plenary parental control over children's lives, in this and other contexts, is that parents are in a better position than the State to decide what is best for children.⁵¹ The claim is often stated in very broad terms; in any area of a child's life—medical care, education, discipline, et cetera—parents know best.⁵² What is the basis for that assertion? It is really a deductive argument rather than a conclusion drawn from empirical evidence. The syllogism goes like this: Parents love their children more than anyone else loves them and know their children better than anyone else knows them. Therefore, parents are the best decision-makers.⁵³

This is clearly inadequate as an argument for parental authority in any aspect of children's lives. One could respond by challenging the premise that all parents know and love their children best, by

51 See, e.g., Gilles, *supra* note 40, at 953–57; Ingram, *supra* note 1, at 58–59; cf. Parham v. J.R., 442 U.S. 584, 602 (1979) (“The law’s concept of the family . . . historically . . . has recognized that natural bonds of affection lead parents to act in the best interests of their children.” (citations omitted)).

52 See, e.g., Ingram, *supra* note 1, at 58–59.

53 Stephen Gilles argues for plenary parental control over children's education along these lines. See Gilles, *supra* note 40, at 953–60.

pointing out that far too many parents give far too little love and attention to their children.⁵⁴ One could also point out that in religious contexts, such as that of spiritual treatment exemptions or that of religious objections to school curriculum, there is the problem of competing motivations. Parents motivated by a sense of religious obligation to oppose mainstream child-rearing norms might be, by virtue of that motivation, less likely to make decisions and act in a manner consistent with their children's welfare, even as they view their children's welfare from their own perspective. Because religious commands regarding child rearing are not necessarily dictated by what is best for children, even as seen from within the religious perspective from which the command emanates, a parent's sense of religious obligation might detract from or override the motivation, which a parent otherwise has, to do what is best for a child. The Old Testament story of Abraham preparing to stab to death and burn his son Isaac at God's command illustrates the potential conflict quite well.⁵⁵ In light of this fact about religious obligation, it is ironic that this argument from parental motivation usually appears in support of special exemptions from legal child-rearing responsibilities for parents who oppose mainstream child-rearing norms on religious grounds.⁵⁶ One might think that parents have a stronger claim for an exemption when motivated by an alternative secular view of what is best for children—for example, by a scientifically-based view that certain vaccines create risks of harm that outweigh potential benefits for individual children, or that some illnesses, such as the flu, are best treated by letting the body develop and deploy its own defenses, rather than by administering drugs that a doctor might prescribe.

A larger problem with this objection, though, is that even if it *were* true that all parents were perfectly loving and whole-heartedly committed to parenting, the implicit major premise in the syllogism above—that this is all it takes to be a good parent or to make the best decisions for a child—is clearly false. Many factors go into making good decisions for one's children. Loving concern is just one such factor. Also critical are competence and knowledge, and merely living with a child does not supply much of either.

54 Cf. BRUCE A. CHADWICK & TIM B. HEATON, *STATISTICAL HANDBOOK ON THE AMERICAN FAMILY* 135–36 (2d ed. 1999) (indicating that there were over one million child victims of substantiated maltreatment—including emotional abuse, sexual abuse, physical abuse, and neglect—in the United States in 1995 and almost three million children reported to be victims of parental abuse or neglect in that year).

55 *Genesis* 22:1–14. There is no indication in this biblical story that Abraham believed killing Isaac would be good for Isaac.

56 See *supra* note 22.

Living with a child makes one more aware than other people of what a child's unique interests and temperament are, but that is not sufficient to inform a decision regarding proper nutrition, health care, education, et cetera. There is a great deal to know about children's development that is more general in nature, that is not unique to one's own child, and that is not apparent simply from looking at and interacting with a child. If that were not the case, there would be no point in having medical schools train pediatricians or having schools of education train teachers. I am certain that my wife and I love our two daughters more than anyone else does and that we know better than anyone else what our daughters' personalities are like, what makes them laugh and what upsets them. But I am also certain that on almost any significant decision we have to make about their lives, there are people who have made a career of studying that aspect of child rearing who could tell us a lot we would not otherwise know about what is generally best for children in that regard. Simply loving and interacting with our children tells us little about how to make such decisions.

That competence and knowledge are critical, and that many parents make little effort to acquire them, is evident from the bad choices that parents in this country make on a routine basis. Listening to proponents of the "parents know best" mantra, one might suppose that few parents in this country feed their children junk food on a regular basis, that few parents in this country allow their children to watch garbage television or play shoot-and-kill video games for most of their time outside of school, and that few parents in this country do such a poor job of instilling self-discipline and self-respect that their children become teen delinquents or school dropouts. I am not suggesting here that state officials are all-knowing or that the State should be legislating what children eat for breakfast and what children do at home after school, but rather that "parents know best" is not a particularly credible response to an argument for increased restriction of parental freedom in hardly any area of children's lives. Parents vary tremendously in their competence to make good choices for their children, and the number of parents whose ability is quite low is not trivial.⁵⁷

⁵⁷ Cf. CHADWICK & HEATON, *supra* note 54, at 118 (showing that 49% of parents say they do not restrict the amount of television their five to seventeen year-old children watch and that 19% say they do not restrict the content of what their children watch); *id.* at 117 (showing that 94% of parents allow their children to be home alone after school, at night, and even overnight); *id.* at 115 (showing that 10% of children have been suspended or expelled from school and that 2.4% drop out of school); *id.* at 113 (showing that 10% of parents *give themselves* a grade of C or worse for the

Talk about competence, however, is really beside the point in the present context. In religious child-rearing contexts, there is a more fundamental problem with the “parents know best” position that its proponents overlook. It does not make sense to argue that parents know better than the State how to promote children’s welfare when parents have an entirely different view of what constitutes a child’s welfare, or have a view as to how to promote their child’s temporal welfare that is based on faith rather than on the kinds of empirical evidence on which the State must rely. If parents believe their children’s welfare consists principally in eternal salvation and temporal well-being should be sacrificed whenever necessary to secure that ultimate good, then comparing their ability to act in their children’s best interests with the State’s ability is comparing apples and oranges. The State does not aim to secure salvation for any of us; it aims at promoting temporal well-being. Likewise, if some parents are convinced that prayer is sufficient treatment for meningitis and that also administering penicillin would be counter-productive, what separates them from doctors and state health officials is not a degree of competence but rather religious belief. Their greater love for and familiarity with their children is irrelevant to the question the State must answer—whether their children should receive penicillin.

What opponents of restrictions on parenting in religious contexts, such as the spiritual treatment debate, need to argue is that parents are entitled to define what the aims are for their children and what sources of instruction on healing are authoritative. They must argue that parents have a right to preclude the State from deciding that the proper aim for the child, until the child grows up and decides for herself wherein her welfare resides, is temporal well-being or from deciding that the best conclusions of the scientific community are authoritative. Relative motivation and competence have nothing to do with those issues. Asserting that parents love most and know best is simply talking around the real issue in these religious child-rearing cases.⁵⁸

quality of their parenting); *id.* at 124 (reporting the results of a survey of parents showing that 29% seldom or never have calm discussions with their children about serious disagreements between them); *id.* at 104 (showing that 20% of parents report almost never talking with their children about things that worry the children and that 62% report almost never talking with their children about things that excite the children); JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY 9 (1999) (noting the great disparity among parents in their ability to make intelligent choices about their children’s education).

⁵⁸ Stephen Gilles, addressing authority over children’s education, appears to take the position that the State should conclude that parents, at least when motivated by

B. *Parents Have a Greater Moral Claim to Decide for Children*

More relevant to the issue of who gets to define the ends of child rearing is the assertion that parents have a superior moral claim to that power than the State does.⁵⁹ Some liberals—so called “liberal statist”—do appear to take the position that the State has a superior moral claim to that power in some areas of children’s lives. Amy Gutmann has argued, for example, that society as a whole, acting through the instrumentality of the State, is entitled to control children’s education to a substantial degree in order to serve certain collective ends—principally the reproduction of democratic culture from one generation to the next.⁶⁰ But that is certainly not the only logical alternative

religious belief, are entitled to plenary control of this aspect of children’s lives because parents have greater incentive to further their children’s interests *as they perceive them* than the State has to further children’s interests *as it perceives them*. See Gilles, *supra* note 40, at 940. He adds as an important proviso, though, that parents must be acting within bounds of reasonableness and he appears to presume that the State will define what those bounds are (who else would do it?). See *id.* But for the State to reach the conclusion Gilles urges regarding parental entitlement, the State would have to assume that, from *its* perspective, it is good for children to have promoted their interests as their parents perceive them. This in turn would require the State to regard the parents’ perception as accurate, or at least plausible, based on the State’s own criteria for children’s welfare. The State could not rationally conclude from the fact of high parental motivation that parental control is best if the parents’ view of what is best for their children entails, from the State’s perspective, great physical harm, educational deprivation, or other harm. In fact, the high motivation of such parents would be reason to give them *less* control. Thus, the fact that parents have a different worldview cannot carry any independent weight; the State must define the permissible range of parental choices, based on its own standards and empirical assumptions, and afford parents only the freedom to choose within that range. The critical question is simply how broad the range should be, or how much freedom the State should give parents to depart from the State’s judgments. In Gilles’s theory, “reasonableness” ends up doing all the heavy lifting, but he never gives material form to that phantom concept. As noted above in the text, this is par for the course among proponents of extensive parental religious freedom. Gilles offers no reason why the State should not conclude that parents act unreasonably, regardless of what motivates them, if they act significantly contrary to what the State regards as in children’s best interests.

59 See, e.g., Robinson, *supra* note 23, at 431; cf. Parham v. J.R., 442 U.S. 584, 602 (1979) (“[O]ur constitutional system long ago rejected any notion that a child is ‘the mere creature of the State’ and, on the contrary, asserted that parents generally ‘have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations.’” (citations omitted)).

60 See AMY GUTMANN, DEMOCRATIC EDUCATION 14 (rev. ed. 1999). Courts, too, when acting to restrict parenting practices deemed harmful, often do so to serve interests of society as a whole rather than for the sake of the individual child at issue. See, e.g., Walker v. Superior Court, 763 P.2d 852, 870 (Cal. 1988) (“Imposition of felony liability for endangering or killing an ill child by failing to provide medical care

to the position that parents are entitled to decide what the aims are for their children's lives. In my view, neither parents *nor* the State have any moral claim on their own behalf, any *entitlement* to decide what the ends of a child's life are. Rather, only children themselves have any moral claim or entitlement in connection with their upbringing, and we adults should be deliberating about how best to fulfill our obligation to them, not about which adults are entitled to determine how children's lives will go. Talk of superior moral claims of this sort effectively treats children and children's lives instrumentally, as means for satisfying the interests of one or another group of adults, and that is morally inappropriate. I have suggested in this Essay that the best way to fulfill the rights of children is to protect and promote their healthy development into adults, who can decide for themselves the aims for their lives.

C. *The State Has Insufficient Interest Absent Extreme Harm*

Related to the assertion of superior parental moral claim is the position that, except in life-threatening situations, the State does not have sufficient reason to restrict parental decision making. As noted above, most supporters of spiritual treatment exemptions concede that the State may step in to prevent death. In such extreme cases, they are willing to allow the child's interests to prevail. But when they discuss less extreme cases, supporters of exemptions are unable to maintain a focus on the child's interests and rights; they shift to a discussion of state interests and parental rights. They characterize the problem as one of deciding who "owns" the child.⁶¹ Putting the matter in those terms makes it easier to say that parental choices should prevail; no one would seriously maintain that children are owned by the State. But insofar as the State's interest is in promoting the child's welfare, in its *parens patriae* role, rather than in avoiding negative consequences for the rest of society, the contest is really between the child's welfare and parental preferences. In saying that parental rights prevail in intermediate cases, supporters of exemptions are really saying that parental preferences should trump children's welfare. If that is not what they believe, but believe instead that in intermediate

further an interest of unparalleled significance: the protection of the very lives of California's children, upon whose 'healthy, well-rounded growth . . . into full maturity as citizens' our 'democratic society rests, for its continuance.'" (quoting *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944)).

61 See, e.g., Robinson, *supra* note 23, at 431 (identifying as "the fundamental principle at stake: Who 'owns' the child and who will determine what (including religion) is in the child's best interest. Will it be the state or the parents?").

cases religious exemptions best serve children's interests, then why do they not say so? If they were truly concerned about the children and intent on always doing what is best for the children, why would they slip into a "parents' rights versus state interests" mode? One begins to suspect that the concession of state intervention to prevent death is merely a gesture designed to ward off the charge of ignoring children and not evidence of real commitment to children's welfare.

D. The State May Not Assume That Parents' Religious Beliefs Are False

I noted in Part I above that the State in our society may not assume the truth of religious beliefs. The principle of church-state separation embodied in the Establishment Clause precludes it from doing so.⁶² Some supporters of religious exemptions to medical neglect laws counter that the State also may not assume that parents' religious beliefs are *false*, and they infer from this premise that the State may not override parental choices that are based on religious beliefs.⁶³

The premise itself is subject to challenge. Arguably, the State must routinely assume that a multitude of possible or actually held religious beliefs are false, in order for it to carry on at all. Some people might have the religious belief, for example, that if the State attempts to tax citizens then God will wipe out human civilization. Given the magnitude of the threatened divine punishment, it would be irrational for the State to impose taxes unless the possibility of that belief being true were zero or very close to zero. Thus, to carry on, the State must assume that the belief is false, or at least exceedingly unlikely to be true. One can easily imagine other examples of beliefs that state officials must routinely treat as false.

The greater problem with this line of argument, though, is that it reflects a fundamental confusion about principles of liberal government. The argument essentially transports the argument for protection of self-determination to the child-rearing context, which, as noted above, is not a matter of self-determination. When adults have religious beliefs that lead them to direct *their own* lives in ways contrary to secular or common views of human welfare, liberalism holds that the State may not, on the basis of an assumption that the persons' religious beliefs are false, try to coercively change the persons' beliefs or prohibit them from directing their own lives in accordance with those beliefs, absent threat of harm to others. Thus, if my religious beliefs tell me I should not accept medical care for myself if I become

62 See *supra* note 6.

63 See, e.g., Ingram, *supra* note 1, at 63; Lederman, *supra* note 7, at 921; Steckler, *supra* note 8, at 514-15.

sick or injured, liberal principles require the State to forbear from trying to convince me that my religious beliefs are false and from compelling me to accept medical care for myself, absent threat of harm to others (for example, if I might spread infectious disease).

But that is all that anyone is due in a liberal society with respect to their religious beliefs. Liberal principles do not preclude the State from overriding religiously-motivated choices that affect *other* people in order to protect other people from what the State regards as harm.⁶⁴ In other words, liberal protections do not extend beyond self-determination. A contrary rule, that the State must forbear from restricting any religiously-motivated conduct, no matter who it will affect, because the State may not assume that the motivating beliefs are false, would lead to chaos and mayhem. Under such a rule, I could stone my neighbor with impunity if my religious beliefs told me that doing so would help to save his soul. Yet that is essentially what is being advocated when supporters of spiritual treatment exemptions argue that the State may not restrict religiously-motivated parenting choices, because it may not assume that any religious beliefs are false.⁶⁵ Generalizing the argument to religiously-motivated conduct

64 Cf. *Ohio v. Miskimens*, 490 N.E.2d 931, 934 (Ohio Ct. Com. Pl. 1984). In rejecting a parental free exercise claim to a religious exemption to medical neglect laws, the court stated:

[T]his court, as with any governmental entity, can neither know nor care whether someone who relies solely on faith healing for his own affliction is religiously or scripturally "correct." But 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.

Id.

65 Some have couched the argument against the State assuming the falsity of religious beliefs in terms of the religious beliefs of the children themselves. See, e.g., Ingram, *supra* note 1, at 63. With respect to very young children, that argument depends upon a prediction about children's beliefs at some point in the future. Even if any predictions were reliable, determining what the relevant future point in time would be—for example, when the child is old enough to speak, when the child is old enough to think independently, when the child reaches adulthood—would be a difficult task that proponents of the argument have not undertaken. With respect to older children—for example, teenagers—complex questions regarding the appropriateness of deferring to children's expressed wishes arise, and proponents of this argument have not undertaken to answer those questions either. *But cf.* Jennifer L. Rosato, *The Ultimate Test of Autonomy: Should Minors Have a Right to Make Decisions Regarding Life-Sustaining Treatment?*, 49 RUTGERS L. REV. 1, 49–51 (1996) (arguing that young children should not have a right to refuse medical care but that "mature minors" with terminal illnesses should have a right to reject life-sustaining treatment in limited circumstances). As Rosato notes, current law is largely opposed to the view that minors should have the power to refuse medical care for themselves when they

affecting any other person—and its proponents offer no reason why it need not be—reveals its lack of principled foundation and its unacceptable implications.

CONCLUSION

When parents seek to direct their children's lives in ways otherwise prohibited by law, they are necessarily asking the State to make a decision about their children's lives. They are asking the State to change the rules for them. There may be good reasons for doing so in some cases, but they must be reasons the State can endorse, from its perspective. I have argued that, from the State's perspective, there is no good reason to include spiritual treatment exemptions in medical neglect laws and strong reasons—the welfare and rights of children—not to include such exemptions.

I close with an observation about the style of argument in debates over state regulation of religious child rearing, including debates in the realm of education as well as in the realm of medical care. There is a great deal of ad hoc "reasoning" in debates about state restrictions on parental freedom. The rhetoric one typically hears would suggest many people believe that the situation of children is entirely unique, that there are no commonalities between children and other people, and no general principles can be called on to reason about allocation of authority over children's lives. If that were true, though, there would be little point in debating child-rearing issues. If competing positions could not be justified by appeal to general principles, then participants in the debate could do no more than shout at one another, with no prospect of anyone demonstrating that others should agree with him.

To the best of my knowledge, no one has ever demonstrated that the situation of children is entirely *sui generis*. Simply acknowledging

are seriously ill. *See id.* at 17. For an argument against creating a mature minor doctrine in these cases, see Jessica A. Penkower, Comment, *The Potential Right of Chronically Ill Adolescents to Refuse Life-Saving Medical Treatment—Fatal Misuse of the Mature Minor Doctrine*, 45 DEPAUL L. REV. 1165 (1996). Compare *Prince v. Massachusetts*, where the Court stated:

[T]he mere fact a state could not wholly prohibit this form of adult activity . . . does not mean it cannot do so for children. . . . The state's authority over children's activities is broader than over like actions of adults. . . . A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within a broad range of selection.

321 U.S. 158, 168 (1944).

that children are persons, as everyone appears willing to do these days, implies that *some* general principles are relevant to decision making about their lives. There are widely shared moral beliefs and legal rules about how we should treat people simply by virtue of their personhood. In addition, what at first blush seems to make children's situation factually unique, at least to those who ordinarily think only about relations among autonomous adults—namely, their dependence and relative lack of autonomy—are actually characteristics they share with many adults. This suggests that certain additional principles—namely, those generally applicable to dependent, non-autonomous persons—should apply to children's lives.

Yet rarely do participants in debates over state regulation of child rearing consider whether and to what extent general principles regarding treatment of dependent, non-autonomous persons, or general principles regarding treatment of individuals in light of their personhood, should govern decision making about children's lives. That is a major shortcoming of the debates. In this Essay, I have suggested ways in which the issue of spiritual treatment exemptions might be informed by appeal to general principles regarding the respect due individuals as persons and by comparison to our beliefs about the proper approach to medical decision making on behalf of non-autonomous adults. Both approaches support the conclusion that spiritual treatment exemptions are unlawful and immoral to the extent they cannot be justified in terms of what is best, from the State's perspective, for the children whose welfare is at stake.

