INTRODUCTION

Although most Americans utilize some form of medical care when they or their children become ill, modern medical practices are not wholly accepted throughout the United States. Various religious sects shun the use of doctors and medicine in favor of spiritual treatment.¹ Unlike religious denominations which recognize a symbiotic relationship between religion and medicine,² these religious sects instruct their members to rely solely on "faith" to heal sickness and forbid the use of medical treatment.³ Sect members extend their "faith healing" practices to the care of their children as well. Members of faith healing sects do not provide their children with any form of medical care, a practice that often results in tragic death.⁴ Infectious diseases which doctors can easily treat with common medicines become deadly when they afflict the children of parents who adhere to faith healing beliefs.

The increase in fatalities of such children has recently attracted unprecedented media attention and public concern.⁵ Much of the attention has focused on faith

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¹ Legal challenges to faith healing practices have involved members of the following religious groups: the Faith Assembly (see infra notes 10–27 and accompanying text for a detailed discussion of the sect and its practices); the General Assembly and Church of the First Born (see infra notes 116–33 and accompanying text for cases involving members of the sect); the Christ Assembly (see Ohio v. Miskimens, No. 83-CR-120 (C.P. Coshocton County, Ohio Jun. 15, 1984) (discussed infra notes 141–47 and accompanying text)); the Church of God of the Union Assembly (see In re Hamilton, 657 S.W.2d 425 (Tenn.App.1983) (discussed infra note 127)); the Church of God and Christ (see In re Gregory S. 85 Misc.2d 846, 380 N.Y.S. 2d 620 (1976)); the First Church of Christ, Scientist (Christian Science) (see Commonwealth v. Sheridan, No. 26307 (Super. Ct., Barnstable County, Mass. Nov. 1967) (discussed in L. Weinreb, CRIMINAL LAW 179-83 (1969))).

² Most religions accept modern medical practices and use prayer in addition to medical treatment to promote healing. For discussion of the importance of religion in the healing process, see generally Meserve, How Religion Heals, 20 J. HEALTH & MEDICINE 259 (1981); J. Fichter, RELIGION AND PAIN (1981); R. Young & A. Meiburg, SPIRITUAL THERAPY (1960); G. Westburg, MINISTER AND DOCTOR MEET (1961).

³ See, e.g., infra note 12 (discussing the faith healing tenets of the Faith Assembly sect). Other groups reject the notion of human illness altogether. Christian Scientists, for example, believe that human diseases do not exist, but are merely "misperceptions of the mortal mind." Flowers, Freedom of Religion Versus Civil Authority in Matters of Health, 446 ANNALS 149, 159 (1979). They reject healing by medical means and believe that "divine truth" can drive out the misperception of illness. Id. According to the group's founder: "Man is never sick, for Mind is not sick and matter cannot be ... [T]o understand that sickness is not real and that Truth can destroy its seeming reality ... is the universal and perfect remedy." MARY BAKER EDDY, SCIENCE AND HEALTH WITH KEY TO THE SCRIPTURES, 393-94 (1906).

⁴ For the purposes of this note, "faith healing" is defined as the use of prayer, faith, or other spiritual means to cure illness and disease in lieu of medical treatment. "Faith healing sects" are those groups which advocate faith healing practices. Also included are those groups which do not recognize the existence of disease (see supra note 3). Cf. Comment, Religious Beliefs and the Criminal Justice System: Some Problems of the Faith Healer, 8 LOY. L.A.L. REV. 396, 397 (1975); Cawley, Criminal Liability in Faith Healing, 39 MINN. L. REV. 48, 48 (1954).

⁵ For examples of child fatalities which have been linked to faith healing practices, see infra notes 15-27 and accompanying text and notes 141-48 and accompanying text.

healing exemptions in state child protection laws under which parents avoid prosecution. More than forty states provide some form of exemption in their child protection laws for spiritual treatment.\(^7\)

In the wake of reports of medically preventable deaths of children, legislators have received increased pressure to remove these exemptions. Nevertheless, most states currently accommodate faith healing practices through exemptions in their child protection laws. Moreover, church-supported lobbyists actively work to ensure continued religious carte blanche,\(^8\) claiming that the first amendment guarantees free exercise of religion proscribes governmental interference with religious practices.\(^9\) As more deaths of children are linked with faith healing practices, however, public outcry may force state legislatures to reevaluate the extent to which they allow religious liberty to endanger children.

This note suggests that legislators should remove religious exemptions from child protection laws or, in the alternative, modify their current laws to adequately protect children from death or serious injury due to faith healing practices. The exemptions presently found in most state child protection statutes result in a failure to adequately safeguard the well-being of children. This note first examines the effects of faith healing practices on children by considering the experience of an Indiana-based faith healing sect. It then discusses the accommodation of faith healing practices through religious exemptions in state statutes, analyzes constitutional arguments for such exemptions, and examines how the courts have interpreted and applied these exemptions. Finally, it discusses what lawmakers can do to protect medically neglected children.

### A CASE STUDY OF A FAITH HEALING SECT

The history of the Faith Assembly church graphically illustrates the consequences children can suffer because of faith healing practices. Based in northern

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8. For example, the Christian Science church maintains a salaried lobbyist in every state. Swan, supra note 6, at 5.

9. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I.
Indiana, the Faith Assembly congregation includes more than 2,000 members. Satellite churches” have extended the ministry to a dozen Indiana cities, at least twenty-one other states, and eight foreign countries. The sect instructs its followers to shun all forms of medical treatment and rely solely on faith for healing. Faith Assembly members are taught that to trust in the inventions of man is to question the power of God. Consequently, members reject the use of medicines, refuse vaccinations, spurn life insurance policies, and do not wear seat belts.

Critics have questioned the efficacy of the sect’s faith healing dogma. As many as eighty-eight Faith Assembly deaths have stemmed from treatable illnesses or injuries over the past eleven years. Nearly two-thirds of the fatalities involved children. The sect attributes the deaths to “God’s discipline” in some cases and to “a complete lack of faith” in others.

In 1983, reports of “excessive perinatal and maternal mortality” prompted the Indiana State Board of Health and the Federal Centers for Disease Control to investigate the parturition practices of Faith Assembly members in two Indiana counties. The investigators discovered that pregnant sect members receive no prenatal care and deliver at home without medical assistance. The study concluded that the perinatal mortality rate for Faith Assembly members in these two counties between 1975 and 1982 was nearly three times greater than the statewide rate for non-Faith Assembly members. Furthermore, perinatal deaths accounted for more than half of all Faith Assembly deaths in Indiana. The study also found that the maternal mortality rate for sect members was almost 100 times greater than that for the remainder of the state.

10. Spence, Danielson, and Kaunitz, The Faith Assembly: A Study of Perinatal and Maternal Mortality, INDIANA MED., March 1984, at 180 [hereinafter cited as Mortality Study]. The group’s racial composition is predominantly white. Many members are married couples in their twenties or thirties, are college educated, and have children. Id.
11. When Faith Lets Children Die, supra note 6, at 32. This expansion is largely due to the sect’s distribution of books and cassette tapes throughout the nation and in several foreign countries.
12. Commonly called “faith-formula” theology, the Faith Assembly asserts that when genuine faith is exercised and is accompanied by a “positive confession,” God will heal one’s illness. Any reliance on nonspiritual treatment signifies a lack of faith. Davis, Inspiration for Living or Invitation to Death?, Warsaw (Ind.) Times-Union, Sept. 29, 1983, at 1, col. 1. According to the sect’s founder, Dr. Hobart Freeman: “When genuine faith is present it alone will be sufficient, for it will take the place of medicines and other aids.” H. FREEMAN, FAITH FOR HEALING 1 (privately published). Ironically, Freeman died last December at age 64 after suffering from a month-long illness. N.Y. TIMES, Dec. 10, 1984, at B14, col. 6.
13. The sect derives this tenet from Jeremiah 17:5: “Thus said the Lord; Cursed be the man that trusteth in man, and maketh flesh his arm, and whose heart departeth from the Lord.”
14. When Faith Lets Children Die, supra note 6, at 32.
15. Id.
17. Davis, supra note 12, at 1.
18. Mortality Study, supra note 10. The study examined infant and maternal mortality in Elkhart and Kosciusko counties. Both counties are located in northeastern Indiana and have large Faith Assembly populations. Id.
19. Id. at 180-81.
20. Perinatal mortality was defined to include stillbirths (20 weeks gestation and greater) and neonatal mortality (deaths occurring within 28 days after birth). Id. at 181.
21. Id. at 180-82. Between 1975 and 1982 there were 344 live births born to Faith Assembly women in the two counties studied and 17 Faith Assembly perinatal deaths (stillborn and neonatal deaths). Thus, the perinatal mortality rate was 47.9 per 1,000 live births as compared to Indiana’s perinatal mortality rate of 17.8 for non-Faith Assembly births over the same period. Id.
22. Id. at 182.
23. Maternal mortality was defined to include deaths related to pregnancy and occurring in women up to one year following termination of pregnancy. Id. at 181.
24. Id. at 180-82. Three Faith Assembly women suffered maternal death in the two counties considered between 1975 and 1982. The maternal mortality rate, given the 344 live births to sect members, was
the number of Faith Assembly births in the investigated counties had more than
doubled between 1975 and 1982,25 reflecting the sect's increasing popularity
among young married couples.26 If these trends continue, the number of Faith
Assembly perinatal and maternal deaths will presumably increase as well.27

Despite numerous deaths of Faith Assembly children from treatable illnesses,
for many years Indiana prosecutors chose not to file criminal charges against sect
parents.28 They refrained from prosecuting these sect members because of an ex-
emption in Indiana's child neglect and nonsupport laws. The laws provide a de-
fense for a person who, "in the legitimate practice of his religious belief, provided
treatment by spiritual means through prayer, in lieu of medical care, to his depen-
dent."29 Members of faith healing sects nationwide have similarly avoided prose-
cution through religious exemptions in state laws.30 Those who believe in "faith
over medicine" regard these exemptions as legislative endorsements of faith heal-
ing practices.31

RELIGIOUS EXEMPTIONS TO CHILD PROTECTION LAWS

Most states have statutes which accommodate the practices of faith healing
sects.32 Although the statutory language varies, every exemption allows some
deviation from secular standards of parental responsibility. For example, Ohio's
criminal code provides that "[i]t is not a violation of a duty of care, protection, or
support" when a parent treats his child's "physical or mental illness or defect . . .
by spiritual means through prayer alone, in accordance with the tenets of a recog-
nized religious body."33 Under such statutes, a parent's right to practice his or
her religious beliefs transcends the child's right to receive medical treatment.

Most of the exemptions were enacted in response to regulations promulgated
by the Department of Health, Education and Welfare (HEW)34 to implement
Federal child protection legislation.35 Congress enacted the Child Abuse Preven-
tion and Treatment Act of 197436 to "provide funding for promising efforts to

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25. Id. at 182-83.
26. Id. at 180.
27. If, for example, the absolute number of Faith Assembly births continued to grow at the 1975-1982
pace, sect members would have 860 live births between 1982 and 1989. Assuming constant perinatal
and maternal mortality rates (see supra notes 21, 24), 41 perinatal deaths and seven to eight maternal
deaths would occur over the same period.
28. Not until June 1984 were criminal charges filed against Faith Assembly members for failing to provide
medical care for their children. For further discussion, see infra notes 148-51 and accompanying text.
30. Few prosecutors have challenged exemption laws through criminal action against faith healing follow-
ers. Courts have ruled that religious exemptions provide a defense to criminal charges. See, e.g., State
31. See, e.g., Cherishing the babe of Christian healing: the need today, 86 CHRISTIAN SCI. SENTINEL 1613,
1613-15 (1984) (noting that laws in most states protect "responsible spiritual healing on behalf of
children").
32. See statutes cited supra note 7.
34. The HEW was redesignated as the Department of Health and Human Services (HHS) in 1980. Any
reference to the HEW or its Secretary in any law or regulation is deemed to refer and apply to the
HHS or its Secretary, respectively. 20 U.S.C. § 3508 (1982).
Abuse Prevention and Treatment and Adoption Reform Act of 1978, Pub. L. No. 95-266, 92 Stat. 205;
amended at 42 U.S.C. §§ 5101-5107 (1982)).
Faith Healing Exemptions

prevent, identify and treat child abuse and neglect."\(^{37}\) The Act was a response to the failure of state and Federal legislators to "focus on child abuse and neglect in [existing child welfare] programs . . . ."\(^{38}\) It provided for the establishment of the National Center on Child Abuse and Neglect to assist public and nonprofit private agencies in preventing child abuse.\(^{39}\)

The HEW regulations that implemented the Act defined "child abuse and neglect" as meaning "harm or threatened harm to a child's health or welfare by a person responsible for the child's health or welfare."\(^{40}\) Although the HEW found that negligent treatment or maltreatment could constitute "harm or threatened harm" to a child,\(^{41}\) it made an exception where such treatment was grounded in religious beliefs. The exemption stated that a parent or guardian who fails to provide medical treatment for a child based on religious convictions shall not be deemed negligent.\(^{42}\) Despite public objection to the proposed religious exemption,\(^{43}\) the HEW concluded that the exception was legitimate and required by the legislative intent of Congress.\(^{44}\) Therefore, the HEW's final regulations required states to modify their statutory definitions of "child abuse and neglect" to provide a religious exemption in order to be eligible for Federal funding for child protection programs under the Act.\(^{45}\)

To qualify for Federal funding, most states amended their child protection laws to include religious exemptions.\(^{46}\) Although several states adopted the

38. Id.
39. 42 U.S.C. § 5101(b) (1982). The Center publishes information and training material for personnel engaged in this field and conducts research into the causes of child abuse and neglect and into methods of prevention, identification, and treatment. Id.
40. 45 C.F.R. § 1340.1-2(b) (1975).
41. Id. § 1340.1-2(b)(1) (1975).
42. Id. The exemption provided:

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

Id. (emphasis in original).

43. See Proposed Rules for the Child Abuse and Neglect Prevention and Treatment Program, 39 Fed. Reg. 31,507 (1974). In addition to comments objecting to the inclusion of the exemption, another comment sought a similar exception where poverty was the sole reason for the parent's failure to provide medical treatment. Furthermore, the question was raised whether the proposed religious exemption would prohibit court-ordered medical treatment. In response to the latter concern, the HEW amended § 1340.1-2(b)(1) to include the following: "[S]uch an exception shall not preclude a court from ordering that medical services be provided to the child, where his health requires it." The HEW declined to extend the grounds for the exemption to poverty. Child Abuse and Neglect Prevention and Treatment Program, 39 Fed. Reg. 43,935-36 (1974).

[The Committee recognized that "negligent treatment" is difficult to define, but it is not the intent of the Committee that a parent or guardian legitimately practicing his religious beliefs who thereby does not provide specific medical treatment for a child is for that reason alone considered to be a negligent parent. To clarify further, no parent or guardian who in good faith is providing to a child treatment solely by spiritual means — such as prayer — according to the tenets and practices of a recognized church through a duly accredited practitioner shall for that reason alone be considered to have neglected the child.

H. REP. No. 685, 93d Cong., 1st Sess. 4-5 (1973) (emphasis in original) [hereinafter cited as House Committee Report].
45. Although the Act itself does not include a religious exemption in its definition of "child abuse and neglect," it authorizes the Secretary of the HEW (HHS) to determine a suitable definition. 42 U.S.C. § 5102 (1982). Under the regulations, states must adopt a definition which is "the same in substance" as the one promulgated by the Secretary. 45 C.F.R. § 1340.3-3(b) (1975).
46. See statutes cited supra note 7.
HEW's exemption language verbatim, 47 most states drafted more restrictive exceptions. 48 Whereas the HEW's suggested exemption provided that parental inaction shall not constitute child neglect, the more restrictive state statutes require some parental action in affirmatively exercising religious beliefs. For example, Idaho's exemption provides "that the practice of a parent or guardian who chooses for his child treatment by prayer or spiritual means alone shall not for that reason alone be construed to be a violation of the duty of care to such child." 49 Similarly, most states compel parents who object to conventional medical care to use some form of spiritual treatment in lieu thereof. 50

In 1983, the Department of Health and Human Services (HHS) (formerly the HEW) issued new regulations which implemented amendments to the Child Abuse Prevention and Treatment Act. 51 The new regulations amended the definition of "negligent treatment or maltreatment" to include failure to provide medical care. 52 These regulations required states to amend their child protection laws to include the "failure to provide adequate medical care" as a reportable condition. 53 Therefore, under the new regulations, failure to provide medical treatment constitutes child abuse and neglect and must be reported to a child protection agency or other authority regardless of the grounds for withholding such treatment. 54

In addition, the new regulations no longer require states to provide religious exemptions to their child protection laws in order to qualify for Federal funding. However, they fail to mandate medical care for children as an eligibility requirement. 55 After reevaluating the religious exemption requirement in light of public

48. The HEW clearly allowed for variation in exemptions among states. The 1975 regulations state: [N]othing in [these regulations] is intended to prevent a State from further elaborating on the definition or from providing additional grounds to consider a child abused or neglected. . . . [T]his approach recognizes the need to allow and encourage flexibility and innovation in light of the diverse local conditions found from State to State and community to community. 45 C.F.R. § 1340.3-3(b) (1975).
50. Most states further narrow the scope of the religious exception by exempting spiritual treatment only if done "in accordance with the tenets and practices of a recognized church or religious denomination." Va. Code § 16.1-228(A)(2) (1982 & Supp. 1984).
52. The definition is currently as follows: "'Negligent treatment or maltreatment' includes failure to provide adequate food, clothing, shelter, or medical care." 45 C.F.R. § 1340.2(d)(3)(i) (1983) (emphasis added).
53. Final Rule, supra note 51, at 3699.
54. 45 C.F.R. § 1340.14(c) (1983). The HHS concluded that a failure to provide children with the necessities of life (adequate food, clothing, shelter and medical care) necessitates reporting of such to appropriate authorities. It found congressional support for its conclusion in the language of the Child Abuse Prevention and Treatment Act. Final Rule, supra note 51, at 3699. See also 42 U.S.C. § 5102 (1982) (defining "child abuse and neglect" as "circumstances which indicate that the child's health or welfare is harmed or threatened thereby").
55. The amended regulation, in pertinent part, is as follows:

Nothing in this part should be construed as requiring or prohibiting a finding of negligent treatment or maltreatment when a parent practicing his or her religious beliefs does not, for that
objection and congressional intent, the HHS concluded that the Child Abuse Prevention and Treatment Act did not require such an eligibility provision and amended the regulations so that a religious exemption was neither required nor prohibited. Although each state is now free to formulate its own definition of negligent treatment or maltreatment of children, few states have taken the initiative to amend their laws by modifying or removing religious exemptions.

The current HHS regulations do not ensure that state laws will protect children from medical neglect. Since each state has complete discretion on whether to retain these exemptions, the HHS has failed to instigate statutory reform. Instead, the new regulations have fostered inconsistent state legislation. To be eligible for Federal funding under the Act, the HHS requires states to have legislation which obliges specified persons to report known and suspected instances of child abuse and neglect—including the failure, for whatever reason, to provide adequate medical care. At the same time, the HHS allows states to prohibit a finding of negligent treatment when parents fail to obtain medical treatment for their children due to religious beliefs.

This inconsistency reflects the underlying tension inherent in child protection legislation. By establishing measures through which potential harm to children can be detected and avoided, the HHS attempts to protect the health and welfare of children. Conversely, by allowing states to provide religious exceptions to health care requirements, it respects the parental rights and religious liberties that states choose to give their residents. Thus, while the HHS regulations offer some protection for children, they fall short of assuring medical treatment for all children.

FAITH HEALING PRACTICES AND THE FIRST AMENDMENT

Faith healing proponents vigorously defend their "right" to withhold medical care from children, citing the first amendment's guarantee of free exercise of religion. They also point to the traditional prominence of familial privacy in our society. As opposition to faith healing practices intensifies, the point at which reason alone, provide medical treatment for a child; provided, however, that if such a finding is prohibited, the prohibition shall not limit the administrative or judicial authority of the State to ensure that medical services are provided to the child when his health requires it.


61. See statutes cited supra note 7. One state which did modify its laws is Oklahoma, which amended its child protection legislation by qualifying its religious exemption. The law now requires "that medical care shall be provided where permanent physical damage could result to such child." OKLA. STAT. ANN. tit. 21, § 852 (West Supp. 1984-85). See infra note 162 for text of the amended exemption. See also infra notes 152-57 and accompanying text (discussing legislative efforts to amend religious exemptions in Ohio and Indiana).

62. According to the founder of the Christian Science church: "The Constitution of the United States does not provide that materia medica shall make laws to regulate man's religion; rather does it imply that religion shall permeate our laws." MARY BAKER EDDY, THE FIRST CHURCH OF CHRIST, SCIENTIST, AND MISCHELLANY 222 (1913) (quoted in Cherishing the babe of Christian healing: the need today, 86 CHRISTIAN SCI. SENTINEL 1613 (1984)).

63. A recent Federal study described the concept of familial privacy as follows: Familial privacy has received increasing protection from law throughout this century. In the earlier stages of legal development, the source of this protection was sometimes found in the
parental rights must yield in order to protect children will be increasingly debated. Opponents of faith healing practices contend that children must be afforded greater protection through medical treatment as a matter of public policy.

Increased protection, however, may require some restriction on the free exercise of religion. In Reynolds v. United States, the Court distinguished between religious beliefs and religiously motivated acts. In rejecting free exercise as a defense to criminal conduct, the Court stated that to do otherwise "would be to make the professed doctrines of religious belief superior to the law of the land . . . ." Although the language of the free exercise clause is absolute, the be-

constitutional right of religious freedom; it has gradually evolved into a more secular protection generally referred to as the right of privacy. The substantive core includes the authority of parents to establish family values, to set goals for the family and for its individual members, and to make decisions affecting the welfare of family members free from interference by agencies of the state . . . . The society as a whole benefits from promoting diversity, and privacy law has an increasing role in protecting diverse life-styles and values.


64. "[T]here is a presumption, strong, but rebuttable, that parents are the appropriate decisionmakers for their infants. Traditional law, buttressed by the emerging constitutional right of privacy, protects a substantial range of discretion for parents." President's Commission, supra note 63, at 212. Although "natural bonds of affection" usually lead parents to act in their children's best interest, "a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized." Parham v. J.R., 442 U.S. 584, 603 (1979).


66. The intent of the "framers" of the Constitution regarding the scope of the free exercise clause is unclear. See Pepper, Reynolds, Yoder and Beyond: Alternatives for the Free Exercise Clause, 1981 Utah L. Rev. 309, 311-17 (discussing the historical circumstances surrounding the drafting of the religion clauses). The framers never specifically limited the free exercise clause. Id. at 315-17.

67. 98 U.S. 145 (1878). In Reynolds, a Mormon was convicted of bigamy, a practice prohibited by federal law. Since bigamy was an accepted doctrine of the Mormon Church, Reynolds contended that the law infringed on his constitutional right to free exercise of religion. Id. at 161-62. Reynolds had requested the court to instruct the jury to find him not guilty if his multiple marriages were "in pursuance of and in conformity with what he believed . . . to be a religious duty." Id. The court refused to allow the jury to consider religious belief as a defense, which Reynolds contested on free exercise grounds. Id. at 162. For a discussion of the rationale behind the doctrine of polygamy, see Linford, The Mormons and the Law: The Polygamy Cases, 9 Utah L. Rev. 308, 308-11 (1964). See also id. at 310-30 (examining the history of legislative action taken in response to the practice of polygamy).

68. 98 U.S. at 164-67. The Court considered the scope of the religious freedom guaranteed by the first amendment and concluded that while "Congress was deprived of all legislative power over mere opinion, [it] was left free to reach actions which were in violation of social duties or subversive of good order." Id. at 164.

The court adopted the views of Thomas Jefferson in interpreting the meaning of the free exercise clause. According to Jefferson, government could not interfere with religious beliefs, but could restrict religiously motivated acts which affect the order of society: "[M]an . . . has no natural right in opposition to his social duties." Id. (quoting Jefferson's Letter to the Danbury Baptists).

69. Id. at 167.

70. Pepper, supra note 66, at 370, n. 249: "Other provisions of the Bill of Rights explicitly provide flexibility: 'right of the people peaceably to assemble' (first amendment); security against 'unreasonable searches and seizures' (fourth amendment); 'due process of law' and 'just compensation' (fifth amendment). (Emphasis added). The free exercise clause does not explicitly offer such flexibility."
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lief-action dichotomy announced in Reynolds significantly limited the protections afforded to religious practices and resulted in the enforcement of secular regulations regardless of their impact on religiously motivated acts. By interpreting the free exercise clause to safeguard religious actions as well as beliefs, the Court abandoned the strict belief-action dichotomy of Reynolds. The Court, however, established separate levels of first amendment protection, holding that the freedom to believe is absolute, whereas the freedom to act must be qualified. The Court stated that religious conduct must remain subject to regulation for the protection of society. The Court limited, however, the government’s ability to regulate religiously motivated acts and emphasized that regulation must avoid undue infringement on protected freedoms. The Court did not define the point at which regulations “unduly infringe” upon religion.

In 1963, the Supreme Court delivered a more definite standard by which to evaluate free exercise claims. In Sherbert v. Verner, the Court held that only a compelling state interest in a regulation could justify burdening an individual’s free exercise of religion. The Court concluded that governmental regulations could not infringe on religious practices absent such an interest. Nine years later, in Wisconsin v. Yoder, the Court reaffirmed this standard and again required a secular regulation to exempt certain religious conduct in order to accommodate free exercise. In Yoder, members of the Amish faith were convicted of violating Wisconsin’s compulsory school-attendance law, which required parents to send their children to public or private school until age sixteen. Amish beliefs do not permit formal education beyond the eighth grade. The Court held that

71. See, e.g., Shapiro v. Lyle, 30 F.2d 971 (W.D. Wash. 1929) (restrictions placed on the use of sacramental wine during Prohibition not violative of first amendment religious freedoms); Scoles v. State, 47 Ark. 476, 1 S.W. 769 (1886) (Seventh-Day Adventist’s abstention from working on Saturday no defense to the violation of statute declaring Sunday as a day of rest); Commonwealth v. Herr, 229 Pa. 132, 78 A. 68 (1910) (wearing of religious dress or insignia by teachers in public schools may be prohibited by statute).
72. 310 U.S. 296 (1940).
73. Id. at 303. In Cantwell, three Jehovah’s Witnesses were convicted for soliciting contributions in violation of a licensing statute. The Court held that censorship of religion through restrictions placed on religious activity violated the first amendment. Id. at 305.
74. Id. at 303-04. The Court also held that the “fundamental concept of liberty” embodied in the fourteenth amendment incorporated the free exercise clause of the first amendment, thus binding state legislatures. Id. at 303.
75. Id. at 304.
76. Id. In Reynolds a secular end justified any regulation, but in Cantwell the Court concerned itself with the adverse effects that regulations may have on religious activity.
78. Id. at 403 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).
79. Sherbert, a member of the Seventh-Day Adventist Church, had been discharged by her employer for refusing to work on Saturday, the Sabbath day of her faith. Sherbert filed for unemployment compensation after unsuccessfully trying to obtain employment that did not require Saturday work. South Carolina denied her benefits based on a statute that disallowed compensation when one failed to accept suitable work without “good cause.” Id. at 399-402.
The Court found that the South Carolina statute violated Sherbert’s free exercise rights. After determining that the denial of unemployment benefits constituted a burden on the free exercise of her religion, the Court then considered whether some compelling state interest was served by the law. Id. at 403-05. The Court concluded that South Carolina had no such interest, and intimated that even if it had an interest sufficiently compelling, the state has the burden of demonstrating that less restrictive forms of regulation are unavailable. Id. at 406-07.
81. Id. at 207-08. The parents refused to send their children, ages 14 and 15, to school after they had completed the eighth grade. Id. at 207.
82. The Amish believe in simple living, with members obligated to make their living by farming or other
the state's interest in compulsory education of Amish children past the eighth grade did not outweigh the burden that the regulation imposed upon the free exercise of religion.\textsuperscript{83} The Court did not find the compulsory education requirement unconstitutional in general application, but specifically limited its decision to requiring an Amish exception to the law, citing the adequacy of Amish informal vocational training.\textsuperscript{84}

Although free exercise doctrine has been significantly expanded since \textit{Reynolds},\textsuperscript{85} states remain free to regulate religiously motivated activity in order to promote health, safety, and the general welfare.\textsuperscript{86} The first amendment does not protect practices that threaten the safety or order of society. Thus, courts have upheld laws prohibiting the handling of poisonous snakes, even if done as part of religious services.\textsuperscript{87} Courts have also held that the free exercise clause does not permit illegal drug use.\textsuperscript{88}

Furthermore, courts have been more willing to curtail religious activity when the health or general welfare of children is implicated. The landmark case concerning governmental protection of children is \textit{Prince v. Massachusetts}.\textsuperscript{89} In \textit{Prince}, a Jehovah's Witness was convicted of violating Massachusetts' child labor laws for permitting a child under her guardianship to distribute religious literature on public sidewalks.\textsuperscript{90} The Supreme Court assessed the competing interests presented in the case:

related activities. The Amish oppose formal high school education because "it places Amish children in an environment hostile to Amish beliefs with increasing emphasis on competition . . . [and] also because it takes them away from their community, physically and emotionally, during the crucial and formative adolescent period of life." The Amish emphasize informal "learning-through-doing" which prepares young people for the Amish way of life. \textit{Id.} at 210-11.

83. \textit{Id.} at 234-36. Although the Court recognized the state's power to establish requirements for basic education, it added that "a State's interest in universal education . . . is not totally free from a balancing process when it impinges on fundamental rights and interests . . . ." \textit{Id.} at 213-14. The Court determined that "fundamental rights and interests" included first amendment free exercise rights and parental rights concerning the religious upbringing of their children. \textit{Id.} at 214. In weighing the competing interests, the Court found a strong state interest in compulsory education, but one that "is by no means absolute to the exclusion or subordination of all other interests." \textit{Id.} at 215. The Court then examined the regulation's impact on the Amish faith and determined that the compulsory-education law substantially interfered with the basic religious tenets and practices of the Amish faith. \textit{Id.} at 218.

84. Central to the Court's decision was the Amish community's "long history as a successful and self-sufficient segment of American society. . . ." \textit{Id.} at 235. The Court carefully qualified its holding in \textit{Yoder} by stating: "It cannot be overemphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some 'progressive' or more enlightened process for rearing children for modern life." \textit{Id.} Noting that the case was decided "in the wake of the turbulent late sixties," one commentator observed that "the 'countercultural' movement was before the eyes of the Court, and its opinion appears to want to say 'yes' to the Amish while saying 'no' to the hippies." Pepper, \textit{supra} note 66, at 335.

85. Of first amendment liberties, only the free exercise clause has sheltered criminal action from prosecution. Pepper, \textit{supra} note 66, at 344.


89. 321 U.S. 158 (1944).

90. \textit{Id.} at 159-63. Prince asserted that it was the child's religious duty as a Jehovah's Witness to "preach the gospel" in this manner. \textit{Id.} at 162-63. In addition to free exercise liberties, the case also involved parental rights secured by the due process clause of the fourteenth amendment. See \textit{Meyer v. Nebraska}, 262 U.S. 390, 399-400 (1923) (parents' right to instruct their children in a foreign language is within the liberty guaranteed by the fourteenth amendment).
On one side is the obviously earnest claim for freedom of conscience and religious practice. With it is allied the parent's claim to authority in her own household and in the rearing of her children. Against these sacred private interests, basic in a democracy, stand the interests of society to protect the welfare of children, and the state's assertion of authority to that end. In weighing these interests, the Court emphasized that parents have great freedom in "the custody, care and nurture" of their children and that the state should respect familial privacy. It added, however, that "the family itself is not beyond regulation in the public interest...and neither rights of religion nor rights of parenthood are beyond limitation." The state as parens patriae may intervene into the realm of the family when a child's welfare is at stake. The Court stated:

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

Thus, in Prince, the Supreme Court clearly established that neither first amendment rights nor parental rights include the right to impair the welfare of a child.

**JUDICIAL REACTION TO WITHHOLDING MEDICAL CARE FROM CHILDREN**

Although courts have required exemptions from secular law under the free exercise clause, they have consistently held that one's free exercise of religion must not interfere with the rights of others, especially where religious practices injure children. Courts have long recognized that religion affords no defense to a statutory obligation to provide medical care for dependent children. Early American cases held parents criminally liable for failing to provide medical care

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91. 321 U.S. at 165.
92. Id. at 166 (citing Pierce v. Society of Sisters, 268 U.S. 510 (1925)).
93. Id. at 166. The Court upheld the conviction, holding that the state may limit parental freedom and authority where such parental control adversely affects a child's welfare. The Court concluded that Massachusetts had a "legitimate" interest in, and therefore had power broad enough to impose, an absolute prohibition on child labor, whether religiously motivated or not. Id. at 170. Since Prince predated Sherbert by almost 20 years, a compelling state interest was not required by the Court.
94. Under the doctrine of parens patriae, the state has the right and duty to act as "the general guardian of all infants, idiots and lunatics." Hawaii v. Standard Oil Co., 405 U.S. 251, 257 (1972) (quoting 3 W. Blackstone, Commentaries *47).
95. 321 U.S. at 166-67 (citing People v. Pierson, 176 N.Y. 201, 68 N.E. 243 (1903)).
96. Id. at 170.
98. According to the Supreme Court in Cantwell: "When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious." 310 U.S. 296, 308 (1940).
100. In the English case of The Queen v. Senior, 1 Q.B. 283 (1899), a member of a faith healing sect who failed to provide his infant child with medical care was convicted of manslaughter after the child had died of diarrhea and pneumonia. The Queen's Bench affirmed the conviction, disregarding the good intentions of the parent in light of his statutory duty to provide medical aid for his child. Id. at 288-92.
in contravention of child protection statutes. In People v. Pierson, the court interpreted the statutory duty to furnish medical attendance as requiring a parent, regardless of religious convictions, to seek medical assistance at the time when an ordinarily prudent person would do so. Under the Reynolds belief-action dichotomy, the court held that a parent could not escape criminal liability because the failure to provide medical care was religiously motivated.

Courts generally grant parents greater freedom in the practice of their religious beliefs when the child’s illness is not life-threatening. In such cases, courts are reluctant to invade the realm of family life, but will order treatment in egregious instances. For example, courts have allowed parents to withhold surgical treatment for religious reasons when a child is deformed but not in imminent danger of death. Moreover, the courts usually will not interfere when parental objections are based on legitimate concerns about the efficacy or safety of the treatment.

In In re Appeal in Cochise County Juvenile Action No. 5666-J, a woman’s seven children had been declared dependent under Arizona law by the Arizona Court of Appeals after one of her children died from a preventable malady. The woman had not sought medical assistance for her deceased son, relying instead on “miracles” to safeguard her children. Although the court authorized state intervention to protect the surviving children from future fatalities, the

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101. 176 N.Y. 201, 68 N.E. 243 (1903).
102. 68 N.E. at 244.
103. Id. at 246-47. “The peace and safety of the state involve the protection of the lives and health of its children, as well as the obedience to its laws . . . . [A person] cannot, under the belief or profession of belief that he should be relieved from the care of children, be excused from punishment for slaying those who have been born to him.” Id. at 246. See also Owens v. State, 6 Okla. Cr. 110, 116 P. 345 (1911).
105. See In re Green, 448 Pa. 338, 292 A.2d 387 (1972) (severe curvature of the spine resulted in child’s inability to stand or ambulate); In re Seiferth, 309 N.Y. 80, 127 N.E.2d 820 (1955) (child’s cleft palate and harelip affected his appearance and ability to speak). But see In re Sampson, 37 A.D.2d 668, 323 N.Y.S.2d 253 (1971), aff’d per curiam, 29 N.Y.2d 900, 278 N.E.2d 918, 328 N.Y.S.2d 686 (1972) (upholding order authorizing surgery to correct child’s facial disfigurement in order that child may lead normal life).
108. According to Arizona law:

“Dependent child” means a child who is adjudicated to be: (a) In need of proper and effective parental care and control and has no parent or guardian, or one who has no parent or guardian willing to exercise or capable of exercising such care and control. (b) Destitute or who is not provided with the necessities of life, or who is not provided with a home or suitable place of abode, or whose home is unfit for him by reason of abuse, neglect, cruelty or depravity by either of his parents, his guardian, or other person having his custody or care.

ARIZ. REV. STAT. ANN § 8-201(11) (Supp. 1974-1984) (formerly codified at § 8-201(10)).
109. In re Appeal in Cochise County Juvenile Action No. 5666-J, 133 Ariz. 165, 650 P.2d 467 (1981), vacated, 133 Ariz. 157, 650 P.2d 459 (1982). The child was pronounced “dead on arrival” at a hospital emergency room. The abdomen of the six-year-old child had swollen to the size of a basketball and fecal material in his mouth indicated prolonged or severe vomiting. An autopsy revealed that the death of the child had resulted from a strangulated inguinal hernia. Part of his intestine had protruded through a defect in the abdominal wall and had become caught. The blood supply decreased to the area, causing tissue death and ultimately a rupture of the bowel. Digestive material then entered the abdominal cavity resulting in infection and eventually death. 650 P.2d at 467. The condition is treatable in its early stages without surgery by pushing the hernia back into the abdominal cavity. In later stages, the problem can be corrected by relatively safe and simple surgery. Id.
110. Id. at 469-70. The court of appeals held that the state may intervene to ensure that her surviving
Supreme Court of Arizona vacated the appellate court's opinion and held that the state cannot abridge religious freedoms and parental rights unless the welfare of a child is seriously jeopardized. The court found no evidence of illness among the surviving children and therefore determined that the woman's refusal to agree to provide medical treatment in the future did not make her a negligent parent. Because the children appeared to be healthy and not in imminent danger, the court allowed the parent to retain legal custody and control of her children.

The Supreme Court of Colorado recently reached a similar result in its first ruling in People in the Interest of D.L.E. (D.L.E. I). D.L.E.'s adoptive mother had refused, for religious reasons, to obtain medical treatment for D.L.E., who suffered from recurring seizure activity. As a result, a juvenile court adjudicated D.L.E. a dependent child under Colorado law. Relying on the religious exemption in the state's Children's Code, the Colorado Supreme Court reversed, recognizing the mother's right to refuse medical treatment for D.L.E. on religious grounds.

The court limited its decision, however, by emphasizing that D.L.E.'s condition did not pose imminent danger to his life.

In 1982, the matter returned to the Colorado Supreme Court due to D.L.E.'s degenerating condition. The court examined its prior decision in light...
of the child's existing condition\footnote{124} and concluded that the religious exception did not apply when faith healing practices threaten a child's life, thus carving out an "exception" to the exception.\footnote{125} D.L.E. and his mother contended that such an interpretation of the statute violated their first amendment right to free exercise of religion. The court rejected their contention, noting that neither religious freedoms nor parental rights are beyond limitation.\footnote{126} The court held that in situations where a minor's life is threatened, the state's interest in protecting the well-being of children forces spiritual healing to yield to medical treatment.\footnote{127}

The court in \textit{D.L.E. II} concluded that certain "additional reasons" may result in a finding of dependency and neglect despite the exemption's accommodation for faith healing practices. Under the court's interpretation of the exemption, the state may not consider a child neglected for the sole reason that spiritual treatment is used instead of medical care. Exactly what other reasons would justify a finding of neglect was left open by the court.

In \textit{In re Jensen},\footnote{128} parents refused to consent to surgical treatment for their daughter because of religious objections.\footnote{129} A circuit court judge ordered that the

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D.L.E. was dependent and neglected, the court granted a motion to dismiss the petition. Based on the supreme court's ruling in \textit{D.L.E. I} the district court concluded that the religious exemption prevented a finding of dependency or neglect, even though D.L.E.'s life was endangered. Id. The Department appealed the ruling.
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\begin{itemize}
\item \textbf{124.} In rejecting arguments that \textit{res judicata} or collateral estoppel barred the redetermination of the issues regarding dependency and neglect, the court stated: "[T]here has been no final judicial determination of the new factual basis and legal issues arising out of the change in D.L.E.'s medical condition to a life-endangering situation." \textit{Id.} at 273-74.
\item \textbf{125.} \textit{Id.} at 274. The district court had concluded that "no mode of logic" allowed for a different interpretation of the religious exception when a child's life was endangered. The supreme court rejected this notion and drew a distinction between life-threatening and non-life-threatening religious practices. \textit{Id.} The supreme court reached its conclusion by focusing on the language of section 114 of the Colorado Code which provides that a child cannot be adjudicated as neglected solely for the reason that only spiritual treatment is provided. \textit{See} statute cited \textit{supra} note 119. According to the court, the meaning of the provision is "quite clear:"

\begin{quote}
[A] child who is treated solely by spiritual means is not, for that reason alone, dependent or neglected, but if there is an additional reason, such as where the child is deprived of medical care necessary to prevent a life-endangering condition, the child may be adjudicated dependent and neglected under the statutory scheme.
\end{quote}
\item \textbf{126.} \textit{Id.} at 275-76 (citing Prince v. Massachusetts, 321 U.S. 158 (1944)).
\item \textbf{127.} In \textit{In re Hamilton}, 657 S.W. 2d 425 (Tenn. App. 1983), a Tennessee appellate court reached a similar conclusion in a case involving a 12-year-old girl suffering from a form of cancer known as Ewing's Sarcoma. The girl's family belonged to the Church of God of the Union Assembly, and they refused to provide medical treatment due to the sect's faith healing tenet. Testimony indicated that without such treatment, the child would die within six to nine months. The appellate court upheld the trial court's decision declaring the girl a dependent and neglected child under Tennessee law. The court held that the state as \textit{parens patriae} has a special duty to protect minors and make decisions on their behalf where life-threatening situations are involved. \textit{Id.} at 429.
\item \textbf{129.} 633 P.2d at 1303. The parents were members of the General Assembly and Church of the First Born. Sara Helen Jensen, a 15-month-old child, suffered from hydrocephalus, a condition in which fluid is retained in the cranium. As a result, her head had become abnormally enlarged to the point where she was unable to sit up or to hold her head up without assistance. If left untreated, the increased pressure on the brain caused by hydrocephalus often results in reduced brain function. \textit{Id.}
\item Unlike the situation in \textit{D.L.E. II}, Sara Helen Jensen's life was not in immediate danger due to her condition. The court of appeals determined, however, that retardation could result if the condition was not treated, affecting the child's ability to lead a normal life. The recommended treatment for hydrocephalus involves a shunting procedure in which surgeons insert plastic tubing into a hollow area of the brain to drain the fluid into other parts of the body. Three or four additional surgeries are
\end{itemize}
child be placed in the legal and physical custody of a state agency for medical treatment pursuant to statutory authority. After first rejecting the contention that the statutory language was impermissibly vague, the Oregon Court of Appeals addressed the parents’ argument that the statutes, as applied by the lower court, violated constitutionally protected religious freedoms and familial rights. The court held that the burden imposed on the child in the interest of faith exceeded the limits of parental and religious freedoms as enunciated in Prince. Although the child’s life was not in imminent danger, the court determined that her parents’ faith healing practices posed a risk sufficiently serious to justify state intervention. The court concluded: “The facts as we find them are that the most basic quality of the child’s life is endangered by the course the parents wish to follow. Their rights must yield.”

Jensen and D.L.E. II demonstrate that courts have readily ordered medical treatment for seriously ill children over the objections of their parents. When children have died as a result of faith healing practices, however, courts have been less willing to hold parents criminally responsible. Even prior to the rise of religious exemptions in child protection laws, appellate courts usually reversed the convictions of well-intentioned parents. Over the past several years, state religious exemptions have reduced both prosecutions and convictions of parents whose faith healing practices resulted in the deaths of their children. Courts have become, however, increasingly suspect of these exemptions. In Colorado v. Lybarger, the court struck down Colorado’s spiritual healing exemption to its child protection law, ruling that the exemption violated the establishment clause

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130. The statutes involved were Oregon Revised Statutes §§ 419.476(1)(c) and 419.500(1). The former provides: “(1) The juvenile court has exclusive original jurisdiction in any case involving a person who is under 18 years of age and: . . . (c) Whose behavior, condition or circumstances are such as to endanger his own welfare or the welfare of others. . . .” OR. REV. STAT. § 419.476(1)(c) (1981). The latter provides in pertinent part:

The practice of a parent who chooses for himself or his child treatment by prayer or spiritual means alone shall not be construed as a failure to provide physical care . . . but shall not prevent a court of competent jurisdiction from exercising that jurisdiction under paragraph (c) of subsection (1) of ORS 419.476. . . . OR. REV. STAT. § 419.500(1) (1981).

131. The Jensens argued that the statutes in question created an impermissibly vague standard which (1) failed to adequately warn what conduct is proscribed, (2) allowed arbitrary enforcement, and (3) inhibited the free exercise of religion. 633 P.2d at 1304. The court held that language of § 419.476(1)(c) was “precise enough to give adequate notice to the parents and to guide the court’s discretion . . . .” Id. at 1305. It also concluded that § 419.500(1) did not inject vagueness into the statutory scheme. Id.

132. Id. at 1305-06.

133. Id. at 1306.

134. Courts have frequently reversed convictions for manslaughter and neglect when parental action is based on religious healing practices, often on grounds unrelated to the criminal charge. See, e.g., Craig v. State, 220 Md. 590, 155 A.2d 684 (1959) (evidence insufficient to show that failure to provide care was proximate cause of child’s death); People v. Arnold, 66 Cal. 2d 438, 426 P.2d 515 (1967) (manslaughter conviction reversed because defendant had not been advised of her right to counsel and right to remain silent); Bradley v. State, 79 Fla. 651, 84 So. 677 (1920) (medical neglect not proximate cause of child’s death). The failure to uphold such criminal convictions may reflect judicial sympathy for those whose religious beliefs result in tragedy. Note, Manslaughter Conviction for Failure to Provide Medical Aid to Child Because of Religious Belief Reversed, 9 DEPAUL L. REV. 271, 274 (1960); Comment, supra note 4, at 407-08.

135. See, e.g., Indianapolis Star, Jan. 26, 1984, at 1, col. 2 (noting the reluctance of Indiana prosecutors to file criminal charges in light of the state’s religious exemption).


137. No. 82-CR-205 (Colo. Cir. Ct., Larimer County, Aug. 1982).
of the first amendment. The exemption provided a defense for the treatment of children solely by spiritual means when done in accordance with the tenets of a recognized church by a legitimate practitioner thereof. The court stated:

The real and practical effect of this law is to recognize and give credence to a particular religion and its practice (i.e., that of healing by prayer alone). The First Amendment establishment clause prohibits the ... granting of privilege or exemption from the application of its laws to a group for religious reasons.

Despite this ruling, Colorado legislators have yet to modify or repeal the exemption.

More recently, an Ohio trial court declared that state’s religious exemption unconstitutional. In Ohio v. Miskimens, members of the Christ Assembly sect were charged with involuntary manslaughter after their 13-month-old son had died from an infection triggered by pneumonia. Both the prosecutor and the defendants challenged the constitutionality of Ohio’s religious exemption. The court ruled that the exemption violates the first amendment establishment clause and the fourteenth amendment equal protection clause and that it is unconstitutionally vague. The court concluded its opinion by emphasizing that

139. COLO. REV. STAT. § 19-1-114 (1978). For text of the exemption, see supra note 119.
142. The exemption reads as follows:
144. The court concluded that the exemption affords certain religious groups preferential treatment, thus violating the establishment clause. Id. slip op. at 2-6. The court also found that the exemption results in excessive government entanglement with religion: [The exemption] hopelessly involves the state in the determination of questions which should not be the subject of governmental inquisition ... such as what is a “recognized religious body;” by whom must it be “recognized” ... what are its tenets; did the accused act in accordance with those tenets; what are “spiritual means;” and what is the effect of combining some prayer with some treatment or medicine. Id. at 4-5. The court held that the determination of such issues violated the “excessive entanglement” prohibition of Walz v. Tax Commission, 397 U.S. 664 (1970). Id. To avoid violating the establishment clause, a statute (1) must have a secular legislative purpose, (2) must have a primary effect which neither advances nor inhibits religion, and (3) must not foster excessive government entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).
145. The court determined that the exemption violates the equal protection clause by denying the children of faith healing sect members the same protections enjoyed by other children. The court stated that “the prayer exception creates a group of children who will never be ... protected, through no fault or choice of their own.” Id. at 7. The court also held that the law denies equal protection to the parents not favored by the religious exemption because it creates separate standards of parental conduct based on religious beliefs. Id. at 6.
146. The court held that the exemption renders the child endangerment statute unconstitutionally vague by failing to provide fair notice of proscribed conduct. The court employed the three-pronged test for unconstitutional vagueness delineated in State v. Sammons, 58 Ohio St. 2d 460, 462, 391 N.E.2d 713, 714 (1979), appeal dismissed, 444 U.S. 1008 (1980): A penal statute is unconstitutionally vague if it (1) fails to provide fair notice that the contemplated conduct is forbidden (United States v. Harris, 347 U.S. 612, 617 (1954)), (2) fails to set reasonably clear guidelines for those charged with their administration, resulting in arbitrary and unequal enforcement (Smith v. Goguen, 415 U.S. 566, 572-73 (1974)), or (3) proscribes conduct that, by modern standards, is normally innocent (Papachristou v. Jacksonville, 405 U.S. 156, 163 (1972)). The court concluded that the exemption invites “confusion as to what is or is not required by parents who prefer the use of faith healing to treat an illness of their child.” Miskimens, slip op. at 13. The court held that the exemption is expressed in terms “so vague that men of common intelligence
the needless death of a child stands as "the real tragedy of the present lack of firm
definitive standards in this troublesome area of the law . . . ." 147

The ambiguous language of Indiana's religious exemption has recently led to
jury convictions of parents whose faith healing practices resulted in the deaths of
their children. 148 Although Indiana's exemption permits the use of spiritual treatment
in the legitimate practice of religious beliefs, 149 prosecutors have argued that
withholding medical care from children is not a "legitimate" practice of religion. 150
Accepting this statutory interpretation, two juries have disallowed the
exemption as a defense to criminal charges, thus ignoring the legislative accom-
modation for faith healing practices. 151

Religious exemptions in state child protection laws have troubled those courts
seeking to adequately protect children. Some courts have sought greater child
protection through statutory interpretation, while more recent cases have attacked
the constitutionality of religious exemptions. These decisions reflect the courts'
unwillingness to allow religious exemptions in child protection laws to preclude
state action against parents whose faith healing practices adversely affect their
children. Absent a legislative reevaluation of the rights and duties of parents, the
viability of exemption laws is uncertain.

THE NEED FOR A LEGISLATIVE RESPONSE

Government must actively seek to protect those too young to protect them-
selves. At times this may require the state to protect a child from a well-inten-
tioned parent. Legislators in Ohio and Indiana have recently acted in response to
the controversy surrounding religious exemptions. In Ohio, proposed legislation
would amend the state's exemption in an attempt to conform with constitutional
limitations. 152 The amended exemption would no longer require that spiritual
healing be done in accordance with the tenets and practices of a recognized reli-
gion, 153 thus removing a source of unconstitutional vagueness and government
entanglement. 154 Moreover, the amended exemption would not protect faith heal-
ing practices where such practices result in serious physical harm to a child. 155

must necessarily guess at its meaning and differ as to its application." Id. at 12 (quoting City of
Columbus v. Becher, 115 Ohio App. 239, 184 N.E.2d 617 (1961)).

147. Miskimens, slip op. at 13.

148. On August 28, 1984, Gary and Margaret Hall were convicted of reckless homicide and child neglect in
the death of their 26-day-old son. State v. Hall, No. S-84-13 (Whitley County Ct., Ind. Aug. 28,
1984). Two weeks later, David and Kathleen Bergmann were convicted on identical charges in a
neighboring county for the death of their nine-month-old daughter. State v. Bergmann, No. SCR-84-
16 (Noble County Super. Ct. Sept. 11, 1984). Both couples were members of the Faith Assembly sect
and had prayed for their ill children instead of seeking medical treatment.

149. See statutes cited supra note 29 and accompanying text.

150. In the Bergmann trial, the prosecutor told the jury that "[r]eligious practice ends where the sacrifice of
innocent children begins." When Faith Lets Children Die, supra note 6, at 32. See also A Child's
Death, supra note 6, at 6 (discussing a similar argument used in the Hall trial).

151. If withholding medical care from children cannot be considered a legitimate practice of religion, one
has to wonder what conduct the exemption protects. The law provides some recognition of faith
healing practices by its mere existence. Perhaps a more accurate interpretation of the statutory lan-
guage would be that withholding medical care from children whose lives are imminently endangered by
medically treatable illnesses is not a legitimate practice of religion. This narrower interpretation still
affords the exemption some meaning. Both Faith Assembly cases have been appealed.

emption and a discussion of the court ruling declaring it unconstitutional, see supra notes 141-47 and
accompanying text. For additional sections containing religious exemptions, see OHIO REV. CODE


154. See supra notes 144, 146.

155. If H.B. 67 is passed, Ohio's exemption to its child endangerment law would provide:
It is not a violation of a duty of care, protection, or support under this division when the
In Indiana, proposed legislation would add the crime of child endangerment to the state child protection laws. The bill would make it a crime to withhold medical care from a child without consulting a licensed physician, where the failure to provide medical treatment endangers the child's life. Previous legislation had removed the religious exemption from Indiana's child abuse reporting law.

Those opposed to legislative reform of child protection laws have claimed that the removal of religious exemptions would have a detrimental effect on children. They question whether a law would deter parents from utilizing spiritual healing, given the fact that their belief in the practice has withstood even the deaths of their children. However, members of faith healing sects typically are taught to obey the law, making their compliance with the laws probable. Indeed, eliminating the exemption from state statutes may provide an “easy way out” for sect members who do not want to admit to a “lack of faith” by resorting to medical treatment for their children. If parents were legally required to seek medical treatment for their children, they could overcome the pressure to conform to the dogma of their faith by blaming their actions on secular law.

Religious exemptions have proven troublesome for those who must interpret and enforce child protection laws. The mere elimination of these exemptions would not automatically guarantee all children medical care. It would, however, establish clear requirements concerning parental obligations and aid in the enforcement of child protection laws. Requiring parents to provide medical care when the health of their children is imperiled will afford states greater latitude in ordering medical treatment for ill children. Moreover, members of faith healing sects are more likely to comply with laws that explicitly require medical care for children. Therefore, eliminating exemptions from child protection laws should at least temper the use of spiritual treatment in instances where a child is seriously ill. Criminal prosecutions of parents who refuse to provide medical treatment to their children would further deter others from following a similar course. If unambiguous child care requirements were set forth by state statutes, perhaps such prosecutions would be unnecessary.


157. The proposed law would provide the following:
A parent, guardian, or custodian who, acting without the advice of a physician licensed to practice medicine in Indiana, knowingly or intentionally fails to provide a dependent child with medical care that is generally provided to similarly situated children, where that failure endangers the child's life, commits child endangerment, a Class D felony.


159. Critics contend that the incarceration of parents will have adverse effects on the surviving children of sect members. Indianapolis Star, Feb. 3, 1984, at 16, col. 3-4.

160. See, e.g., Flowers, supra note 3, at 159 (characterizing Christian Scientists as law-abiding people); Indianapolis Star, Feb. 3, 1984, at 16, col. 3-4 (noting that the Faith Assembly instructs its members to obey secular law).
In order to effectively deter parents from relying solely on spiritual treatment for their seriously ill children, state legislatures must respond by eliminating or amending existing religious exemptions. Under current HHS regulations, states no longer are required to have religious exemptions in their child protection laws to qualify for Federal funding under the Child Abuse and Neglect Prevention and Treatment Program.\(^\text{161}\) By removing these exemptions, a state's legislature can send a clear message to its citizens concerning what parental inaction will not be tolerated by the state. Such legislative action would provide parents with better notice of proscribed conduct and would protect children from serious injury or death due to treatable illnesses. State courts have long wrestled with the exemptions in an attempt to give them effect while at the same time ensuring that children are protected. State legislatures should respond by establishing definitive standards of parental duty.

Some states have elected to amend their current exemptions instead of completely eliminating them. In so doing, these states have attempted to protect children without unduly interfering with parental and religious freedoms. The Oklahoma legislature has effectively restricted its religious exemption by requiring parents to provide medical care where permanent physical damage could result to their children.\(^\text{162}\) The amendment represents a compromise position which recognizes and allows for spiritual healing unless such practices would result in permanent injury.\(^\text{163}\)

At the Federal level, the HHS should play a more active role in initiating state legislative reform. Although the revised HHS regulations were a step in the right direction, they fall short of ensuring that children will be protected from harm due to the withholding of medical care. The HEW prompted many states to adopt religious exemptions pursuant to regulations issued in 1975. The HHS has perpetuated these policies by failing to mandate changes in state laws.

In order to counteract the retention of state exemption laws, the HHS should impose a stricter standard upon states wishing to qualify for funding under Federal child protection programs. For states electing to retain religious exemptions, the HHS should require qualifications similar to those adopted in Oklahoma and proposed in Ohio and Indiana which represent a compromise between religious freedom and the state's interest in protecting children. The HHS should promulgate new regulations to compel states to require that parents provide medical care where serious physical injury or death could result to a child. By modifying the regulations in this way, the HHS would force states to reevaluate their laws instead of simply maintaining the status quo. The HHS should take positive action to instigate such statutory reform.

The problems presented by religious exemptions to state child protection laws have recently come to the attention of Congress.\(^\text{164}\) Congress enacted the Child

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161. See regulation cited supra note 55.
162. OKLA. STAT. ANN tit. 21, § 852 (West Supp. 1984-1985). The exemption precludes a finding that a child is endangered solely because the parent or guardian, in good faith, selects and depends upon spiritual means alone through prayer, in accordance with the tenets and practice of a recognized church or religious denomination, for the treatment or cure of disease or remedial care of such child; provided, that medical care shall be provided where permanent physical damage could result to such child; and that the laws, rules, and regulations relating to communicable diseases and sanitary matters are not violated.

\text{Id.} \ (emphasis added). The italicized portion was added in 1983.
163. For proposed legislation that would amend other states' exemptions in a similar fashion, see Ohio H.B. 67, supra notes 152-55 and accompanying text; Ind. S.B. 303, supra notes 156-57 and accompanying text.
164. In 1984, the Senate passed a bill to extend and revise the provisions of the Child Abuse Prevention and Treatment Act of 1974 and the Child Abuse Prevention and Treatment and Adoption Reform Act of
Abuse Prevention and Treatment Act of 1974 and subsequent amendments thereto to help prevent child abuse and neglect. Pursuant to regulations promulgated by the HEW and HHS to implement the Act, however, most states adopted religious exemptions which lessen the statutory protections afforded children. Some legislators feel that Congress should address this issue directly and establish clear eligibility requirements for funding under Federal child protection programs. According to Senator Alan Cranston (D-Calif.):

Congress needs . . . to find a reasonable balance which allows States to deal with the religious exemption issue in their own fashion while reaffirming the well-recognized authority of the State, through its judicial system, to protect the health and lives of the children involved . . . . Congress ought to determine these issues and not merely relegate them to a regulatory process which has in the past produced quite contradictory results.

Absent HHS action to shore up current regulations, Congress should directly confront the religious exemption issue in future legislation. Congress should amend the Child Abuse Prevention and Treatment Act to include more stringent standards for Federal funding under the Act. Specifically, Congress should require all states to recognize that withholding medical care from a child where death or serious bodily injury is likely to result constitutes child neglect. A finding of neglect should allow the state to intervene on behalf of the child in order to provide necessary medical treatment. Moreover, such a finding should allow for criminal proceedings against the parents if such proceedings are deemed to be warranted. By conditioning state receipt of Federal funds upon the adoption of such legislation by state legislatures, Congress will better protect children from medical neglect.

CONCLUSION

Faith healing exemptions in child protection statutes are inherently problematic. The laws in most states, however, still allow parents to withhold medical care from their children for religious reasons. While courts have struggled to reconcile the competing interests presented by religious exemptions in child protection laws, state legislatures have largely ignored the problems created by these provisions. The ambiguous language of exemption laws results in confusion by creating unascertainable standards of parental conduct. Unfortunately, the victims of this confusion are the children who die from medically preventable illnesses.

State laws must provide clear notice to parents of both required and prescribed conduct. State legislatures should act to eliminate or modify their exemptions in order to ensure medical care for all children whose health so requires. The HHS and Congress should also respond to the problems created by religious exemptions by requiring states to eliminate or modify their exemptions as an eligibility requirement for grants under Federal child protection programs. A clear

165. See Child Abuse Prevention and Treatment Act, supra note 36.
pronouncement on this issue will firmly establish the parent’s duty to furnish medical care and the child’s right to receive such care where necessary.

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