

# Taking God Out of the Hospital: Requiring Parents to Seek Medical Care For Their Children Regardless of Religious Belief

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## I. Introduction

Since 1975, at least one hundred and sixty five children have died from curable illnesses when their parents refused medical treatment in accordance with religious strictures.<sup>1</sup> Two-year old Robyn Twitchell and seven-year old Amy Hermanson represent examples of children who unnecessarily died from curable illnesses because their parents, in accordance with religious doctrine, refused needed medical treatment.<sup>2</sup> On the surface, it surely appeared that tragedies could have been prevented, considering the curable nature of their respective illnesses and the readily accessible remedies offered through conventional medical modalities. By all accounts, the illnesses confronting Robyn and Amy were medically preventable even minutes before their untimely deaths.<sup>3</sup> However, their parents, in accordance with Christian Science doctrine, repeatedly refused conventional medical treatment in favor of exclusive reliance on "faith healing." While the decision to refuse medical treatment for one's child may, at a visceral level, seem indefensible, the fate bestowed upon Robyn and Amy strike familiar reverberations. In the state of Oregon alone, over twelve children have perished in recent years due to sole reliance on faith healing; two of these deaths occurred upon newborn children in 1999 alone.<sup>4</sup> These deaths, coupled with nationwide legislative exemptions for such conduct, have re-energized the debate

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1. See Jennifer L. Hartsell, *Mother May I...Live? Parental Refusal of Life-Sustaining Medical Treatment For Children Based on Religious Objections*, 66 TENN L. REV. 499, 502 (1999).

2. See Paula A. Monopli, *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) (discussing the constitutionality of exemption policies in the child neglect context); see also, *Hermanson v. State*, 604 So.2d 775, 777 (Fla. 1992).

3. *Id.* at 325.

4. See Diane Sawyer, "Who Will Save the Children?" 20/20 ABC January 6, 1999 (examining the practices of the First Church of Christ sect in Oregon, where a startling number of children have died when parents have refused medical treatment for their children in accordance with the sect's doctrine).

legislative exemptions for such conduct, have re-energized the debate regarding faith healing exemptions in child neglect statutes, prompting many to call for their repeal.<sup>5</sup> Unfortunately, the repeated, albeit unsuccessful, demands for curative measures in the wake of these tragedies reflect the nature of their futility; the cries for reform are ephemeral, the responses nominal. Simply put, parents are routinely refusing medical treatment for their children; despite movements to the contrary, no one is stopping them.

The reason for this lies in the reality that legislative bodies across the country, rather than prohibit such practices, affirmatively protect them. In fact, despite repeated tragedies, over forty states contain exemptions in their child neglect statutes that permit parents to categorically reject medical treatment and rely instead on spiritual healing as a mode of medical care.<sup>6</sup> Three states even make the utilization of spiritual healing an affirmative defense to homicide.<sup>7</sup> When asked to justify such exemptions in light of the tragedies they have engendered, legislatures uniformly recite the common two-fold mantra: parents have plenary power to raise their children as they see fit, and the Free Exercise Clause of the First Amendment constitutionally accords parents the right to refuse medical care for their children in accordance with their religion. Moreover, both scholarly commentary and contemporary debate follow the legislative construct in concentrating on parental rights as the driving force behind the exemptions' necessity. Whether it is the right of the parent to control their child's upbringing, to act as the primary representative for the child's interest, or to freely practice religious faith, the analysis is strikingly one-dimensional in favor of parental autonomy. Lost in the dialogue is any meaningful discussion regarding the rights of the child, or the power of the legislature, to effectively impact both the scholarly debate and legislative options regarding medical treatment for children.

This article attempts, in a comprehensive manner, to rectify this imbalance. First, by focusing largely on the rights of parents as opposed to the power of legislatures, the legal community has inappropriately framed this issue as primarily one of parental rights. Such a posture has ignored the power of legislatures to make policy decisions that focus on the health and well being of children, not simply the rights and responsibility accorded parents. In fact, a glimpse into both Supreme Court precedent and Free Exercise Clause jurisprudence reveals that legislative bodies may, as a constitutional matter, require parents to seek medical treatment for their children, regardless of religious beliefs. This

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5. See *id.* (In Oregon, many officials are calling for the state legislature to reconsider the exemption policies contained in the neglect statutes.).

6. *Id.* (Except for the states of Oregon and South Dakota, there has been no attempt to repeal these exemption policies, despite the number of children who have perished at the hands of spiritual healers.).

7. See Hartsell, *supra* note 1, at 510 (Arkansas, West Virginia, and Oregon).

proposition is true, *a fortiori*, when one considers that a cogent argument can be adduced that current exemption policies facially violate the Establishment Clause.<sup>8</sup> The dissemination of this legal reality will appropriately reframe the debate, not merely one of parental rights, but one of legislative prerogative. Importantly, upon re-definition of the traditional framework in light of the aforementioned, this debate will focus not merely on legal or constitutional dimensions, as has often been the case, but more appropriately on policy considerations. Legislatures will be cognizant that they have the option to enact neglect laws that are congruous with their predilections, not merely the obligation to create exemption statutes in accordance with a misperceived constitutional mandate. Once policy considerations become the predominant variable, then the rights of children can effectively pervade the scholarly and legislative debate as the primary consideration mandating a restructuring of our child neglect laws. Importantly, cognizant that they have the power to reconstruct child neglect laws, legislative bodies may, with the health and well being of children as their guiding principle, enact responsible child neglect laws that stand not only on formidable legal grounds, but on unassailable policy grounds as well.

Accordingly, in the wake of the hundreds of deaths that have resulted from curable ailments that went untreated, this article calls on legislative bodies throughout the country to recognize that the time has arrived for a reconsideration of current child neglect policy. As a normative matter, legislative bodies should repeal existing exemption policies in favor of generally applicable criminal laws that require all parents, regardless of belief, to seek conventional medical care for their children. Such policies should be predicated on the notion that a child's health and well being should not be conditioned upon, or inexorably linked to, the religious predilections of their parents. Instead, all children, regardless of the regardless proclivities of their parents, possess the individual right to have their health and well protected by law and preserved by principle, and the legislature is empowered to accord this rights its proper recognition.

Only when we enact such laws will we adequately protect the lives of children and avoid the tragedies that have heretofore occurred. Part II endeavors to trace the rights and deference traditionally afforded to parents in the rearing of their children. Part III ventures to explore the rights accorded to the state, as *parens patriae*, to counterbalance the rights of parents in the context of decision-making for children. Part IV analyzes the standards by which courts have wrestled with the conflicting interests of parents and state, and the differing legal principles that have been applied to adjudicate these disputes in the free exercise context. Part V opines that, with the exception of *Smith*, the approaches taken by

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8. See *infra* Part V.

the courts in this area are erroneous. First, as a constitutional matter, statutory exemption policies must be repealed because they violate both the letter and spirit of the Establishment Clause. Second, as a policy matter, exemption statutes should be repealed in recognition that the Free Exercise Clause does not, and should not, extend to such a degree that affords constitutional protection to a parent whose child dies at the altar of religious freedom. With the foregoing in mind, it becomes clear that legislative bodies possess the power to abolish child neglect exemption without fear of constitutional reprisal. Part VI suggests that with the power to effect a change in the status quo, legislative entities should exercise their prerogative to enact statutory directives that criminalize the neglect and abuse of children, regardless of the belief system upon which such acts are premised. Such laws should replace current exemption policies because, as a normative matter, legislatures should enact laws to protect all children, not merely those whose parents are willing to access conventional medical care. This approach would remain consonant with free exercise jurisprudence while representing an adequate societal response to those who are willing to sacrifice life for religious dogma. Moreover such an approach would restore the proper balance between parent, child, and state that has been lost in current parlance. Most of all, such a law would be a clear manifestation of the just and moral principle that accords priority to the sanctity of life over abstract notion of religious liberty, thereby protecting children whose lives would otherwise be lost in the name of religion.

## II. The Right of Parents to Raise their Children Free from State Interference

The right of parents to refuse medical treatment for their children is premised on two grounds. First, parents may reject medical treatment based upon the broad grant of authority conferred upon them to raise their children as they see fit. This is frequently referred to as the parental control doctrine. Second, parents may buttress a claim of parental autonomy by relying on the Free Exercise Clause of the First Amendment, which states: "Congress shall make no law respecting the establishment of particular religion or prohibiting the free exercise thereof." This Part will examine the scope of each of these rights in turn.

A. *The Parent's Right To Raise the Child As They See Fit  
(The Parental Control Doctrine)*

It is a basic axiom of constitutional jurisprudence that the right to raise a child and make decisions on their behalf resides first and foremost with the parent. This notion is born out of several Supreme Court decisions that firmly entrench the parents, not the state, as the primary caretakers and advocates for a child's upbringing. Indeed, *Meyer v. Nebraska* marks the seminal case that afforded judicial cognizance to the notion that the parents retain primary authority for the upbringing of their children.<sup>9</sup> This principle was further enunciated in *Wisconsin v. Yoder*, where the parents of Amish children challenged the constitutionality of Wisconsin's compulsory attendance laws.<sup>10</sup> The Amish contended that such a requirement would detract from the customs upon which they chose to rear their children, thereby affecting their parental right, *inter alia*, to raise their children as they deem appropriate.<sup>11</sup> The Supreme Court agreed with the Amish's proposition, holding:

The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now *established beyond debate as an enduring American tradition*.<sup>12</sup>

The courts are uniformly consistent with the approach elucidated by the Court in *Yoder* and *Meyer*. In *Stanley v. Illinois*, the Court held that parental rights, which include decisions regarding child bearing and child rearing, are "basic civil rights."<sup>13</sup> Similarly, in *Santosky v. Kramer*, the Court held that the right to raise a child free from governmental interference is a "fundamental liberty interest."<sup>14</sup> In *Planned Parenthood v. Casey*, the Court stamped its permanent imprimatur on the principle that the right to make decisions on behalf of the child is primarily within

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9. 262 U.S. 390 (1923) (involving a teacher who decided to teach German in the classroom in express contravention of the rules set forth by the school regarding foreign language instruction; in the midst of deciding this case, the Court firmly entrenched the parents as the primary caretakers of a child's health and well-being).

10. 406 U.S. 205 (1972) (Amish parents contended that it was their prerogative to raise their children as they see fit, which did not include sending their children to school past the age of sixteen. The Court held for the Amish, stating that the state's interest in compulsory attendance did not outweigh the right accorded to parents under the Free Exercise Clause.).

11. *Id.* at 209-10.

12. *Id.* at 232 (emphasis added) (This decision represents the most expansive reading of the Free Exercise Clause rendered by the Supreme Court. As we will see *infra*, this approach has been substantially undercut in recent Free Exercise jurisprudence.).

13. 405 U.S. 645, 651 (1972) (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

14. 455 U.S. 745, 753 (1982).

the province of parental liberty.<sup>15</sup> The *Planned Parenthood* Court held, "It is settled now...that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood."<sup>16</sup> Lastly, in *Prince v. Massachusetts*, the Court succinctly and without ambiguity held, "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."<sup>17</sup>

Hence, it is axiomatic that parents retain primary authority to make decisions on behalf of the child. This broad grant of authority also extends to specific medical decisions relating to the health and welfare of the child. In *Burge v. City and County of San Francisco*, the California Supreme Court held that the custody of a child includes, but is not limited to, the right to make health care decisions for the child.<sup>18</sup> In *In Re Hofbauer*, the court similarly held, in relation to a parent's medical decision regarding her child, that "great deference must be accorded a parent's choice as to the mode of medical treatment."<sup>19</sup>

Ostensibly, courts accord significant deference to parental authority because society values both the sanctity and integrity inherent in the familial institution. This sentiment was echoed in *Parham v. J.R.*, where the Court held, "for centuries it has been a canon of the common law that parents speak for their minor children. So deeply embedded in our traditions is this principle of law that the Constitution itself may compel a State to respect it."<sup>20</sup> The significant latitude accorded to parents is also premised on the supposition that the natural bonds of affection between parent and child will necessarily cause a parent to act in the child's best interests.<sup>21</sup> By promoting a deferential posture toward parents in the rearing of their children, the state underscores the important values of securing the integrity of the family structure and providing continuity in the child's life. As one commentator posited, "the right of parents to raise their children as they think best, free of coercive intervention, comports...with each child's biological and

15. 505 U.S. 833 (1992) (holding unconstitutional a mandated parental notification provision before a minor seeks an abortion).

16. *Id.* at 849.

17. 321 U.S. 158, 166 (1943).

18. 262 P.2d 6 (Cal. 1953) (noting that medical decisionmaking for the child is within the realm of authority conferred upon a parent in the rearing of children).

19. Commentators Garry Sigman and Carolyn O'Connor reaffirm this principle in their article relating to minors and medical treatment, explaining that parents are usually entrusted to make medical decisions on behalf of their children. See, Gary S. Sigman & Carolyn O'Connor, *Exploration for Physicians of the Mature Minor Doctrine*, 119 J. Pediatrics 520, 521 (1991); Matthew S. Feigenbaum, *Minors, Medical Treatment, and Interspousal Disagreement: Should Solomon Split the Child?*, 41 DEPAUL L. REV. 841, 851 (1992).

20. 442 U.S. 584, 621 (1979) (Stewart, J., concurring).

21. See Susan D. Hawkins, *Protecting the Rights and Interests of Competent Minors in Litigated Medical Treatment Disputes*, 64 FORDHAM L. REV. 2075, 2081 (1996); see also Elizabeth J. Sher, *Choosing for Children: Medical Care Disputes Between Parents and the State*, 58 N.Y.U. L. REV. 157, 157-58 (1983) (examining the conflicting interests between parent, state, and child).

psychological need for unthreatened and unbroken continuity of care by his parents.”<sup>22</sup> These psychosocial benefits are crucial in the eyes of courts, as a parent seeks to rear the child to become a self-sufficient, contributing member of the community.

However, while the parents’ right to raise a child according to their own commands remains a crucial aspect of our legal milieu, it is not an absolute right. Specifically, the right of parents to rear their children is qualified by a duty to ensure their health, safety, and well being. In *Newmark v. Williams*, the court was confronted with a situation where the parents were charged with medical neglect for failing to accede to chemotherapy for their cancer-stricken child.<sup>23</sup> In passing on this question, the court noted, “[w]e...recognize that parental autonomy over minor children is not an absolute right. Clearly, the state can intervene in the parent-child relationship where the health and safety of the child and the public at large are in jeopardy.”<sup>24</sup> In *Jacobson v. Massachusetts*, the Court recognized that parental authority, in certain instances, is not free from state regulation and intervention.<sup>25</sup> This premise was reaffirmed in *Hawaii v. Standard Oil Co.*, where the Court positioned the state, not the parents, as the “guardian of all infants.”<sup>26</sup> Lastly, the notion that parental control is not unbridled was echoed in *Prince v. Massachusetts*, where the Court held, “but the family itself is not beyond regulation in the public interest...and neither rights of religion nor rights of parenthood are beyond limitation.”<sup>27</sup>

Thus, it is apparent from the preceding discussion that the right to raise a child, while basic and fundamental in our constitutional scheme, is limited. Ostensibly, the right to rear a child is contingent upon the preservation of the child’s health and well being. It is possible, even likely, that some degree of infringement into the province of parental autonomy may be justifiable in certain instances. However, instances of interference will often require the highest of justifications. Moreover, such interference is made considerably more difficult when a claim of parental autonomy is buttressed by a claim of religious liberty.

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22. See Joseph Goldstein, *Medical Care for the Child At Risk: On State Supervision of Parental Autonomy*, 86 YALE L.J. 645, 649 (1977); see also John Dwight Ingram, *State Interference With Religiously Motivated Decisions On Medical Treatment*, 93 DICK. L. REV. 41 (1988) (“It is fundamental in our society that the custody, care, and nurture of the child reside first with the parents.” (quoting *Prince*, 321 U.S. 158, 166). Under the doctrine of *parens patriae*, however, most, if not all states have limited the autonomy of parents in certain instances.) Ingram, 93 DICK. L. REV. at 56.

23. 588 A.2d 1108, 1115 (Del. 1991) (ultimately concluding that parents would not be forced to consent to chemotherapy for their child, in part because the rate of success was relatively low).

24. *Id.* at 1116.

25. 197 U.S. 11 (1905).

26. 405 U.S. 251, 257 (1972).

27. 321 U.S. 158, 166 (1944) (In *Prince*, the plaintiff was convicted of violating the state’s child labor laws when she enlisted the child’s assistance in distributing religious pamphlets at night. The Court rejected plaintiff’s claim of religious freedom, holding that the state has the power to delimit free exercise of religion when necessary to safeguard child’s interests.)

*B. The Free Exercise Clause As It Relates to the Parent-Child Paradigm*

Another core axiom that lies at the heart of our constitutional scheme is that, in conjunction with the parental control doctrine, a parent may rely on the Free Exercise Clause of the First Amendment when seeking to resist interference by the government into the parent-child paradigm. This power is expressly delineated by the Constitution, which provides in part that, "Congress shall make no law respecting a particular religion or prohibiting the free exercise thereof."<sup>28</sup> Thus, the Constitution is a place of refuge for individuals who seek to justify their parental decisions on religious grounds.

Furthermore, the notion that the Free Exercise Clause acts as a vehicle to preserve and enhance parental autonomy is well supported by precedent. In *Prince*, the Court stated, "the rights of children to exercise their religion, and of parents to give them religious training and to encourage them in the practice of religious beliefs, as against preponderant sentiment and assertion of state power voicing it, have had recognition here..."<sup>29</sup> In *Yoder*, the Court expressed similar sentiments by holding that "the duty to prepare the child for 'additional obligations...' must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship."<sup>30</sup> These propositions intimate that parental autonomy includes, but is not limited to, the right of parents to impart religious values to their children without fear of government intrusion. This is made possible because the parental control doctrine frequently operates in conjunction with the Free Exercise Clause.

The Free Exercise Clause has been invoked specifically in the medical context, where parents often seek to refuse conventional medical treatment for their children. The assertion of such a claim has frequently been successful in thwarting attempts by the state to compel medical treatment for children. The court in *In Re Seithfert* refused the state's request to compel surgery for a fourteen-year-old child with a cleft palate and a hair lip.<sup>31</sup> The court's decision was motivated primarily by the father's religious objections, as he preferred "mental healing by letting

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28. U.S. CONST. ART. I; see also, McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1412 (1990); compare Jesse H. Choper, *The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments*, 27 WM. & MARY L. REV. 943 (1986).

29. 321 U.S. at 165.

30. 406 U.S. at 233.

31. 127 N.E.2d 820, 822-23 (N.Y. 1955); but see *In Re Sampson*, 317 N.Y.S.2d 641, 657-59 (authorizing surgery, over parental objection, for a minor's facial and neck deformity, partly because the objection was merely to the blood transfusion).

‘the forces of the universe work on the body.’”<sup>32</sup> In *In Re Green*, the force of the Free Exercise Clause in preserving parental autonomy was further re-enforced, as the court refused to order corrective spinal surgery on a minor over the parents’ religious objections.<sup>33</sup> The court held, “as between a parent and the state, the state does not have an interest of sufficient magnitude outweighing a parent’s religious beliefs when the child’s life is not immediately imperiled by his physical condition.”<sup>34</sup> Thus, in the context of medical decision making, the preceding authorities intimate that the Free Exercise Clause can serve as a powerful tool to allow parents to reject conventional medical aid in favor of alternative methods of treatment.

Furthermore, the Free Exercise Clause has also been successfully utilized as an affirmative defense to shield parents from criminal liability when their child died as a result of sole reliance on spiritual healing. In *State v. Lockhart*, the Oklahoma Court of Criminal Appeals held that parents could not be liable for manslaughter when their child died as a result of such spiritual reliance.<sup>35</sup> In *In Re Hudson*, the court similarly held that a Jehovah’s Witness could not be liable for child neglect when the refusal to accept conventional medical treatment was premised on religious grounds.<sup>36</sup> In *Bradley v. State*, the Florida Supreme Court also held that parents could not be criminally liable when their child perished as a result failed attempts at spiritual healing.<sup>37</sup> Thus, the Free Exercise Clause has been construed by some courts to confer a type of criminal immunity, or at least serve as an affirmative defense, for religious parents whose actions would otherwise lead to criminal culpability.

However, as with the general right to rear a child free from state intervention, the broad Free Exercise right for parents is not absolute. In *Prince*, the Court explicitly held, “the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. Furthermore, neither rights of religion nor rights of parenthood are beyond limitation.”<sup>38</sup> The Court in *Prince* also uttered dicta that have been the cornerstone upon which religious rights of parents have been restricted in the medical context. The *Prince* Court explicitly held, “The right to practice religion freely does not include liberty to expose...the

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32. *Id.* at 822.

33. 292 A.2d 387, 392 (Pa. 1972).

34. *Id.* at 392.

35. 664 P.2d 1059 (Okla. Cr. 1983) (a parent is justified in not providing medical treatment for the child if the parent in good faith depends upon spiritual treatment alone for the child); see also J. Nelson Thomas, *Prosecuting Religious Parents For Homicide: Compounding a Tragedy?* 1 VA. J. SOC. POL’Y & L. 409 (discussing the practicality of prosecuting parents when their child dies as a result of unsuccessful attempts at spiritual healing).

36. 126 P.2d 765, 768 (Wash. 1942) (refusing to compel amputation of a girl’s deformed arm over her mother’s objection).

37. 79 So. 651 (Fla. 1920) (father acquitted of manslaughter where epileptic daughter died from a seizure).

38. *Prince*, 321 U.S. at 166 (citing *Reynolds v. United States*, 98 U.S. 145 (1878)).

child...to ill health or death.”<sup>39</sup> The *Yoder* Court similarly intimated that a Free Exercise claim by parents may be subject to stringent limitation in certain instances, thereby narrowing the contours of this seemingly sweeping constitutional guarantee.<sup>40</sup>

The type of limitation envisioned in *Prince* has been specifically applied in the medical context to illustrate that parental Free Exercise rights are limited. In *Walker v. Superior Court*, the parents of a child afflicted with meningitis relied solely on faith healing to cure their son.<sup>41</sup> When the child died, the parents were charged with manslaughter. The parents invoked the free exercise of religion defense, but to no avail. Instead, the court rejected their free exercise argument and found the Walkers’ criminally liable for the death of their child. The court held, “parents have no right to free exercise of religion at the price of a child’s life.”<sup>42</sup> In *Commonwealth v. Barnhardt*, the Superior Court of Pennsylvania upheld the involuntary manslaughter convictions of parents who, as members of the Faith Tabernacle Church, relied on faith healing to cure their son’s cancer.<sup>43</sup> The court rejected the parents’ claim of religious freedom, instead finding that they abdicated their duty to protect the child’s welfare when his life was imperiled. In *Hall v. State*, the parents of a child who died from bronchial pneumonia were found guilty of reckless homicide after they refused conventional medical treatment.<sup>44</sup> Likewise, in *Craig v. State*, the Maryland Court of Appeals also held that religious freedom did not constitute a bar to prosecution for failure to provide medical treatment.<sup>45</sup>

A similar result was reached in *People v. Pierson* and *Beck v. State*, decided by the Courts of Criminal Appeal in New York and Washington, respectively. Both courts refused to grant immunity to parents from criminal neglect prosecution merely because their actions were religiously motivated.<sup>46</sup> In *State v. Norman*, the Court of Appeals of Washington also upheld the manslaughter conviction of a father who unsuccessfully relied on spiritual healing to cure his son’s diabetes.<sup>47</sup> The court reasoned that religious freedom was not absolute and did not

39. *Id.* at 166-67.

40. *Yoder*, 406 U.S. at 233-34.

41. 763 P.2d 852, 855 (1988) (prosecuting Christian Scientists for involuntary manslaughter, when child’s death resulted in part from refusal of medical treatment).

42. *Id.* at 870.

43. 497 A.2d 616 (Pa. Super. 1985) (upholding convictions of members of the Faith Tabernacle Church for involuntary manslaughter and endangering the welfare of a child after they rejected medical treatment in favor of sole reliance on spiritual healing).

44. 493 N.E.2d 433 (Ind. 1986); see also *State v. Norman*, 808 P.2d 1159 (Wash.Ct.App. 1991).

45. 220 Md. 590 (1959) (convicting parents who relied unsuccessfully on spiritual healing when their daughter died of pneumonia); see also, Elizabeth A. Lingle, *Treating Children By Faith: Colliding Constitutional Issues*, 17 J. LEGAL MED. 301 (1996) (surveying a plethora of cases where parents were charged in the neglect of their children after they refused conventional medical care in favor of spiritual healing).

46. 176 N.Y. 201 (1903)(holding that child endangerment statute making it an offense to fail to seek medical treatment was not offensive to the Free Exercise Clause); 6 Okla. Crim. 110 (1911).

47. 808 P.2d 1159 (Wash. Ct. App. 1991).

permit a parent to place a child's life in danger. In *Funkhauser v. State*, the parents of a child who died of pneumonia were convicted of manslaughter in the second degree when they unsuccessfully relied on religious healing to effectuate their child's recovery.<sup>48</sup> Similarly, in *Commonwealth v. Nixon*, the parents of a child who perished from diabetes were convicted of involuntary manslaughter after they relied solely on prayer treatment to the exclusion of conventional medical aid.<sup>49</sup> The same result was reached in *In Re Custody of a Minor*, where the parents of a leukemia stricken child were found to have neglected the child when, in accordance with their religious tenets, they refused life saving chemotherapy treatment.<sup>50</sup> Lastly, in *Commonwealth v. Twitchell*, the parents of Robyn Twitchell were convicted of manslaughter; their attempts to utilize the Free Exercise Clause as a shield from liability were rejected by the court.<sup>51</sup> Hence, the regularity by which courts have overridden Free Exercise claims has prompted one commentator to opine that, while the Free Exercise Clause defense is "the most common and certainly the most obvious constitutional defense that parents raise, it is also the least successful."<sup>52</sup>

In sum, two propositions clearly emerge from the preceding discussion. First, it is without question that parents possess a fundamental civil liberty to raise their children as they see fit. It is also equally fundamental that a parent's right to raise a child autonomously is not absolute and may be subject to state interference when the health, welfare, or safety of the child is jeopardized. Second, it is clear that parents may assert a constitutionally-driven claim of religious freedom when seeking to justify and defend their decision to rely on spiritual treatment to the exclusion of all other forms of medical treatment. Statutory exemption schemes often facilitate this assertion. However, it is also equally clear that this right is limited, and may be subject to state interference, or judicial denial, when a child suffers at the alter of religiously motivated conduct. Indeed, while the degree of interference by the state is not unlimited, it does possess constitutional rights of intervention designed to counterbalance the broad authority conferred upon parents. This is known as the *parens patriae* doctrine.

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48. 763 P.2d 695, 697-98 (1988).

49. 718 A.2d 311 (Pa. Super. Ct. 1998).

50. 379 N.E.2d 1053, 1065-66 (Mass. 1978).

51. 617 N.E. 2d 609 (Mass. 1993) (Their conviction was ultimately overturned by the Massachusetts Supreme Court, in part because of the exemption policy contained in their child-neglect statute, which called into question the parents knowledge that their conduct was in fact criminal.).

52. See Lingle, *supra* note 45, at 309. (outlining several cases where the courts, despite the religious defenses of the parents, found the parents liable for manslaughter).

### III. *Parens patriae*: Restoring the Balance Between Parent, Child, and State

The doctrine of *parens patriae* literally means, “parent of the country” and is classified as follows:

‘*Parens patriae*,’ literally ‘parent of the country,’ refers traditionally to the role of state as sovereign and guardian of persons under legal disability, such as juveniles or the insane...and in child custody determinations, when acting on behalf of the state to protect the interest of the child. It is the principle that the state must care for those who cannot take care of themselves, such as minors who lack proper care and custody from their parents. It is a concept of standing utilized to protect those quasi-sovereign interests such as health, comfort and welfare of the people, interstate water rights, general economy of the state, etc.<sup>53</sup>

Simply stated, the *parens patriae* doctrine represents a competing interest to parental rights that allows the state to interfere in the parent-child paradigm when the health, welfare, or safety of the child is threatened. As one court posited, “where the parents fail to perform their natural duty so to rear and educate the child...the state, as *parens patriae* of all children, may assert its power and apply curative measures, so as to prevent injury to the child and to society.”<sup>54</sup> The State, then, has a duty to protect the child’s “right to live and grow up with a sound mind in a sound body.”<sup>55</sup> This concept was recognized by the Supreme Court in *Parham v. J.R.*, where the Court pronounced that the state may usurp the parent child relationship to safeguard the child’s welfare.<sup>56</sup> In essence, the *parens patriae* doctrine operates to permit the state intervene in private relationships to promote the “best interests” of a particular individual in a given situation. The state’s *parens patriae* power is justified in such a context because of its paramount and overriding interest in the safety and preservation of the lives of its citizens. In this way, the *parens patriae* doctrine operates both to preserve the state’s interests in protecting the welfare of its citizens and to protect the lives of individuals who are threatened in their private relationships.

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53. BLACK’S LAW DICTIONARY, P. 1114 (1990).

54. *In Re Hudson*, 126 P.2d 765, 775 (Wash. 1942); see also *Saratoga County Dep’t of Social Servs. v. Hofbauer*, 393 N.E.2d 1009, 1013 (N.Y. 1979) (holding that the State, as *parens patriae*, may intervene to ensure that a child’s health or welfare is not being seriously jeopardized by a parent’s fault or omission).

55. *In Re Clark*, 185 N.E.2d 128, 132 (1962).

56. 442 U.S. 584 (1979).

The *parens patriae* doctrine is often characterized as the most potent weapon to derogate the fundamental rights of parents to control the upbringing of their children. As one commentator posited, "the state often has the power to limit parental freedom and authority when parents endanger the welfare of children."<sup>57</sup> Acting in its role as *parens patriae*, the state "has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare."<sup>58</sup> The limitations placed upon parenthood in the name of a child's welfare have allowed the state to permeate many areas of the parent-child realm. In *Sturges & Burn Mfg. Co. v. Beauchamp*, the court held that the state may, acting as *parens patriae*, regulate or prohibit child labor.<sup>59</sup> In *State v. Bailey*, the Indiana's highest court held that the state, in its *parens patriae* capacity, may require school attendance.<sup>60</sup> Soon after, in *Jacobson v. Massachusetts*, the Supreme Court held that the state may require children to receive vaccinations.<sup>61</sup> Ostensibly, the state may invade the province of the parent-child domain when necessary to safeguard vital and fundamental interests.

This proposition is most vivid when dealing with medical decisions involving children, an area where the state asserts significant *parens patriae* authority. The *parens patriae* doctrine has often been the competing interest by which the state has sought to override a parental decision to refuse medical treatment on free exercise grounds. In *In Re Clark*, the court considered whether to order a blood transfusion for a three-year-old child over the religious objections of his parents.<sup>62</sup> Although the child was not gravely ill, his health was rapidly deteriorating.<sup>63</sup> This case presented a direct clash between the *parens patriae* directive and parental claims to free exercise. After weighing the competing objectives, the court determined that the *parens patriae* doctrine justified intervention over the religious doctrines espoused by the parents. The court held:

[The child's parents] have a perfect right to worship as they please and believe what they please, [but] this right of theirs ends where somebody else's right begins. Their child is a human being in his own right—the right to live and grow up without disfigurement...when a religious doctrine espoused

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57. See Hawkins, *supra* note 21, at 2083; see also Ann Maclean Massie, *The Religion Clauses and Parental Health Care Decisionmaking For Children: Suggestions For a New Approach*, 21 HASTINGS CONST. L.Q. 725, 731-32 (1994) ("In light of the particular obligations of government to protect children, it is indefensible to hold that children who would be found abused or neglected in one context are simply the legitimate objects of their parents religious rights in another.").

58. See 59 AM. JUR. 2D Parent and Child, § 11, P. 143 (1987).

59. 231 U.S. 320, 325-26 (1913).

60. 61 N.E. 730, 731-32 (Ind. 1901).

61. 197 U.S. 11, 35 (1905).

62. 185 N.E.2d 128, 129 (1962).

63. *Id.* at 130.

by the parents threatens to defeat or curtail such a right of their child, the State's duty to step in and preserve the child's right is immediately operative...to put it another way, when a child's right to live and his parents religious beliefs collide, the former is paramount, and the religious doctrine must give way.<sup>64</sup>

A similar result was reached in *Jehovah's Witnesses v. King County Hospital*, where the Court granted the state's request to intervene, as *parens patriae*, and administer a life-saving blood transfusion to the child of a Jehovah's Witness member.<sup>65</sup> In *Hawk v. Hawk*, the Tennessee Supreme Court held, "Tennessee law...upholds the state's authority as *parens patriae* when interference with parenting is necessary to prevent serious harm to a child."<sup>66</sup> In *Bennett v. Jeffreys*, the New York Court of Appeals pronounced a similar view, stating that parental rights are appropriately displaced when it is necessary to safeguard the child from serious physical harm, illness or death.<sup>67</sup> Likewise, in *In re Sampson*, the Appellate Division of New York mandated corrective surgery for a minor's facial and neck deformity over the parent's religious objections.<sup>68</sup> The court stated the mother's religious convictions could not "stand in the way of attaining through corrective surgery whatever chance the child may have for a normal, happy existence."<sup>69</sup> In *Wallace v. LaBrenz*, the court, also citing the state's *parens patriae* power, ordered a blood transfusion for a child over the religious objections of his mother.<sup>70</sup> Some states have also codified the state's right to intervene in a *parens patriae* capacity when a child's life is jeopardized.<sup>71</sup> Thus, it is clear that the *parens patriae* doctrine constitutes a legitimate method by

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64. *Id.* at 132.

65. 278 F.Supp. 488 (W.D. Wash. 1967) (rejecting plaintiff's free exercise claim; "[T]he right to practice religion freely does not include liberty to expose...the child...to ill health or death." (quoting *Prince*, 321 U.S. at 166-67)).

66. 855 S.W. 2d 573, 580 (Tenn. 1973); *see also* *State v. Hamilton*, 657 S.W.2d 425 (Tenn. Ct. App. 1983).

67. 356 N.E.2d 277, 283 (N.Y. 1976) (outlining situations in which the state can properly intervene in its role as *parens patriae*: "fault or omission by the parents seriously affected the welfare of a child, (and) the preservation of the child's freedom from serious physical harm, illness, or death.").

68. 317 N.Y.S.2d 641, 657-59 (Fam. Ct. 1970); *see also* Walter Wadlington, *Medical Decision Making For and By the Children: Tensions Between Parent, State, and Child*, 1994 U. ILL. L. REV. 311, 321.

69. *Id.*; *but see* *In Re Guardianship of Barry*, 445 So.2d 365, 371 (Fla. Dist. Ct. App. 1984) (upholding parental decision to terminate life support for 1 month old baby because there was little hope for recovery).

70. 104 N.E.2d 769 (Ill. 1952).

71. *See* ARIZ. REV. STAT. ANN. Sec. 8-531 to 8-546.04 (1989 and Supp. 1995) (describing the situations in which the the state may permissibly intervene in the parent child relationship).

which the state can combat a parent's refusal to accept medical treatment on religious grounds.<sup>72</sup>

However, assertion of the state's power via the *parens patriae* doctrine is also constrained in its application and thus, not always successful. As a general matter, the *parens patriae* doctrine is primarily invoked only when an individual's welfare is at risk, and even then, the religious interests of the parents may trump the state's. The cases of *In re Seithfert* and *In re Green*, discussed *supra*, illuminate this proposition.<sup>73</sup> In *Newmark v. Williams*, the court similarly refused to compel chemotherapy for a child who was dying of cancer, finding that the religious tenets of Christian Science members outweighed the *parens patriae* directives of the state.<sup>74</sup> In *Weber v. Stonybrook*, the court upheld a parent's refusal to accede to surgery for their infant, who was afflicted with spinal bifida, thereby overriding the *parens patriae* assertion proffered by the state.<sup>75</sup> In *In Re Hudson*, the court also validated a parent's refusal, on religious grounds, to consent to the amputation of her twelve-year-old daughter's congenitally deformed arm.<sup>76</sup> Likewise, in *In Re Green* (a different case than *Green*, *supra*), the court refused to classify a minor as a "neglected" child when his parents refused, on religious grounds, to consent to medical treatment for his sickle cell anemia.<sup>77</sup> In *In Re Philip B.*, the court similarly upheld, over the state's objections, the parents' refusal to consent to cardiac surgery for their child, who was suffering from congenital heart deformity.<sup>78</sup> In *In Re E.G.*, the appellate court rejected the state's request to compel a blood transfusion for a child whose mother objected to the procedure based on Jehovah Witness dictates.<sup>79</sup> Lastly, in *Yoder*, the Supreme Court rejected application of the *parens patriae* doctrine in the context of compulsory school attendance, holding that the Amish's refusal to attend school posed no threat to "the public safety, health, or welfare."<sup>80</sup> Regarding the *parens patriae* doctrine, the Court explained that only the highest of interests will succeed in piercing the autonomous relationship of parent and child.<sup>81</sup> Thus, it is clear, from both Supreme Court precedent and

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72. See Matthew J. Marcus, *Constitutional Law—State Intervention When Parental Decision Based on Religious Beliefs Threatens Child Held Constitutional*, 25 SUFFOLK U.L. REV. 813, 816-17 (1991).

73. 127 N.E.2d 820, 822-23 (N.Y. 1955); 292 A.2d 387, 392 (Pa. 1972).

74. 588 A.2d at 1118.

75. 467 N.Y.S.2d 685, 686 (App. Div. 1983).

76. 126 P.2d 765, 768 (Wash. 1942).

77. (Wis. Milwaukee County Ct. 1966), reprinted in *Parental Right to Refuse Medical Treatment for Child*, 12 CRIME AND DELINQ. 377, 384-85 (1966).

78. 156 Cal. Rptr. 48, 51 (Ct. App. 1979).

79. 549 N.E.2d 322, 327 (Ill. 1989).

80. 406 U.S. at 230 (1972).

81. *Id.* at 238 ("[R]espondents' claim must prevail, largely because 'religious freedom—the freedom to believe and to practice strange and, it may be, foreign creeds—has classically been one of the highest values of our society.'") (White, J., concurring) (quoting *Braunfeld v. Brown*, 366 U.S. 599, 612 (1961)).

lower court decisions in the context of medical decision making, that the *parens patriae* doctrine, while a powerful disposal at the hands of the state, is nonetheless significantly restricted in both its applicability and scope. This is true, *a fortiori*, when the state intervention does not concern an immediate threat to the child's life or when the treatment sought by the state is no more likely to benefit the child than the alternative course of action chosen by the parents.<sup>82</sup>

In sum, we are confronted with a complex intersection of the Free Exercise Clause, the Parental Control Doctrine, and the state's *parens patriae* power. The Free Exercise Clause affords parents the right to freely practice religion, yet sometimes restricts this power when it compromises the health or welfare of a child. The *parens patriae* doctrine confers broad authority upon the state to intervene in the lives of its citizens, yet often restricts such intervention to cases involving impairment of an individual's physical or mental well being. Even then, the success of the state's assertion is in doubt. Ostensibly, there are clear strengths and weaknesses to each doctrine in terms of its legal validity and propensity for consistent success. As a result, the legal arena is fraught with a plethora of cases that fall on either side of these competing interests without any clear rationale or consistency. Thus, the competing interests of the state as *parens patriae* and the parent as a free and autonomous being remains an unsettled, uncertain, and unresolved area of law, especially in the context of medical decision making for children. Consequently, it is necessary to design a definitive standard, and proffer a coherent underlying rationale in an attempt to resolve the ambiguity between these clashing constitutional doctrines. In order to proffer a new approach, it is necessary to survey our legal system's attempt to reconcile these competing interests, especially in the context of a parent's refusal to consent to medical treatment for their child on religious grounds. Only by doing so can we appreciate and understand the necessity for a more clear-cut constitutional mandate in this area of law. As we will see below, the courts' current jurisprudence reflects the uncertainty and precarious nature that is ever present when the constitutional rights of parents clash with the imperatives of the state.

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82. See *Newmark v. Williams*, 588 A.2d at 1117 (Del. 1991) (courts will employ a balancing test to determine the risk of the procedure compared to its potential success); see also *County of Contra Costa Dep't of Social Servs. v. Ted B.*, 237 Cal. Rptr. 22, 27 (Ct. App. 1987) (considering the potential success of the treatment and the risks to the child in determining whether to order medical treatment).

#### IV. The Legal Standards Utilized to Evaluate Issues Involving a Parent's Refusal To Consent to Medical Treatment for Their Children on Religious Grounds

The clash between the state and religious parents over administration of medical treatment for children has been adjudicated under a variety of legal standards and produced an inconsistent array of judicial determinations. This premise is illustrated in cases arising in both Great Britain and the United States, from early periods to current jurisprudence. This part will examine both systems' approach to adjudicating cases where parents, in accordance with their religious beliefs, reject conventional medical treatment for their ailing children.

##### *A. The British Approach To Parental Refusal of Medical Treatment on Religious Grounds*

In *Regina v. Wagstaffe*, the court was confronted with a situation where a child's parents relied solely on spiritual treatment as a method to combat illness.<sup>83</sup> The child's parents were members of a religious sect called the "Peculiar People," which, in accordance with the tenets of their faith, utilized spiritual healing rather than conventional medical means to effectuate their son's recovery from an illness.<sup>84</sup> Their approach failed and resulted in the death of their child from an ailment that was readily curable via conventional medicine.<sup>85</sup> The parents were subsequently charged with manslaughter, and they relied on their religious doctrine as a defense to the manslaughter charge.<sup>86</sup> The jury in *Wagstaffe* returned a verdict of not guilty, and the decision proceeded to stand for the proposition that parents could not be criminally liable for the death of their children simply because it resulted from their reliance on spiritual methods in lieu of conventional medical modalities. In response to this sweeping decision, Parliament enacted the "Poor Law

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83. 10 COX. CRIM. CAS. 530 (1868); *see also*, Ontario Consultants on Religious Tolerance, (visited April 15, 2001) <<http://www.religioustolerance.org>>. In Britain today, spiritual healers are permitted 72 hours in which to attempt a cure for their child's illness. If, after 72 hours, the child's condition is not improving, then the state has authority to intervene. Such a test differs from most approaches, where the severity of the illness is often controlling as to whether state intervention is permitted. The approach in Britain is more of an "opportunity" approach. *See id.*

84. This case is discussed in Trescher & O'Neil, *Medical Care for Dependent Children: Manslaughter Liability of the Christian Scientist*, 109 U. PA. L. REV. 203, 206 (1960) (attempts to prosecute parents for the murder of their children after spiritual healing attempts failed has been met with varying degrees of success); *see also* Monopli, *supra* note 2, at 327 (discussing the evolution of church state jurisprudence in England and the United States).

85. Monopli, *supra* note 2, at 327 (outlining the approaches taken in Britain and the United States).

86. *Id.*

Amendment,” which implicitly mandated the administration of conventional medical treatment for children whose health was imperiled, irrespective of religious belief. The Amendment stated:

[W]hen any parent shall willfully neglect to provide adequate Food, Clothing, Medical Aid, or Lodging for his child...whereby the Health of such Child shall have been injured...he shall be guilty of an offense.<sup>87</sup>

Subsequent to the enactment of the Poor Law Amendment arose the seminal case of *Regina v. Downes*.<sup>88</sup> In *Downes*, the court affirmatively held that parents were subject to criminal liability for failure to obtain medical treatment for their child, even if such belief was premised on religious conviction. Several of the justices utilized the Poor Law Amendment as a basis upon which to reach their conclusion.<sup>89</sup> This holding represents both a reversal of *Wagstaffe* and the prevailing law in British jurisprudence today.

### B. *The American Approach*

The American approach to this issue is more complex and has changed dramatically over several generations of Supreme Court jurisprudence. As a threshold matter, the Supreme Court was initially reluctant to extend constitutional protection to religious conduct per se. In *Reynolds v. United States*, the Supreme Court held that while laws “cannot interfere with mere religious beliefs and opinions, they may with practices.”<sup>90</sup> Under the *Reynolds* paradigm, religious belief was accorded a significant degree of constitutional protection, while religious conduct was considered more prone to regulation and interdiction by the state.<sup>91</sup>

However, in *Cantwell v. Connecticut*, the belief/conduct dichotomy which characterized the *Reynolds* decision was somewhat blurred by the Court.<sup>92</sup> In *Cantwell*, the petitioner, a Jehovah’s Witness, was convicted of both soliciting contributions without a state certificate and breaching the peace by publicly distributing religious materials.<sup>93</sup> The Court unanimously reversed these convictions, holding that the

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87. *Id.*

88. *Id.*

89. *Id.* (*Regina v. Downes* has been unchallenged by subsequent case law and remains valid law in current British jurisprudence.)

90. 98 U.S. 145, 162-67 (1848).

91. *Id.*

92. 310 U.S. 296 (1940); see also, Laura M. Plastine, “*In God We Trust: When Parents Refuse Medical Treatment For Their Children Based Upon Their Sincere Religious Beliefs*,” 3 SETON HALL CONST. L.J. 123, 127-28 (1996).

93. See Plastine, *supra* note 92, at 127-28.

Connecticut statute deprived Cantwell of his religious liberty in violation of the Fourteenth Amendment.<sup>94</sup> The Court opined that the state impermissibly burdened Cantwell's religious freedom when it conditioned his right to solicitate upon receipt of a certificate whose issue was subjectively determined by a state official.<sup>95</sup> This case represented a significant departure from *Reynolds* because, while it did not adopt any definitive legal standards, it afforded a significant degree of protection not only to religious belief, but to conduct as well.

In *Prince v. Massachusetts*, however, the rights afforded parents pursuant to the Free Exercise Clause were once again narrowed.<sup>96</sup> In *Prince*, a Jehovah's Witness engaged her child in the distribution of religious pamphlets on public streets in direct contravention of the state's child labor laws.<sup>97</sup> Sarah Prince attempted to eschew her statutory obligation by relying on the Free Exercise Clause to justify her conduct. The Supreme Court disagreed, and found Prince in violation of the state's statutory strictures. The Court balanced both Prince's religious interests and those of the state, as *parens patriae*, in the health and welfare of its citizens, and determined that the latter interest must trump the former. In making this determination, the Court explained, "the family itself is not beyond regulation in the public interest, as against a claim for religious liberty."<sup>98</sup> While no specific standards were elucidated, the Court held that the state possessed the power to regulate in many areas, including child labor, and that the concern for the child's health and welfare were paramount to the parents' religious motivations.<sup>99</sup>

In *Sherbert v. Verner*, a more stringent and definite standard for justifying state intervention was exacted.<sup>100</sup> In *Sherbert*, a Seventh-day Adventist was discharged because she refused to work on Saturday, the Sabbath day for her religion. Following her discharge, Sherbert filed for unemployment benefits and was denied on the ground that she was discharged for work-related misconduct. Sherbert sued, and in this instance the Court disagreed with the State's determination that refusal to work on the Sabbath constituted work-related misconduct.<sup>101</sup> The Court held that the only permissible method by which to burden an individual's

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94. *Id.*

95. *Id.* at 128.

96. 321 U.S. 158.

97. *Id.* at 159-61.

98. *Id.* at 165-71 (Justice Murphy dissented in this case, arguing that "religious freedom is too sacred a right to be restricted or prohibited in any degree without convincing proof that a legitimate interest of the state is in grave danger.") *Id.* at 176.

99. *Id.* at 166-67.

100. 374 U.S. 398 (1963).

101. *Id.* at 403, 406-09 ("[N]o showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."); see also, Plastine, *supra* note 92, at 130-31.

religion was through demonstration of a “compelling state interest.”<sup>102</sup> The Court found the state lacking in such a justification here and subsequently reversed the lower courts.<sup>103</sup> In doing so, the Court afforded the most sweeping protection yet to the religious conduct that was deemed insignificant in *Reynolds*. Importantly, the Court established a “compelling interest” standard that would subsequently govern all clashes between state and parental interests.<sup>104</sup>

The expansive reading of free exercise rights was further amplified in *Yoder*, where the Amish claimed that Wisconsin’s compulsory education law impermissibly burdened their free exercise of religion, which called for inculcation of their fifteen-year old child into the Amish culture in lieu of conventional schooling.<sup>105</sup> The state combated the Amish argument by asserting its *parens patriae* authority, arguing that it possessed a “compelling interest” in guaranteeing that its children are educated to become self reliant and self sufficient citizens. The Court, applying the *Sherbert* “compelling interest” standard, rendered its most expansive reading of the Free Exercise Clause to date, holding that the interests of the Amish culture trumped those of the state.<sup>106</sup> The Court found that by requiring the Amish to comply with the compulsory attendance laws, the burden on them was “inescapable” and would violate fundamental tenets of their religion and community practice.<sup>107</sup> The Court determined that there existed no “compelling interest” to justify such a burden. Consequently, the *Yoder* decision marks the zenith in the degree of protection afforded individuals pursuant to the Free Exercise Clause.

However, the expansive reading of the Free Exercise Clause found in *Sherbert* and re-affirmed in *Yoder* was significantly abrogated in what now constitutes the prevailing constitutional case on point, *Employment Division v. Smith*.<sup>108</sup> In *Smith*, two members of the Native American Church were denied unemployment benefits after they were discharged for using peyote, a drug that was declared illegal in the State of Oregon. The petitioners sought to exempt their conduct pursuant to the Free Exercise Clause, claiming that their peyote use was in accordance with the directives of the Native American church. The Court rejected their purported religious justification.<sup>109</sup> In a piercing decision by Justice Scalia that signaled a significant retreat from previous rulings, the Court

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102. *Sherbert*, 374 U.S. at 406-09.

103. *Id.*

104. This approach by the Court highlighted what was to become a very expansive reading of the Free Exercise Clause, in which only the most compelling of state interests would serve to override a free exercise claim.

105. 406 U.S. at 207-09.

106. *Id.* at 214-15 (“[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.”).

107. *Id.* at 218.

108. 494 U.S. 872 (1990).

109. *Id.* at 874.

held that generally applicable criminal laws which are facially neutral do not, as a constitutional matter, burden the Free Exercise Clause.<sup>110</sup> In *Smith*, there was no application of the *Sherbert* standard and no weighing of competing interests between the state and the individual. Rather, the Court pronounced a blanket rule that weakened the constitutional protections afforded pursuant to earlier decisions interpreting Free Exercise guarantees.<sup>111</sup> Thus, after *Smith*, legislatures were not required to carve out statutory exemptions from generally applicable criminal laws for individuals whose religious beliefs were not consonant with such laws. As is discussed, *infra* Part VI, this decision has severe implications for parents who seek to utilize the Free Exercise Clause to justify their reliance on spiritual healing. Despite Congress' attempt several years ago to provide an alternative avenue of relief via the Religious Freedom Restoration Act, the *Smith* decision remains the prevailing constitutional standard in Free Exercise jurisprudence.<sup>112</sup>

In sum, the Court has taken a sinuous path in reaching its current constitutional mandate. The protections afforded by the Free Exercise Clause have repeatedly shifted, and *Smith* has marked a change in the method by which the Court will analyze certain Free Exercise issues. While competing state and parental interests will certainly be weighed in some contexts, it appears that criminal laws that retain facial neutrality will engender no such constitutional analysis. However, while the *Smith* decision appears to grant states the power to repeal all child-neglect exemptions in their statutory schemes, it suffers from three flaws that continue to expose children to harm, and even death, in the name of religious freedom. First, while *Smith* has positive implications for repeal efforts, there is no guarantee that *Smith* will remain good precedent in what has become a mercurial field of law that appears to afford Free Exercise claims differing degrees of vitality on a regular basis. Second, Congress may continue its attempt to effectuate legislation that provides an alternative avenue by which to pursue Free Exercise claims. Although the Religious Freedom Restoration Act was deemed unconstitutional by the Supreme Court,<sup>113</sup> such efforts exemplify Congress' attempt to breathe life into the very notions of religious freedom which were derogated in the wake of *Smith*. If, in the future, Congress were to be successful in resurrecting expansive notions of religious freedom, its mandate would effectively supplant the *Smith* ruling, leaving children in the same nefarious position pre-dating *Smith*.

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110. *Id.* at 878, 890.

111. See generally Angela C. Carmella, *A Theological Critique of Free Exercise Jurisprudence*, 60 GEO. WASH. L. REV. 782, 783 n.2 (1992); Michael W. McConnell, *Accommodation of Religion: An Update and a Response To the Critics*, 60 GEO. WASH. L. REV. 685 (1992).

112. Cf. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 61 U.S.L.W. 4587 (June 11, 1993) (declaring that a facially neutral statute which is discriminatory in its purpose and effect would be deemed unconstitutional.)

113. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

Third, and most importantly, *Smith* was a “negative” decision in that nothing in the *Smith* rationale prevents legislatures from enacting exemption policies in their statutory schemes to continue preservation of a parent’s right to refuse medical treatment for their children on religious grounds. Such a preservation of the status quo still leaves children exposed to harm and demonstrates that the *Smith* decision did not go far enough.

Consequently, it is clear that there still exist significant obstacles in the path of guaranteeing children an unfettered right to life over guarantees of religious freedom. In order to break down these barriers and permanently safeguard the fundamental right to life over religious liberty, the Supreme Court must follow and expand the path it carved out in *Smith*. First, in the wake of *Smith*, the Court must affirmatively and definitively pronounce that statutory exemption policies that involve core public interest issues, such as the welfare of children in the medical context, are per se violations of the Establishment Clause. This would preclude lower courts from employing the untenable and precarious balancing between parent and state that has produced a conundrum of uncertainty in church/state jurisprudence. Second, the Supreme Court must reaffirm *Smith* and pronounce that generally applicable criminal laws concerning the public interest will not and do not offend the Free Exercise Clause in so far as they are neutral on their face and consistent in their application. Such a law would assume an egalitarian posture and disperse the responsibility for protecting children on all individuals.

Such pronouncements by the Court would go a long way toward protecting the health of children who may suffer at the hands of parents who would choose to remain faithful to religious dogma at the expense of acting in the best interests of their children. Such a directive by the Court would represent a significant step toward effectuating a repeal of all existing statutory exemption policies that endanger the lives of children on a daily basis. More importantly, such a declaration would legally and constitutionally facilitate the adoption of generally applicable laws, in the place of exemptions, that will criminalize the neglect and abuse of children, regardless of the belief system upon which such conduct is predicated. Such a statutory directive would represent both a just and moral societal response to the repugnant act of allowing a child to die at the behest of fidelity to religious belief. Furthermore, such a law would restore harmony with the Constitution by affirmatively and without ambiguity standing for the fundamental proposition that our legal and societal interest in the preservation of life retains primacy above all else, including claims of religious freedom. Only by adopting such a law can we guarantee a child’s fundamental right to life, because we would afford parents a fixed and certain pronouncement on the nature of parental obligation in the face of contrary religious dogma. In this

way, tragic deaths like those of Robyn Twitchell and Amy Hermanson would forever be averted.

However, since the Supreme Court has not yet passed on these issues, it is important, as a practical matter, to illustrate the constitutionality of realizing these propositions in light of the Establishment and Free Exercise Clauses of the First Amendment. Accordingly, as discussed *infra* Part V, existing statutory exemption policies operate in clear violation of rudimentary Establishment Clause dictates. Hence, it is conceivable that the Supreme Court will invalidate such provisions in the near future.

Also, it is asserted *infra* Part VI that, in the place of invalidated exemption policies should arise generally applicable criminal laws, which, as will be shown below, do not suffer constitutional infirmity in relation to the Free Exercise Clause of the First Amendment. The unconstitutionality of existing exemption policies and the constitutionality of generally applicable criminal laws will be discussed below.

#### V. The Unconstitutionality of Existing Statutory Exemption Policies In the Child Neglect Context

Ohio's statutory scheme is paradigmatic of exemption policies in the United States as it relates to the neglect of children.<sup>114</sup> The law in Ohio, as in other states, provides that no child shall be neglected or denied proper physical care. However, this law contains an exemption that precludes the application of this statute against parents who rely exclusively on spiritual healing. Ohio Revised Code 2919.22, provides:

No person, being the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen or a mentally or physically handicapped child under twenty-one years of age, shall create a substantial risk to the health or safety of such child, by violating a duty of care, protection, or support. It is not a violation of a duty of care, protection, or support under this division when the parent, guardian, custodian, or person having custody or control of a child treats the physical or mental illness or defect of such child by spiritual means through prayer alone, in accordance with the tenets of a recognized religious body.<sup>115</sup>

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114. Some statutes even allow spiritual healing to be an affirmative defense to murder (i.e., Oregon, Arkansas, Delaware, Iowa, Ohio). See Hartsell, *supra* note 1, at 502.

115. OHIO REVISED CODE 2919.22 (Baldwin's 1997).

The State of Tennessee evinces a similar intent to immunize parents who engage in otherwise abusive and neglectful conduct, provided that they do so for purely religious motives. Tennessee, like other states, specifically criminalizes the abuse or neglect of children, and then proceeds to exempt otherwise abusive conduct merely because it is religiously inspired. The statute provides in relevant part:

(c) Nothing in this chapter shall be construed to mean a child is neglected, abused, or abused or neglected in an aggravated manner for the sole reason the child is being provided treatment by spiritual means through prayer alone in accordance with the tenets or practices of a recognized church or religious denomination by a duly accredited practitioner thereof in lieu of medical or surgical treatment.<sup>116</sup>

It is a central tenet of this article that these exemption policies exist in contravention of the Establishment Clause. This Part will (1) examine the underpinnings of the Establishment Clause; (2) trace several court decisions which have invalidated exemption policies, like those above, in light of the Establishment Clause; and (3) proceed to demonstrate that statutory exemption policies contravene Establishment Clause strictures.

#### A. *The Establishment Clause Framework*

It is a firmly embedded maxim of Establishment Clause jurisprudence that legislative entities must retain a neutral posture towards religion. Initially, the Supreme Court, in *Reynolds v. United States*, construed the Establishment Clause as requiring a “wall of separation” between the state and religious entities.<sup>117</sup> This notion was refined in *Everson v. Board of Education*, where the Court expressly held that the Establishment Clause requires government neutrality on matters involving religion.<sup>118</sup> While the Supreme Court has not expressly defined the concept of neutrality, it has held, in *School District of Abington Township, Pennsylvania v. Schempp*, that neutrality

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116. TENN. STAT. ANN. 39-15-402 (West 1999).

117. 98 U.S. at 164 (1879).

118. 330 U.S. 1, 12 (1947) (“[T]hat no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief....”).

encompasses aspects of both impartiality and noninvolvement.<sup>119</sup> One commentator has posited that the impartiality requirement “typically refers to a position that is non-religious as opposed to religious or anti-religious.”<sup>120</sup> The Court echoed similar sentiments in *Everson*, where it delineated the parameters of the Establishment Clause:

The Establishment of Religion Clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can it pass laws that aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance...Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between Church and State.’<sup>121</sup>

The Court’s posture of requiring governmental neutrality toward religion was reaffirmed in *Larson v. Valente*, where the Court explained, “the clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”<sup>122</sup> The concept of “denominational neutrality” has manifested itself in several other Supreme Court decisions. In *Zorach v. Clausen*, the Court elucidated, “[t]he government must be neutral when it comes to competition between sects.”<sup>123</sup> In *Epperson v. Arkansas*, the Court unambiguously held that “the First Amendment mandates governmental neutrality between religion and religion...the State may not adopt programs or practices...which ‘aid or oppose’ any religion...this prohibition is absolute.”<sup>124</sup> Justice Goldberg explained in *Abington School District* that “the fullest realization of true religious liberty

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119. 374 U.S. 203, 259 (1963); see also John T. Valauri, *The Concept of Neutrality in the Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83 (1986); Michael E. McConnell, *Neutrality Under the Religion Clauses*, 81 N.W. U. L. REV. 146 (1986).

120. See LaDonna DiCamillo, *Caught Between The Clauses and the Branches: When Parents Deny Their Child Nonemergency Medical Treatment For Religious Reasons*, 19 J. JUV. L. 123, 142 (1998).

121. 330 U.S. at 14 (quoting *Reynolds*, 98 U.S. at 164).

122. 456 U.S. 228, 244 (1982).

123. 343 U.S. 306, 314 (1952).

124. 393 U.S. 97, 104-06 (1968).

requires that government...effect no favoritism among sects.”<sup>125</sup> As noted by the *Everson* Court, the requirements of neutrality also indicate that religion cannot be officially sanctioned over non-religion.<sup>126</sup> The preceding dictum illuminates the contours of Establishment Clause jurisprudence in that it places a two-tiered burden on legislatures: (1) they cannot favor one religion over another; and (2) religion cannot be favored over non-religion. In essence, legislative enactments must evince, to some degree, a secular purpose.

The courts have enunciated varying standards by which to discern whether particular governmental conduct ceases to be “neutral” and therefore exists in contravention of the Establishment Clause. As a practical matter, the legal test employed to discern whether an Establishment Clause violation exists is contingent upon the type of benefit conferred by the respective exemption statute. Thus, while commands of neutrality and impartiality pronounced in *Larson* and *Everson* remain ubiquitous in any Establishment Clause scenario, the controlling legal standard will depend upon whether the legislative promulgation: (1) affords a uniform benefit to all religions or; (2) discriminates among religions.<sup>127</sup> If the statute confers benefits in accordance with the former, the tests set forth in *Walz v. Tax Commission* and *Lemon v. Kurtzman* (as modified in *Agostini*) will be germane to discern if the statute retains the requisite neutrality. Specifically, *Walz* mandates that a court “must also be sure that the end result—the effect—is not an excessive government entanglement with religion.”<sup>128</sup> This test was incorporated as part of a broader paradigm encompassed in *Lemon*, where the Court held that, to be constitutional, statutes that confer a benefit among all religions must: (1) have a secular purpose; (2) have a principal or primary effect that neither advances nor inhibits religion; and (3) result in no excessive government entanglement with religion.<sup>129</sup> For clarification purposes, laws that afford a uniform benefit to all religions are often challenged on the grounds that the legislature is unconstitutionally favoring religion over non-religion.

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125. 374 U.S. at 305 (“[U]ntutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive dedication to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.”). See DiCamillo, *supra* note 120, at 157, n.118.

126. 330 U.S. at 14. (a state cannot pass a law which “aids” all religion at the expense of non-religion.). This will be further discussed *infra* Part V.

127. *Walker v. Superior Court*, 763 P.2d at 873 (Cal. 1988) (Mosk, J., concurring).

128. 397 U.S. 664, 674 (1970) (*Lemon* is the predominant test utilized to analyze claims involving the Establishment Clause, although several justices have posited alternative models.) See *infra*.

129. 403 U.S. 602, 612-13 (1971). (*Lemon* has since been modified by the Court in *Agostini*, such that the second and third prongs have been merged into a singular analysis, namely, whether the statute in question has the primary effect of advancing religion.).

If a statute discriminates among religions, however, the governmental action will be presumably suspect and trigger strict scrutiny analysis.<sup>130</sup> This will require the government to demonstrate a “compelling state interest,” which is narrowly tailored to achieve its objectives. The state must also demonstrate that the statute at issue represents the least restrictive means available to achieve its purported objectives.<sup>131</sup> For clarification purposes, a statute that allegedly discriminates among religions is often challenged on the grounds that the legislature prefers one religion over another. Currently, these standards represent the prevailing models by which to analyze Establishment Clause claims, although several justices have posited alternative models. For example, Justice O’Connor advocates an “endorsement” test, where the relevant question would focus on whether the governmental conduct has the effect of endorsing a particular religion.<sup>132</sup> Justice Kennedy advocates a “coercion” test, which would prohibit government activities that directly support religion or coerce individuals into engaging in particular religious conduct.<sup>133</sup> The *Lemon* and “strict scrutiny” paradigms, however, retain significant prominence in this area of Establishment Clause jurisprudence. As we will see, *infra*, statutory exemption policies fail regardless of the standards deployed to adjudicate their validity.

*B. Judicial Interpretation of Exemption Policies in Light of Establishment Clause Strictures*

Statutory exemption policies throughout the United States should be facially invalid because they violate both the letter and spirit of the Establishment Clause. While this principle has not yet received Supreme Court recognition, lower courts that have considered the issue have affirmatively ruled that certain statutory exemption policies constitute a per se violation of the Establishment Clause. In *State v. Miskimens*,<sup>134</sup> the Ohio Court of Common Pleas considered the constitutional validity of Ohio Revised Code (ORC) 2919.22, which made it a crime to “create

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

131. *Id.*

132. See DiCamillo, *supra* note 120, at 147 (“Under the endorsement test, the relevant questions are: first, whether the government intended to endorse religion by ‘[sending] a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community[;]’ and second, whether the governmental action has the effect of endorsing religion such that ‘an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as endorsement...’ or that the action ‘conveys a message of endorsement.’” (quoting Lynch v. Donnelly, 465 U.S. 668, 687-94 (O’Connor, J., concurring)).

133. See DiCamillo, *supra* note 120, at 148-50. (Justice Kennedy first proposed the “coercion” test in his dissenting opinion in Alleghany v. ACLU, 492 U.S. 573, 655-70 (1989)).

134. 22 Ohio Misc.2d 43 (Com. Pl. 1984).

a substantial risk to the health or safety of such child, by violating a duty of care, protection, or support.”<sup>135</sup> ORC 2919.22 also provided an exemption for parents who “treat the physical or mental illness or defect of such child by spiritual means through prayer alone, in accordance with the tenets of a recognized religious body.”<sup>136</sup> Thus, conduct that would otherwise be culpable as criminal neglect was exempted from liability, provided the conduct was premised on the tenets of a “recognized religion.” Presumably, the phrase “recognized religion” implied that this was a statute that discriminated among religions (recognized/non-recognized).

This is exactly what the *Miskimens* court held in striking the exemption language as an unconstitutional violation of the Establishment Clause. In the process of invalidating Ohio’s statutory scheme, the court characterized the statutory directive as essentially saying to parents, “You may not violate your parental duties and thereby endanger your child’s health or safety unless you and some of your co-worshippers believe you can.”<sup>137</sup> This, in the court’s estimation, represented an unconstitutional transgression of the Establishment Clause because it violated the neutrality, impartiality, and non-involvement directives set forth in *Everson*, *Larson*, and *Abington School District*.<sup>138</sup> The court also held that the statutory language, which only exempted recognized religions, clearly evinced legislative preference or favoritism for certain religious ideologies at the expense of others.<sup>139</sup> Consequently, in assessing the statute, the court held that this type of discrimination was patently unconstitutional in light of the requirements born out of Establishment Clause jurisprudence. The court in *Miskimens* held:

This exemption is based solely upon a religious preference of the accused. How can such a clearly preferential favoring of one group of potential offenders over another group based upon that group’s self-proclaimed religious tenets fail to constitute a “law respecting the establishment of that religion?” I think it cannot...it is also submitted that that entanglement can hardly be said to have any legitimate purpose other than to advance one religion over others.<sup>140</sup>

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135. *Id.* at 44.

136. *Id.*

137. *Id.* at 44 (Judge Evans, writing for the majority in striking the statute, explained that the court has more leeway in regulating practice than it does in belief, and because of this dichotomy, statutes like the one in *Miskimens* were more vulnerable to invalidation.)

138. *Id.* at 44-45. Judge Evans also found support in *Prince*, which held, “parents may be free to become martyrs themselves. But it does not follow that they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.” *Prince*, 321 U.S. at 170.

139. *Miskimens*, 22 Ohio Misc.2d at 44.

140. *Id.*

On the strength of this dicta, the Court of Common Pleas of Coshocton County invalidated Ohio's statutory scheme as an unconstitutional violation of the Establishment Clause because "the clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."<sup>141</sup> The type of preferences engendered by the Ohio statute clearly failed to maintain the wall of separation necessary to preserve the church/state dichotomy.<sup>142</sup>

In addition, the *Miskimens* court also cited the *Walz* and *Lemon* tests in holding ORC 2919.22 to be infirm. Specifically, the court determined that, by favoring certain religions over others, the statutory scheme unconstitutionally promoted excessive entanglement with religion. The court explained:

While the Supreme Court cautions that this test is 'inescapably one of degree,' it has been apparent throughout this trial that the second sentence of R.C. 2919.22(a) hopelessly involves the state in the determination of questions which should not be the subject of governmental inquisition and potential public ridicule—questions such as what is a 'recognized religious body,' by whom it must be 'recognized,' for how long must it have been 'recognized,' what are its tenets, did the accused act in accordance with those tenets, what are 'spiritual means,' and what is the effect of combining some prayer with some treatment or medicine. The determination of such issues runs clearly afoul of at least one recognized test for determining an impermissible establishment problem, i.e., the 'excessive entanglement' test noted in *Walz*, supra, and echoed in *Lemon v. Kurtzman*.<sup>143</sup>

By involving itself in a factual determination relating to particular religious practice, the state positioned itself as the final arbiter of which religions would qualify for the statutory exemption. This, according to the *Miskimens* court, clearly transgressed the lines of demarcation between church and state and was thus unconstitutional pursuant to either strict scrutiny or *Lemon*.

Lastly, the *Miskimens* court was circumspect to note that it was cognizant of the important role of religion in the daily lives of American citizens. The court explained: "much of the strength of this nation has been our American heritage of tolerance of divergent religious beliefs and of strong intolerance of persecution for those beliefs, and this court

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141. Larson, 456 U.S. at 244.

142. *But see* Wallace v. Jaffree 472 U.S. 38, 91 (1985) (Chief Justice Rehnquist argued that there was no historical foundation for the notion that there must be a wall of separation between church and state.).

143. *Miskimens*, 22 Ohio Misc. 2d at 45.

supports staunchly both precepts.”<sup>144</sup> However, the *Miskimens* court also recognized that “the right to hold one’s own religious beliefs, and to act in conformity with those beliefs, does not and cannot include the right to endanger the life or health of others, including his or her children.”<sup>145</sup> Thus, according to the court, while the preservation of religious belief is a moral imperative in our culture, it is not absolute or without qualification. This notion will be discussed further, *infra*, in the free exercise context.

The preceding propositions were similarly echoed in *Walker v. Superior Court*, where the court invalidated a similar exemption provision on the grounds that it violated the Establishment Clause.<sup>146</sup> In *Walker*, the defendant was a member of the Christian Science Church. Her four year-old daughter Shauntay fell ill with the flu on February 21, 1984, and later developed a stiff neck. In accordance with her religious tenets, Ms. Walker contacted her Christian Science practitioners to provide spiritual treatment for Shauntay. Despite these efforts, Shauntay’s health deteriorated and, after heavy and irregular breathing episodes, she died of acute purulent meningitis. Shauntay suffered for 17 days and during this time received no medical treatment. Subsequent to her death, Ms. Walker was charged with criminal neglect. As an affirmative defense, she invoked the statutory exemption policy in California Penal Code Section 270, which provided “If a parent provides a minor with treatment by spiritual means in accordance with the tenets of a recognized church or religious denomination...such treatment shall constitute other remedial care.”<sup>147</sup> Ms. Walker asserted that this provision immunized her from liability under the criminal neglect statute. As with the statute in *Miskimens*, the phrase “recognized church or religion” implied a discrimination among religion on the basis of recognition.

This is precisely what the *Walker* court held in rejecting plaintiff’s claim and holding the exemption as violative of the Establishment Clause. Judge Mosk, concurring in the judgment, first pointed out that the statute only exempted spiritual treatment if it was in accordance with a recognized religion.<sup>148</sup> In applying strict scrutiny, Mosk pointed out that the statute allocates its exemption in a discriminatory manner because those who rely on spiritual treatment, but who are not part of a recognized religion, do not qualify for the exemption.<sup>149</sup> Similarly, those who rely on prayer treatment because of personal belief do not qualify

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144. *Id.* at 44.

145. *Id.* at 45 (noting, “[A]n 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.”).

146. 763 P.2d 852 (Cal. 1988).

147. *Id.* at 856.

148. *Id.* at 874.

149. *Id.* at 874-75 (Justice Mosk points to several sects that would not be considered “recognized” but who nonetheless practice spiritual healing in accordance with their religious tenets.).

for the exemption. This, according to Judge Mosk, was constitutionally impermissible because it compromised the command of governmental neutrality toward religion without evincing any compelling interest to justify the discriminatory effect.<sup>150</sup> In his concurrence, Mosk stated:

By sparing the favored from criminal liability while condemning others for failure to cloak identical conduct in the mantle of a sanctioned denomination or procedure, the religious exemption of Section 270 operates without neutrality 'in matters of religious theory, doctrine, and practice,' and thus cannot survive in the absence of a compelling state interest in its discriminatory effect. Unlike the exemption in *Larson*, however, which advanced an independent secular objective, the only discernible state interest in this exemption is religious accommodation per se. While accommodation has been sustained as a legitimate objective when it 'reflects nothing more than the governmental obligation of neutrality in the face of religious differences,' here the accommodation reflects nothing less than a denominational preference in the face of indistinguishable religious conduct. Manifestly this is not a compelling objective in the constitutional sense.<sup>151</sup>

In addition to failing strict scrutiny, Mosk held that the statute also failed to pass constitutional muster under *Lemon*. Citing the second prong of *Lemon*, Mosk intimated that Section 270's favoritism of recognized religions over non-recognized religions lead to a "troubling entanglement of church and state that the provision invites and *Lemon* forbids."<sup>152</sup> Mosk explained:

To apply Section 270, law enforcement officials and courts are required to evaluate "the tenets and practices" of various religions, searching for a doctrinal sanction of "spiritual treatment by prayer alone"; they are called upon to consider whether individual healers have been 'duly accredited' by a particular denomination; and most disturbing, they are required to ascertain whether a particular religious group is 'recognized.' This last inquiry requires prosecutors and law enforcement officials to judge in their discretion whether a

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150. *Id.* at 875.

151. 763 P.2d 852, 876 ("[I]f the legislature wishes to exempt from criminal liability those parents who rely on prayer treatment in lieu of medical care, the establishment clause requires at a minimum that the exemption be granted irrespective of denominational affiliation or practice.").

152. *Id.* at 877 ("[F]urthermore, the indicia are underinclusive and more likely to complicate rather than facilitate administration by requiring theological and social judgments that law enforcement officials and courts are not equipped to make.").

particular religious group has reached the critical mass of size and acceptance necessary for statutory protection, and leaves courts with nothing but subjective belief to guide the required determination.<sup>153</sup>

Such a legislative posture, according to Judge Mosk, was a clear violation of the excessive entanglement prong first enunciated in *Walz* and later incorporated in *Lemon*. Consequently, the *Walker* court recognized and subsequently invalidated the unconstitutional predilection evinced by California's statutory scheme.

While the cases heretofore analyzed have dealt with discrimination among religions, statutes that afford a uniform benefit to all religions are also likely to be struck down on Establishment Clause grounds because they unconstitutionally favor religion over non-religion, which is similarly proscribed under Establishment Clause strictures. This notion was exemplified in *Texas Monthly v. Bullock*, where the court confronted a Texas sales tax exemption for "[p]eriodicals that are published or distributed by a religious faith and that consist wholly of writing promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith."<sup>154</sup> The exemption was challenged on the grounds that the legislature was evincing a preference for religion at the expense of non-religious groups. The Court agreed, and in striking the statute, held that favoritism of religion over non-religion is undoubtedly inimical to the mandates of the Establishment Clause. The Court in *Texas Monthly*, per Justice Brennan, held:

In proscribing all laws 'respecting an establishment of religion,' the Constitution prohibits, at the very least, legislation that constitutes an endorsement of one or another set of religious beliefs or of religion generally. It is part of our settled jurisprudence that the 'Establishment Clause prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such...' The core notion animating the requirement that a statute possess 'a secular legislative purpose,' and that 'its principal or primary effect...be one that neither advances nor inhibits religion...' is not only that government may not be overtly hostile to religion, but also that it may not place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general, compelling non-adherents to support the practices or proselytizing the favored religious organizations and

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153. *Id.*

154. 489 U.S. 1, 1 (1989).

conveying the message that those who do not contribute gladly are less than full members of the community.<sup>155</sup>

While the substantive outcome of *Texas Monthly* may be dubious in current church and state jurisprudence,<sup>156</sup> the core principle that religion may not be favored over non-religion remains axiomatic. This admonition was re-iterated in *Gillette v. United States*, where the Court again enunciated the proposition that, even if legislative conduct is not specifically favoring one religion, it may nonetheless be unconstitutional if it evinces a broader predilection for religion over non-religion.<sup>157</sup> The clear implication is that where a statute proffers no secular purpose, the presumption of partiality toward religion generally will prevail to strike such statutes as unconstitutional Establishment Clause violations.

In sum, court precedent reveals that, while the constitutionality of child-neglect exemption policies have not been adjudicated by the Supreme Court, they have already been invalidated by lower courts on Establishment Clause grounds. The preceding analysis unveils a schism or categorization of Establishment Clause problems into two sections. First, it is crucial to discern whether the statute (1) provides a uniform benefit to all religions; or (2) discriminates among religions. The former will trigger the now-modified *Lemon* test, while the latter will trigger the more stringent commands of strict scrutiny. As we will see below, current statutory exemption policies operate in contravention of either test, rendering them constitutionally impermissible.

### *C. Current Exemption Policies Fail to Pass Constitutional Muster Under Either Strict Scrutiny or Lemon*

The *Walker* and *Miskimens* decisions illustrate that statutes such as those in Ohio and Tennessee represent unconstitutional transgressions of the Establishment Clause.<sup>158</sup> In the State of Minnesota, however, the legislature has attempted to cure potential defects by altering its statutory language to provide for an unqualified right to rely on spiritual healing, regardless of whether the religion is "recognized."<sup>159</sup> Consequently,

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155. *Id.* at 8-9.

156. The result may be different in light of *Agostini v. Felton*, 521 U.S. 203 (1997) (modified *Lemon* analysis).

157. 401 U.S. 437 (1971) (sustaining the military selective service system against the claim that it violated the Free Exercise Clause).

158. There is a crucial distinction to make here, namely, that those statutes were invalidated in part because the words "recognized" religion implied an invidious discrimination among religions. It is the premise of this article that even when such language is removed in order to achieve an "all encompassing" statutory scheme, they still fail under the Establishment Clause.

159. See MINN. STAT. ANN. 609.378(1) (WEST 1999) (exempting conduct that would otherwise constitute neglect, as long as the conduct is in accordance with a religious belief).

Minnesota's statutory scheme is representative of the most sweeping child abuse exemption policy in the country.<sup>160</sup> Because of its "inclusive" posture, Minnesota's scheme represents the most promising exemption to withstand constitutional scrutiny. Accordingly, it will be utilized for our discussion. Specifically, Minnesota's statute provides in pertinent part:

(a) A parent...who willfully deprives a child of necessary food, clothing, shelter, health care, or supervision appropriate to the child's age, when the parent...is reasonably able to make the necessary provisions and which deprivation substantially harms the child's physical or emotional health...is guilty of neglect of a child and may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than \$3,000, or both.<sup>161</sup>

However, it also contains an exemption for parents' predicate their otherwise criminal conduct on religious belief:

(1) If a parent...responsible for the child's care in good faith selects and depends upon spiritual means or prayer for treatment or care of disease or remedial care of the child, this treatment shall constitute 'health care' for purposes of this clause.<sup>162</sup>

While Minnesota's statute appears to be all-encompassing in its effect, it nonetheless suffers from the same constitutional defects as other exemption policies, and thus stands for the proposition that all exemption policies are per se violations of the Establishment Clause. Specifically, exemption policies in the child-neglect context are constitutionally infirm based on two grounds: (1) exemption policies, like the one in Minnesota, implicitly prefer certain religions to others. The fact that the words "recognized religion" are omitted from the statutory language does not alter this reality, nor does it alter the narrow legislative intent underlying the exemption; and (2) even if the words "recognized religion" are omitted in order to connote a uniform benefit to all religious conduct, they still draw an unconstitutional line between religion and non-religion. Each of these arguments shall be discussed in turn.

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160. Minnesota's scheme is all encompassing in that it excludes the words "recognized religion." Indeed, it applies to all religious behavior that is motivated by spiritual healing. *See id.*

161. *Id.*

162. *Id.*

1. *Statutory Exemption Policies Such as Minnesota's are Unconstitutional Violations of the Establishment Clause Because They Implicitly Favor and Prefer Certain Religions Over Others.*

First, all statutory exemption policies, including Minnesota's, represent a per se violation of the Establishment Clause. Despite its all-encompassing statutory language, exemption policies implicitly favor or prefer certain religious groups over others. This type of governmental conduct contravenes the clearest command of the Establishment Clause and requires invalidation. Simply stated, statutory exemption policies were crafted specifically, if not expressly, to accommodate those specific and finite religions that practice spiritual healing. As a factual matter, spiritual healing is only practiced by approximately seven religions in our culture, and exemption legislation was a direct response to the much-lobbied concerns of these groups. In *Walker*, the court assessed the constitutionality of Penal Code 270, which purportedly accorded an exemption to all recognized religions.<sup>163</sup> However, a glimpse into the legislative history tells a different story. A statement from the Senate Committee on the Judiciary observed, with regard to Section 270, that it was designed to "ensure that no parent who uses Christian Science methods to heal his or her child shall be liable for not providing recognized medical attention for the children."<sup>164</sup> Clearly, the legislative history belies the statutory language, showing a clear legislative intent to prefer and accommodate the Christian Science denomination to the exclusion of other religious practices.

However, this result is not alarming, and instead represents a logical result of the purposes underlying exemption policies. After all, as a matter of factual necessity, the common-sense question must be raised, Do all religions reject conventional medical treatment in favor of spiritual healing, or is it confined to a specific number of religions? The answer is self-evident and readily knowable: only seven recognized religions endorse the latter proposition. Thus, with this information, it would be non-sensical and disingenuous to assert that these exemptions were crafted for all religions when we know that only seven religions endorse the type of spiritual practice that is specifically exempted by the statutes. Legislators, many of whom are religious themselves, are keenly aware, as are most individuals, of the fact that most conventional religions endorse common medical modalities. Thus, it flies in the face

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163. 763 P.2d 852 ("As enacted in 1872, the statute provided that 'every parent of any child who willfully omits, without lawful excuse, to perform any duty imposed upon him by law, to furnish necessary food, clothing, shelter, or medical attendance for such child, is guilty of a misdemeanor. The statute was amended...in 1976 to specify that 'treatment by spiritual means through prayer alone' constitutes 'other remedial care.'").

164. *Id.* at 874-76 (Mosk, J., concurring).

of common sense to say that legislatures are affording a benefit to all religions, and not favoring a certain religious sect, when their legislation specifically mirrors the ideological norms of only a finite and marginal number of sects. It is simply irrational and deductively illogical to assert that the exemption policy is accorded to all religious groups when most religions practice ideological norms that are contrary to, and disagreeable with, the spiritual healing doctrines espoused by sects such as Christian Science. To arrive at a contrary result would be to turn a blind eye to the underlying factual realities driving these exemptions and yield to the dubious suggestion of the statutory plain language (that it is a benefit for all religions). This not only contrary to principles of statutory construction, but contrary to the dictates of reason and common sense, which suggest that a statute that exempts the specific religious practice of a few is specifically designed to benefit those few. To hold that the exemption policy benefits all religious practice would, in effect, allow the exemption to swallow the rule; if every religious denomination could benefit from the exemption, then there would be little purpose in having the rule. In fact, in such a case an exemption might be more appropriate for non-believers, since, in such a scenario, they would comprise the finite minority of individuals still subject to the neglect proscription.

By way of analogy, let us assume that an undergraduate college is accepting applications for financial aid, and the advertisement reads, "financial aid available to all enrolled undergraduates." Now, this might appear to stand for the proposition that every enrolled undergraduate can receive financial aid, but we intuitively know that only those in the lower income levels will be eligible for the expenditures. Now, does the advertisement, on its face, appear to afford a uniform benefit to all students? Yes. But, does it truly apply to all students? No. Thus, the university is crafting an all encompassing advertisement but implicitly favoring only those whose income levels fall below a certain income level. While such university action is not unconstitutional, the same type of preference, when based upon religion instead of income, is patently unconstitutional when it is the product of governmental action. Like the latter analogy, the all-encompassing language in these statutes represents an attempt by the legislators to have the exemptions appear to assume an egalitarian posture. But even a superficial examination demonstrates that this clearly amounts to an implicit, yet clearly obvious, predilection by the legislature. This predilection by the drafters of the legislation is indirect, yet unconstitutional.

For the sake of argument, assume that a parent in Minnesota is a practicing Roman Catholic whose son becomes stricken with acute bacterial meningitis. Instead of seeking conventional medical treatment, the parent relies solely and completely on spiritual healing, believing this to be a central tenet of Roman Catholicism. However, Roman Catholicism contains no such dogma; the parent's belief is therefore

erroneous. As her son's health declines, the parent continually rejects medical treatment, believing that she is honorably following the dictates of Catholic ideology. The son dies, and the state seeks to prosecute the parent for child abuse. She subsequently invokes the statutory exemption of Minnesota. The parent defends on the grounds that the state's statute encompasses all religions, not just those that are recognized or that specifically endorse spiritual healing. What result?

The use of the exemption in this hypothetical would amount to an untenable proposition because Roman Catholicism specifically and unambiguously endorses conventional medical care. Faced with this contradiction, it is implausible to assume the exemptions apply to the Roman Catholic in the hypothetical. This ostensibly shows that the exemptions evince a legislative preference based upon religious ideology and based upon specific doctrinal directives of religions like Christian Science. However, let us assume, *arguendo*, that the exemption was held to apply to the Roman Catholic father. Such a pronouncement would lead to the implausible result of elevating every individual to his or her own religious entity, so long as they sincerely believe that they are following some religious tenet or directive. This would hold true regardless of the underlying validity of the belief. More importantly, this would make every individual subjectively beyond the law's reach regardless of objective criterion and, in effect, make every man a law unto himself. This is not only contrary to the legal responsibilities to which we hold individuals, but also an unfocused, broad attempt to protect sincere religious belief at the expense of civic and societal responsibilities. Such a legislative intention would be quite suspect because mere sincerity is rarely the standard for adjudicating or immunizing conduct.<sup>165</sup>

This raises the crucial and dispositive policy question: Do these exemptions make every man a religious entity unto himself, or were the exemptions more narrowly designed to benefit those few religions which genuinely believe in the use of spiritual healing? The answer clearly lies in the latter, and the fact that many statutes include the words "recognized religion" evinces a clear legislative intention that the exemptions be confined in scope and not construed to confer broad immunity on anyone who sincerely and subjectively decides that their religion suddenly calls for spiritual healing. The fact that some statutes now omit the words recognized religion does not connote that they are changing their intent; rather, they are trying to make the statutes appear as if they are not discriminating among religions, although such an effect is apparent. However, an effort to avoid constitutional invalidation through semantic changes should not be construed as a change in the narrow legislative intent that underlies exemption policies.

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165. Even if this were the case, the statute would be drawing an unconstitutional line between religion/non-religion. See *infra* Part V.

Consequently, such activity by the legislature, as recognized in *Miskimens* and *Walker*,<sup>166</sup> is an unconstitutional violation of basic Establishment Clause principles. At the very least, this demonstrates that the statute, on its face and by its application, is discriminating among religions.

Even if child-neglect exemption policies such as the one in Minnesota are not invalidated based upon neutrality, they are invalid under strict scrutiny analysis.<sup>167</sup> Upon close examination, exemptions such as Minnesota's constitute per se violations of the Establishment Clause because they fail this exacting standard. It is improbable that the state could proffer a compelling interest that justifiably places religious freedom above its interest in the health and welfare of children. The state would essentially be saying that although the health and well being of a child is paramount, if a parent has serious religious beliefs, it does not matter if the child is abused in the name of such beliefs. Thus, the state would be protecting certain children via the neglect statute, but leaving another class of children unprotected by enacting the exemptions. It is far from compelling to argue that certain children warrant less protection from the state merely because of their parents' religious disposition. Such a position runs contrary to, and is inconsistent with, the express purpose of the statute. It thereby emasculates the objectives that gave rise to its enactment. The Supreme Court should reject a statute that allows arbitrary religious beliefs to trump child welfare. If religion were found compelling, it would not only expose a certain class of children to harm, but would also compromise the state's *parens patriae* directive to safeguard the health and well being of children. It is simply implausible, as a normative matter, to assert that the interest in religious freedom is compelling when that interest invariably intersects with, and causes the derogation of, another individual's fundamental liberty interest in health and well being. If anything, the converse would be sanctioned by the Court, as the state could viably argue that a neglect law that applies to everyone would represent a compelling interest in protecting all children, regardless of the religious association of their parents.

Hence, child-neglect exemption policies, by discriminating among religions, fail both the strict scrutiny test and the rudimentary requirements of neutrality promulgated in *Everson*, *Larson*, and *Abington*

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166. *Miskimens* and *Walker* invalidated the statutes in those cases because they only exempted spiritual healers who were members of recognized religions. Thus, a spiritual healer from an unrecognized religion would not receive the same protection although they were engaging in identical conduct. In the case of statutes like the one in Minnesota, the words recognized religion are omitted to give the law an all encompassing effect to protect all spiritual healers. However, such a change is merely semantical; the statute still works to primarily benefit only those specific, well-known religions that practice spiritual healing.

167. The strict scrutiny test is clearly necessitated here because in such a scenario, the statute would be discriminating among religions.

*School District*.<sup>168</sup> The state is clearly delineating a denominational preference for those religions that practice spiritual healing, and in doing so, the state is unconstitutionally favoring these religions. Such favoritism invariably leads the state to excessively entangle itself with religion by engaging itself in a determination of which religions qualify or are eligible for the exemptions. As cautioned against in *Miskimens* and *Walker*, such an endeavor “hopelessly involve[s] the state in the determination of questions which should not be the subject of governmental inquisition...”<sup>169</sup> The state, through the judiciary, will be required to examine the tenets of the religious practice, whether the accused acted in accordance with these tenets, whether the religion authorized such activity, whether it is an essential part of its ideology, and so on. This will involve the state in countless determinations concerning the validity and scope of a particular religious belief and whether these beliefs are legitimate enough to qualify under the exemption. Through such excessive entanglement, the state will subjectively determine which religions qualify and which do not, and in doing so, violate the clearest command of the Establishment Clause: “the state may not advance one religion over other.”<sup>170</sup> Such inquiry is surely not the business of the state, and its interdiction compromises the fundamental requirements of legislative neutrality. If the Establishment Clause stands for anything, it stands for the proposition that the government is not permitted to intermingle itself in a decision-making process that validates certain religions and marginalizes others.

2. *Even Assuming That Statutory Exemption Policies Extend to All Sincerely Held Religious Beliefs, They Still Fail to Pass Constitutional Muster Because They Unconstitutionally Favor Religion Over Non-Religion*

The preceding discussion is subject to several strong counter-arguments. First, and foremost, opponents of the preceding assertions

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168. *Everson*, 330 U.S. at 15 (“The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasions of civil authority.”); *Larson*, 456 U.S. at 244 (“[T]he constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause.”); *Abington*, 374 U.S. at 259 (“It is not only the non-believer who fears the injection of sectarian doctrines and controversies into the civil policy, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government.”) (Brennan, J. concurring).

169. *Miskimens*, 22 Ohio Misc. 2d at 45 (“...questions which should not be the subject of governmental inquisition and potential public ridicule—questions such as what is a ‘recognized religious body,’ by whom it must be ‘recognized,’ for how long it must have been ‘recognized,’ what are its tenets, did the accused act in accordance with those tenets...”).

170. *Larson*, 456 U.S. at 246 (This principle of denominational neutrality has been restated on many occasions.).

will cite *Thomas v. Review Bd. of Indiana Employment Security Division*.<sup>171</sup> Opponents will argue that *Thomas* unequivocally stands for the proposition that exemption policies apply to all religiously motivated conduct, as long as the perpetrator of such conduct sincerely believes that he or she is correctly following the tenets of their particular religion.<sup>172</sup> In such a case, opponents may argue, exemption policies are not discriminating or preferring any religion per se, because the exemption applies to all those who sincerely and subjectively believe that their conduct is commanded in accordance their respective religious beliefs. The government is not compromising its neutrality because it is extending the exemption to all religious conduct, as long as it has a legitimate subjective basis.<sup>173</sup> The strict scrutiny test is not apposite, nor is the exemption a violation of the state's requirement to remain impartial to all matters involving religion. In essence, the proponents of this argument would have answered differently the question posed above regarding the legislature's intent in enacting the exemption. They would assert that it was meant to apply to all conduct that has a religious basis, or better yet, to anyone who uses spiritual healing.<sup>174</sup> Proponents would intimate that the government has a legitimate reason for exempting religiously inspired behavior: to protect the constitutional commands of freedom of religion for all citizens.

This argument still fails, however, to posit exemptions as passing constitutional muster. First, as a peripheral matter, the argument that legislatures enacted these statutes to provide for the subjective, albeit sincere, assertion of religion freedom, no matter how illegitimate or irrational the assertion, is dubious. If this were true the state would be expanding the class of unprotected children limitlessly. It is questionable that the legislature summarily decided to eviscerate the impact of child-neglect laws to such an extent that its enforcement was contingent upon any sincere assertion of religious belief. Thus, the argument that the

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171. 450 U.S. 707, 715-16 (1981) (finding that a plaintiff was entitled to unemployment compensation because his subjectively held religious beliefs, which prohibited him from producing "weapons of war," were entitled to protection, even though not entirely consistent with Jehovah's Witness doctrine, in part because "the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect.").

172. *Thomas* 450 U.S. at 715-16 ("[T]he Indiana court also appears to have given significant weight to the fact that another Jehovah's Witness had no scruples about working on tank turrets; for that other Witness, at least, such work was "scripturally" acceptable. Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill-equipped to resolve such differences in relation to the Religion Clauses. One can, of course, imagine an asserted claim so bizarre, so clearly non-religious in motivation, as to not be entitled to protection under the Free Exercise Clause; but that is not the case here, and the guarantee of free exercise is not limited to beliefs which are shared by all members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.").

173. *Id.* (the Court held it sufficient that "Thomas terminated his employment for religious reasons.").

174. Pursuant to *Thomas*, such belief need not be doctrinally accurate as long as it is subjectively and honestly held.

legislature instead enacted these statutes to accommodate the few religious sects who actually practice spiritual healing seems more plausible and logical.

However, assuming *arguendo* that *Thomas* is good law, there is still a glaring constitutional problem. First, *Thomas* admittedly elucidated an expansive reading of the Free Exercise Clause, in that it preserved the honest and subjective beliefs of an individual, regardless of objective foundational validity. However, *Thomas* was nonetheless confined to protecting subjectively held religious beliefs, as opposed to non-religious ones. As the Court stated, per Justice Berger, “one can, of course, imagine an asserted claim so bizarre, so clearly non-religious in motivation, as to not be entitled to protection under the Free Exercise Clause...”<sup>175</sup> Accordingly, even if one assumes the validity of *Thomas* and postulates that child neglect exemptions insulate anyone who subjectively, honestly, or in good faith believes that their religious practice commands refusal of medical treatment in favor of spiritual healing, they nonetheless do not allow non-believers (i.e. atheists) to benefit from the exemption because they inherently target only religious or spiritual conduct. If the converse were true, then there would be no purpose to enacting child neglect statutes in the first place. In essence, even if we concede *Thomas* and stipulate that the exemption statutes do not implicitly discriminate among religions, they nonetheless provide a uniform benefit only to religion and religiously motivated conduct. Thus, the statute still unconstitutionally delineates a class constituting non-believers/believers, and discriminates accordingly, with the latter group being extended benefits to the exclusion of the former.<sup>176</sup> Hence, even if strict scrutiny is inapposite, the *Lemon* test<sup>177</sup> (in *Agostini's* modified form) now becomes germane to demonstrate the statute's infirmities.

*a. Exemption Policies in the Child Neglect Context Fail to Delineate A Permissible Secular Purpose*

When we apply the less stringent *Lemon* standard, we find that these exemptions still fail to pass constitutional muster. Specifically, exemption policies fail to pass muster under both prongs of *Lemon*. First, statutory exemptions must proffer, at least to some degree, a secular purpose. As the Court warned in *Gillette*, “the Establishment

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175. *Id.* at 715.

176. As Justice Brennan argued in *Lynch v. Donnelly*, the Establishment Clause was designed to prevent “religious chauvinism” that sends a message to minority organizations that “minority groups, as well as...those who may reject religion...that their views are not similarly worthy of public recognition nor entitled to public support.” 465 U.S. at 688 (Brennan, J., dissenting).

177. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

Clause prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization.”<sup>178</sup> Even if we accede to the *Thomas* counter-argument, it still leaves exemptions policies devoid of any secular purpose because there is no benefit that accrues to non-believers or secular entities. Tellingly, non-believers are the only group of individuals that are not eligible to assert the exemption defense. The aim of exemption policies is solely to accommodate those non-secular groups or individuals that believe in spiritual treatment at the expense of conventional medicine. And spiritual treatment is uniformly and solely a product of religious doctrine. Simply put, an atheist cannot purport to rely on spiritual healing because such a practice implies a celestial proclivity. Thus, it is implausible for opponents to assert that anyone can benefit from the exemption. Importantly, only those with a religious inclination can benefit, and this is patently non-secular, and therefore unconstitutional.

Furthermore, these statutes illustrate a dichotomy between religion and non-religion by viewing identical conduct in a contradictory light—if a child is neglected by a believer, it is deemed to constitute religious conduct and thereby exempted from liability; if a child is neglected by a non believer, it is deemed criminal conduct, and thereby culpable. In this way, the statute is designed for the exclusive benefit of, and justification for, religiously motivated conduct. Even if we thus concede that the statute does not discriminate among religions, it undoubtedly favors religion over non-religion, and this broader characterization violates the Establishment Clause imperatives cited in *Gillette*. The statute thus places a societal burden on non-believers simply because their conduct was not motivated by those societal values that the legislature deems worthy of protection. This is non-secularism in the most invidious sense because the legislature is actually evincing a viewpoint preference for religion over non-religion.

However, opponents may assert that exemption policies are not entirely devoid of secular purpose and therefore do not fail the first prong of *Lemon*. Opponents may cite *Corporation of the Presiding Bishop v. Amos*, where the court found that the exemption at issue represented a “permissive legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions.”<sup>179</sup> Relying on this case, opponents may argue that the secular purpose here is to obviate significant government intrusion into private affairs, thereby allowing for the free exercise of religious belief. Opponents will posit that the preservation of an

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178. 401 U.S. 437, 449 (1971); *see also* *Engel v. Vitale*, 370 U.S. 421, 430-31 (1962); *Torasco v. Watkins*, 367 U.S. 488, 495 (1961).

179. 483 U.S. at 335 (1987).

enumerated constitutional guarantee is secular in its most fundamental sense.

However, as a legal and factual matter, the *Amos* decision is readily distinguishable. In *Amos*, the Court assessed the constitutionality of exempting religious organizations, under Section 702, from Title VII's prohibition against discrimination in employment on the basis of religion.<sup>180</sup> Specifically, an organization run by the Church of Latter-Day Saints sought to assert the Title VII exemption against a former employee who claimed that his firing was discriminatory, notwithstanding the exemption. The aggrieved employee asserted that the current Title VII exemption only allowed religious employers to discriminate, on religious grounds, in hiring for religious jobs.<sup>181</sup> The employee argued that the court adopt the pre-1972 exemption, which only exempted "religious conduct."<sup>182</sup> The employee claimed that the exemption did not permit a religious entity to discriminate, on religious grounds, in hiring for non-religious jobs. If the exemption were allowed in such a broad manner, the employee argued, it would violate the Establishment Clause.<sup>183</sup> The District Court accepted this assertion, and proceeded to assess whether the employment at issue was of a religious or non-religious nature.<sup>184</sup> Concluding that it was non-religious, the District Court held that, to exempt such conduct by religious organizations would be tantamount to advancing religion by singling out these groups for a benefit.<sup>185</sup> In the District Court's view, such a broad benefit amounted to an "exclusive authorization to engage in conduct which can directly and immediately advance religious tenets and practices."<sup>186</sup> Accordingly, the district court found that Section 702 violated the Establishment Clause, insofar as it allowed religious organizations to benefit from discrimination in non-religious matters.

The Supreme Court reversed, and construed 702 in a sweeping fashion to exempt the Church of Latter Day Saints from Title VII's prohibition, regardless of whether their conduct concerned religious or

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180. *Id.* at 329 (the question squarely presented before the Court was whether "applying the [Section] 702 exemption to the secular non-profit activities of religious organizations violates the Establishment Clause of the First Amendment"). *See id.* at 330.

181. *Id.* at 331 (The plaintiff, an aggrieved former employee, asserted that if the exemption allowed for discrimination in non-religious matters, that it would violate the Establishment Clause.).

182. *Id.*

183. 483 U.S. 327, 333 (1987).

184. *Id.* at 331-33.

185. *Id.* at 332-33 (In finding that the activity engaged in by plaintiff was nonreligious, the court found: first, that the Gymnasium is intimately connected to the Church financially and in matters of management; second, that there is no clear connection between the primary function which the Gymnasium performs and the religious beliefs and tenets of the Mormon Church or church administration; and third, that none of Mayson's duties at the Gymnasium are "even tangentially related to any conceivable religious belief or ritual of the Mormon Church or church administration." The court concluded that Mayson's case involved nonreligious activity.) *See* 594 F.Supp. 791, 802 (Utah 1984).

186. *Id.* at 333 (thus failing the second prong of *Lemon*).

non-religious employment.<sup>187</sup> In stamping its imprimatur on such a broad interpretation of the exemption, the Court held that it was a proper secular purpose to “alleviate significant governmental interference” with the ability of religious organization to discriminate, on religious grounds, in a religious or non-religious situation.<sup>188</sup> Rejecting the argument that only the religious activities of such employers should be exempted from the ban on religious discrimination, the Court held:

We may assume for the sake of argument that the pre-1972 exemption was adequate in the sense that the Free Exercise Clause required no more. Nonetheless, it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission...After a detailed examination of the legislative history...Congress’ purpose was to minimize governmental interference with the decision making process in religions.<sup>189</sup>

On these grounds the *Amos* Court held that it was a permissible secular purpose to accommodate religious activity. Consequently, the Court held that the Corporation could discriminate on religious grounds in employment regardless of whether or not the employment was of a religious or non-religious nature.<sup>190</sup>

However, the argument in *Amos* is distinguishable from child-neglect exemptions, which do not manifest the same permissive secular purpose that were found constitutional by the *Amos* Court. First, as a factual matter, the exemption in *Amos* was premised on a governmental burden that is simply not present in child-neglect law. In *Amos*, the absence of an exemption for both religious and non-religious conduct would have thrust the Church of Latter Day Saints into countless ex ante decisions concerning whether the particular conduct at issue was religious or non-religious (thus whether it was exempt from discrimination laws). Without the broad legislative accommodation in *Amos*, there would be a level of decisional uncertainty among the

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187. *Id.* at 339-40 (finding that the Title VII exemption did not offend *Lemon* and consequently, encompassed both religious and non-religious activities of the organization).

188. 483 U.S. 327, 335 (1987) (“[U]nder the *Lemon* analysis, it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious mission”).

189. *Id.* at 336.

190. *Id.* at 340 (In making this determination, the Court found, under *Lemon*, that the exemption, even though it exempted both religious and nonreligious conduct, did not serve to advance religion or promote excessive entanglement between church and state.).

religious organization because it would be unable to discern when its conduct was “religious” (and thereby exempted) and when it was not (and thereby subject to liability). In fact, absent the accommodation for both religious and non-religious conduct, such a determination would be placed solely in the hands of a judge, who would decide *ex post* whether the conduct engaged in, and decisions made by, the organization were encompassed within the Title VII exemption. Such an uncertain outcome, especially after a decision was made, would certainly burden the religious organization because it would force them to act without knowing whether their conduct was constitutionally exempted under Title VII. And the fear of potential liability, and resulting ambiguity, as the Court noted, would affect the organization’s ability to carry out its religion mission. Thus, the practical and significant burden of making uncertain *ex ante* decisions on whether the activity involved is religious or non-religious necessitated the need for some type of broader exemption to ameliorate the degenerative effect on religious freedom. In essence, the permissive secular purpose was deemed proper in part because of the practical difficulties and significant government interference that would be present if the judiciary routinely had the final say on the validity of the organization’s conduct. The exemption was thus properly interpreted to extend broadly to religious and non-religious conduct, in order to alleviate the apparent hardships that would be visited had they been construed narrowly.

Such a necessity is not present, however, in the case of exemptions in the child-neglect context because the decisional burden would not be nearly as significant if no exemption were proffered. Simply put, a law which refused to extend any exemption to religious conduct would not burden spiritual healers in the way that the Latter Day Saints were burdened in *Amos*. If all religions were required to comply with child neglect laws (requiring medical treatment), they would know *ex ante* (instead of finding out *ex post* by the government) of the responsibilities and obligations under which they were required to seek medical care. Unlike *Amos*, the organization would not have to engage in technical legal determinations as to whether the conduct at issue fell into the ambiguous category of religious or non-religious. Thus, the decisional burden, and resulting uncertainty regarding the legality of their conduct, would be less apparent in this context because the legal obligation would be clear and unambiguous. Religious entities would not have to depend on the uncertain proclivities of a judge to single-handedly resolve the definitional uncertainties regarding what constitutes a protected religious activity and what does not. Accordingly, the degree of governmental interference with the religious mission and practice of an organization would be much lower than that which confronted the Latter-Day Saints in *Amos*. Ostensibly, the conduct requirement would not be fraught with the burdensome uncertainty and outside interference by judges and

legislatures that confronted the corporation in *Amos*. As a result, the burden that was experienced by the Church of Latter Day Saints would not be present in the neglect context. Consequently, the necessities that lead the court in *Amos* to declare the exemption to have a permissive legislative purpose are not present.

Second, as a corollary to the above argument, the exemption in *Amos* represented a permissive legislative purpose because without the broad exemption for religious and non-religious conduct, compliance with law would have been affected for the Church of Latter Day Saints. The uncertainty alluded to above was deleterious to the organization in *Amos* because it could not know in advance whether its conduct was simply in furtherance of their religious prerogatives, or in contravention of laws against discrimination. And when you make compliance with the law difficult, you make it more difficult to practice religion free from legislative and secular interference. Consequently, the interposition of a broad legislative exemption was, in effect, designed to eliminate a secular and legislative entanglement that burdened the freedom to carry out one's own religious mission. In the child-neglect context, however, compliance with law is not uncertain or unknown if a broad exemption is not interjected. Those groups which seek to endorse spiritual healing would be well aware that they are required to seek treatment if their child's health was compromised. Compliance with law and fear of judicial declaration of illegality would, as a result, be less frequent and cumbersome. In this sense, therefore, the same practical difficulties which gave rise to the broad, permissive secular purpose in *Amos* are not necessitated in the case of child neglect policies.

Moreover, the exemption in *Amos* was permissible, in part, to vitiate the need for secular entities to entangle with the doctrines of the non-secular. Without the exemption, the final arbiter of the organization's religious validity rested with the judiciary's hyper-technical, ad hoc determination in defining what constituted religious conduct. The injection of a secular entity into the affairs of the non-secular would have deprived the religious organization of the freedom to carry out its mission free from government interference. The need to be religiously unencumbered by such technical case by case judicial oversight clearly necessitated the exemption. In the neglect context, however, the determination of whether or not to act within a statute that required medical care rests with the organization itself. It is not subject to judicial interpretation, definitional complexities, and *ex post* case by case determinations. In this sense, the type of interference that gave rise to an exemption in *Amos* is not present here.

It is important to point out that the burden resulting from government interference in *Amos* was a burden based on practicality, not on Free Exercise grounds. Specifically, the exemption was designed to alleviate "governmental interference with the decision-making

process.”<sup>191</sup> On these narrow grounds, the court determined that there existed a permissive secular purpose in exempting both religious and non-religious activity. Thus, the permissibility of an exemption in *Amos* was not premised on constitutional grounds. Consequently, the notion that the Church of Latter Day Saints in *Amos* was accommodated does not implicate constitutional issues so much as it recognized the difficulties that would have arisen had no exemption been proffered. As the *Amos* Court noted, “we may assume for the sake of argument that the pre-1972 exemption (refusing to exempt non-religious conduct) was adequate in the sense that the Free Exercise Clause required no more.”<sup>192</sup> *Amos* thus lends itself to a pragmatic, case by case determination of what constitutes permissible accommodation, not a blanket statement that accommodating religion is *per se* a secular purpose. This point will be especially important when we discuss the constitutionality of generally applicable criminal laws, discussed *infra* Part VI.

In sum, the argument that exemption policies in the child neglect context fail to retain a secular purpose is not vitiated by *Amos*. Instead, *Amos* was confined to the specific facts facing the Church of Latter Day Saints. Accordingly, *Amos* is limited to those situations where a significant burden (and resulting interference) would result if an exemption was not permitted. As detailed above, such a burden is not present in the child neglect context, distinguishing this situation in degree from that which existed in *Amos*. Furthermore, there are many instances in which accommodations, in the form of exemptions, are not even required, as “the mere fact that the petitioner’s religious practice is burdened by a governmental program does not mean that an exemption accommodating his practice must be granted.”<sup>193</sup> If anything, *Amos* clarifies the argument that exemptions are not permissible in the neglect context because the practical difficulties and inherent uncertainties that necessitated a broad reading of the exemption in *Amos* are not present. Consequently, unlike in *Amos*, such a permissible purpose is not present in the child neglect context because the exemption works primarily to confer a broad grant of immunization on conduct that is otherwise criminal. Even in light of *Amos*, such an exclusive benefit fails to satisfy the first prong of *Lemon*.

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191. *Id.* at 336 (quoting the District Court, 594 F.Supp. at 812).

192. *Id.* at 336.

193. Thomas, 450 U.S. at 718.

*b. Statutory Exemption Policies in the Child-Neglect Context Have The Primary Effect of Unconstitutionally Advancing Religion*

Even assuming *arguendo* that the statute has the secular purpose of accommodating religious belief, it fails the second inquiry of *Lemon*, which requires that the statute “neither advance nor inhibit religion.”<sup>194</sup> Exemption policies advance religion because they immunize conduct that would otherwise be criminal, provided that it is cloaked in religious motives. In this way, the statute again works a discriminatory dichotomy between believers and non-believers by extending an exclusive benefit to believers and maintaining a burden on non-believers for the exact same conduct. Essentially, the statute declares child neglect to be criminal, and then creates a class of individuals, based exclusively on the fact that they are religious, who are immune from its strictures. Thus, the exemption, in effect, holds that the dispositive factor is not “what you did” as much as it is “who you are and why you did it.” A religious motive will constitute a defense, a secular one will not, and here we have the clearest example of identical conduct being treated differentially based solely on the basis of religion. It is rare to locate other examples in the criminal law where motive will be entirely dispositive of liability. In any case, as a consequence, the believers receive legally sanctioned status advancement because they are elevated above the criminal law, above the respective penal code, and thereby immunized from conduct that the state has otherwise declared culpable. The immunization is not a product of extenuating circumstances, mitigating factors, or external considerations; in a sense, the immunization is not action-based. Rather, it is belief based, which connotes a *per se* exemption as between two different perpetrators simply because one has a religious basis and the other does not. Thus, a Christian Science believer whose child dies in accordance with spiritual healing will likely be immunized from liability, while an individual who rejects medical treatment because he despises technological intervention will be liable under the exact same statute. In preferring religion over non-religion, the exemption is infirm because “by sparing the favored from criminal liability while condemning others for failure to cloak identical conduct in the mantle of a sanctioned denomination or procedure, the religious exemption...operates without neutrality.”<sup>195</sup> As Justice Brennan explicated in *Texas Monthly*, “the Constitution prohibits, at the very least, legislation that constitutes an endorsement of one or another set of religious beliefs or of religion generally.”<sup>196</sup> This is exactly the type of egregious favoritism and

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194. See *Lemon*, 403 U.S. 602 (1970).

195. See *Walker*, 763 P.2d at 876 (Mosk, J. concurring).

196. 439 U.S. 1, 8 (1989).

preferential treatment in favor of religion that is profoundly unconstitutional and clearly proscribed under the rubric of *Lemon* and Establishment Clause jurisprudence.

Opponents may, however, assert a counter-argument here, stating that the immunization benefit for believers is merely incidental, because the statute is primarily concerned with accommodating the free exercise of religion. Opponents may quote Justice Brennan in *Texas Monthly*, where the Court held:

It does not follow, of course, that government policies with secular objectives may not incidentally benefit religion. The nonsectarian aims of government and the interests of religious groups often overlap, and this Court has never required that public authorities refrain from implementing reasonable measures to advance legitimate secular goals merely because they would thereby relieve religious groups of costs they would otherwise incur. Nor have we required that legislative categories make no explicit reference to religion. Government need not resign itself to ineffectual diffidence because of exaggerated fears of contagion or by religion, so long as neither intrudes unduly into the affairs of the other.<sup>197</sup>

Opponents may also cite a plethora of cases that have upheld legislative enactments even though they benefit religion in some way. In *Widmar v. Vincent*, religious groups were allowed access to university facilities, and such a benefit was not held to be unconstitutional.<sup>198</sup> In *Mueller v. Allen*, a state income tax deduction was extended to parochial schools, and it was held to be constitutionally valid.<sup>199</sup> Lastly, in *Walz*, cited *supra*, the Court upheld a property tax exemption that was accorded to religiously owned properties.<sup>200</sup> We thus observe many instances where laws withstood constitutional attack even though they extended an incidental benefit to religion.

This argument fails, however, because in each of the cases above, the benefit was mutually inclusive—it conferred benefits to secular as well as non-secular entities. Thus, the statutes in those cases still retained an inherently egalitarian outlook and possessed some semblance of non-secular objectives. In the case of statutory exemptions, however, the benefit is one-sided: religious groups gain the benefit of immunity, while secular individuals are held accountable for identical conduct. Unlike the above class of cases, there is no concurrent secular benefit

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197. *Id.* at 10.

198. 454 U.S. 263 (1981).

199. 463 U.S. 388 (1983).

200. 397 U.S. 664, 667 (1969).

provided by exemption policies. This type of statutory scheme has been held by the court to violate the Establishment Clause. Specifically, the Court in *Texas Monthly* held:

In all of these cases, however, we emphasized that the benefits derived by religious organizations flowed to a large number of non-religious groups as well. Indeed, were those benefits confined to religious organizations, they could not have appeared other than as state sponsorship of religion; if that were so, we would not have hesitated to strike them down for lacking a secular purpose and effect.<sup>201</sup>

This passage evinces a crucial point: even if *Thomas* is good law, we need not show that the legislature is preferring one specific religion to another. While this is undoubtedly true, it is sufficient to show a broader pattern of invidious preference based on legislative preference for religion over non-religion. Statutory exemption policies ostensibly produce this effect, and any attempt to import a secular purpose would amount to an act of duplicity. Accordingly, exemption policies must be struck down as violative of the Establishment Clause.

Opponents may, however, attempt to again rely upon *Amos*, asserting that the activities of religion are not advanced by the exemption because the government is not advancing religion “through its own activities and influence.”<sup>202</sup> However, this argument fails to persuade in part because the exemptions are the sole product of legislative decree. But for the legislative decision to exempt this conduct, all individuals, including religious entities, would be subject to the basic proposition that it is illegal to neglect or endanger the welfare of a child. The legislative decision to exempt spiritual healers is precisely what prompted the exemption. Hence, the argument that the legislature is somehow passive or distant from these laws is unappealing.

Furthermore, even assuming a uniform benefit to all religion and the validity of *Thomas*, the statutes, in exempting religiously motivated conduct from the reach of child-neglect laws, fail under *Lemon* because they again excessively entangle legislative conduct with religious belief.<sup>203</sup> While the entanglement is quite different from that which is present

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201. *Texas Monthly*, 489 U.S. 1, 11 (1989).

202. *Amos*, 483 U.S. at 337 (discussing the second prong of *Lemon*: “A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden ‘effects’ under *Lemon*, it must be fair to say that the government itself has advanced religion through its own activities and influence. As the Court observed in *Walz*, ‘for the men who wrote the Religion Clauses of the First Amendment the “establishment” of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity.’”) (quoting *Walz*, 397 U.S. at 668).

203. See *Lemon*, 403 U.S. 602 (1970) (Entanglement is an important consideration in the *Lemon* paradigm, although subsequent cases have somewhat modified the *Lemon* analysis in that they have combined the second and third prongs of *Lemon*. Specifically, the court will now ask whether (1)

when legislatures discriminate among religions, it is nonetheless apparent and equally as unconstitutional. By enacting exemptions that are devoid of secular motives and benefit only religion, the government is intimately aligning itself with the religious culture in our society, and implicitly endorsing that culture by conferring such a sweeping and categorical exemption from the criminal laws. This is not an incidental or indirect benefit; it is a primary and intentional benefit. The legislature, in performing this function, is clearly complicit with, and acquiescing to, the religious ideologies that drive parental action away from conventional medical treatment. This implicit endorsement and apparent viewpoint association by the legislature with religion fails to maintain the distance and secular, neutral posture that is required to provide a wall of separation between church and state. Hence, even if we construe the exemption policies such as Minnesota's as construing a benefit to all religions, it still fails to pass muster under the modified *Lemon* analysis.

3. *Even if Lemon is Deemed Inapposite, Exemption Policies Fail Constitutional Muster Pursuant to the "Endorsement" Test.*

Opponents may assert that *Lemon* is inapposite because the Court now predominantly applies the endorsement test to adjudicate claims involving the Establishment Clause. They may cite Justice O'Connor, who stated in *Amos* that the relevant inquiry should be "whether the government's purpose is to endorse religion and whether the statute actually conveys a method of endorsement."<sup>204</sup> The relevant inquiry is whether an "objective observer" would construe the governmental conduct in question as favoring or endorsing a particular religion or religion generally.<sup>205</sup> Therefore, opponents would argue that the two

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there is a secular purpose, and (2) whether the primary effects is one that advances religion.). See *Agostini*, 521 U.S. 203 (1997).

204. 483 U.S. 327, 348 (1987) (citing *Wallace v. Jaffree*, 472 U.S. at 69) (O'Connor, J., concurring) (Justice O'Connor has been a frequent advocate of replacing *Lemon* with the endorsement analysis. As she stated in *Amos*: "the necessary first step in evaluating an Establishment Clause challenge to a government action lifting from religious organizations a generally applicable regulatory burden is to recognize that such government action does not have the effect of advancing religion. The necessary second step is to separate those benefits to religion that constitutionally accommodate the free exercise of religion from those that provide unjustifiable awards of assistance to religious organizations. As I have suggested in earlier opinions, the inquiry framed by the *Lemon* test should be 'whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement.' To ascertain whether the statute conveys a message of endorsement, the relevant issue is how it would be perceived by an objective observer, acquainted with the text, legislative history, and implementation of the statute."). *Amos*, 483 U.S. at 348; see also *School Dist. v. Ball*, 473 U.S. 398-00 (1985) (O'Connor, J. concurring).

205. See *Amos*, 483 U.S. at 348 (O'Connor, J., concurring).

pronged test of *Lemon* is inapposite and that the exemptions in question clearly do not “endorse” any particular religion.

This argument is without merit. First, a very strong argument could be made that the endorsement test is inapposite because it deals with Establishment Clause cases primarily involving governmental and religious speech. As a matter of context, the endorsement test has never been utilized in the exemption arena. Rather, the *Lemon* test has historically been, and currently is, implemented to adjudicate Establishment Clause disputes involving exemption polices. The Supreme Court has never intimated that *Lemon* is inapposite in this context, and any assertion to that the endorsement test is more relevant would be to infer intent on the part of the Court that has not yet been demonstrated. While *Lemon* has experienced some general criticism, it is still used in many Establishment Clause cases. Thus, to assert a change in course at this point would be a specious attempt to undermine *Lemon*'s authority. Clearly, *Lemon* still retains prominence in this area of Establishment Clause jurisprudence.

However, this argument provides little help to advocates of exemption policies because exemptions fail under the endorsement standard for the same reasons that they fail under *Lemon*. Even if we postulate *arguendo* that strict application of *Lemon* is inappropriate, the underlying rationale utilized still evinces patent endorsement by the legislature. By immunizing only religious entities from conduct that is otherwise criminal for all other individuals, the legislature is clearly endorsing, if not expressly advancing, religion. By exempting only those who engage in spiritual healing from otherwise neglectful conduct, the legislature is clearly endorsing only religious practice. By proffering no secular purpose, either implicitly or explicitly, the legislature is clearly aiding, and thereby endorsing, only religion. Now, to restate in detail every reason for invalidation proffered, *supra*, would be a tautological exercise. The message is clear: while the tests for the validity of the conduct may change, the reasons for invalidation do not. It is sufficient to say that the endorsement test provides no more of a sanctuary for opponents than *Lemon*. If anything, it is much easier to invalidate exemptions pursuant to the endorsement framework than it is under *Lemon*.

Opponents may further assert that the reasons cited above do not show an endorsement for any particular religion *per se*. The legislature is thus providing a benefit to all religious conduct, which is exactly the type of even-handedness and neutrality that will withstand constitutional scrutiny. In response to this, it is plausible to assert, as it was above, that there is an implicit favoritism here because the statute exempts the exact practices (faith healing) that represent the norm of a few distinct sects. And even if we assume *arguendo* that all religious conduct benefits from the exemption, the broader predilection for religion over non-religion is

still, as a constitutional matter, inappropriate. Thus, without again engaging in a tautological exercise, one need only refer to Justice O'Connor who, in advocating the endorsement test, stated that it does "preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred."<sup>206</sup> It is hardly compelling to argue that even-handedness and neutrality is present when religion singularly benefits from the exemption.

4. *Statutory Exemption Policies Represent an Unnecessary and Overreaching "Accommodation" That Undervalues Life in the Name of Religious Autonomy*

Another counter argument exists that can be proffered by opponents of repealing exemption polices. Simply stated, opponents may assert that government, without violating the Establishment Clause, accommodates religious belief on a regular basis in many spheres of civilian life. The accommodation scheme, even when it has afforded religious groups significant deference, has received the imprimatur from the judiciary as well. In *Hobbie v. Unemployment Comm'n of Florida*, the Court held, "this court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause."<sup>207</sup> The Court further observed that "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the free exercise clause...there is ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.'<sup>208</sup> On the strength of this dictum, opponents may point to countless examples where legislative bodies have accommodated the needs of religion by allowing them to abdicate certain civic responsibilities. Many courts of similar thought to *Gellington v. Methodist Episcopal Church* have held that ministerial exemptions under Title VII are permissible under the Establishment Clause.<sup>209</sup> Other examples of legislative accommodation include selective service exemptions, school laws, medical practice laws,

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206. *Wallace v. Jaffree*, 472 U.S. 38, 69-70 (1985) (Justice O'Connor, concurring, stated, "the task for the Court is to sort out those statutes and government practices whose purpose and effect go against the grain of religious liberty protected by the First Amendment.").

207. 480 U.S. 136, 145 (1987) ("As in *Sherbert*, the accommodation at issue here does not entangle the state in an unlawful fostering of religion.").

208. See *Amos*, 483 U.S. at 334 (citing *Walz*, 397 U.S. at 673).

209. 203 F.2d 1299, 1303 (11th Cir. 2000) (Citing a "long line of Supreme Court cases that affirm the fundamental right of churches to 'decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" (quoting *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952)).

Sunday closing laws, and tax exemptions.<sup>210</sup> Thus, the exemptions in child neglect statutes should reflect the same conciliatory posture toward religion contained in the latter examples. Simply stated, opponents may argue that the tangible benefit accruing to religion is peripheral; the true meaning behind exempting such conduct is so that legislative enactments demonstrate regard for, and are consonant with, the Free Exercise Clause.

The problem with this argument is that accommodation under child-neglect statutes is readily distinguishable in terms of degree, because we are dealing here with another individual's right to life, and the necessity to accommodate religious behavior must end where someone else's fundamental right to life begins. In *Miskimens*, the court, in dealing with similar analogies as those presented above, explained, "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."<sup>211</sup> The apposite question here is whether religious freedom should be accommodated in light of the countervailing liberty interest held by the child, and unlike the above examples, the decision to accommodate here has a direct, adverse, and irreversible effect on the fundamental liberty interest of another individual. Thus, unlike the above examples, it is not simply confined to the individual making the assertion. The inevitable intersection and interdependence of these interests mandates a more circumspect balancing, and through this balancing it is apparent that accommodation must bow in favor of a higher societal good—the health and welfare of children.

Consider the following example. Let us assume that a popular, mainstream religion exists that, as part of its dogma, allows parents to sacrifice their children if they "disobey the commands of God." Let us further assume that this is a fundamental tenet of a "recognized religion," and is acceded to, and accepted by, its members. Or imagine another religion, which, as a requirement for membership, requires potential members to slaughter "non-believers" as a condition of their acceptance. Would the state intervene here? Surely. Would such intervention violate Free Exercise Clause and thereby necessitate accommodation? No. The rationale underlying state intervention here is that no matter how much we believe in the sanctity of religion, we will not sanction affirmative acts of murder in its name. The same rationale applies here, because, while exemption policies may not be affirmative in the sense of allowing murder, they are certainly negative in the sense of allowing neglect. And

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210. See, e.g., *Walz*, 397 U.S. 664; *Texas Monthly*, 489 U.S. 1 (1989).

211. 22 Ohio Misc.2d at 44 (citing *Prince* in making this assertion, 321 U.S. at 170. The court also explained, "this court realizes that *Prince* was a case limited by its own terms to its own facts and that it involved a child labor restriction, not a manslaughter charge. However, its reasoning is sound, its eloquence clear, and its diction prophetic.").

the permission of neglect and abuse can often lead to a tragic result—the same result as in the latter example, albeit achieved by different, but nearly as culpable, means. Robyn Twitchell and Amy Hermanson are the manifestations of this type of negative murder sanctioned by statute. These examples should serve as a caveat that the very result that we are so committing to averting—death—can often be the outcome with exemption policies that implicitly sanction inaction when action is clearly called for by the exigencies of a circumstance. If we thus assume an objective view of the problem, it becomes clear that our objective of condemning murder must take place in both a positive and negative milieu.

Along the lines of accommodation, opponents may assert that parents, at the very least, should be permitted to reject conventional medical means in non-emergency medical situations. Opponents may point to several statutes that criminalize parental refusal of medical treatment in emergency scenarios, but exempt such a proscription in non-emergency circumstances. This, opponents may argue, would represent a proper accommodation between freedom of religion and protection of children. The problem with this argument is two-fold. First, the child's fundamental liberty interest in health and well being must not be limited to freedom from death only. It is untenable to assert the proposition that a child may constitutionally suffer at the hands of their parents' religious beliefs, so long as their life is not imperiled and the situation does not amount to an emergency. Moreover, it is implausible to draw a clear boundary between emergency and non-emergency scenarios, because non-action in the former often leads to the latter. The cases cited above clearly illustrate this proposition: many of the children who perish at the hands of their parents religious directives have curable ailments that only become life threatening emergencies when the parents fail to act at the outset to treat the non-emergency. Thus, to bifurcate the exemptions (non-emergency/emergency) would lead to catastrophic results, because, by the time intervention is necessitated, it may be too late to effectuate a cure for an ailment that was curable at a non-emergency stage. Many illnesses follow a path of progression that, at the outset, may appear curable but are nonetheless deadly if not treated easily. In this way, allowing intervention only when the ailment becomes life-threatening would still fail to protect children, and represent an unworkable compromise that would fare only minimally better than the current status of exemptions.

It is important to note, from a formalistic viewpoint, that if we are to act faithful to the term neutrality, then these exemptions are never permissible accommodations. It is impossible to assert that the government is being neutral when its policies benefit clearly benefit one segment of society over another. The benefit here is not simply that of law, it is one of expression. By enacting exemptions, the legislature is

making a statement, an affirmation that it values one group over another. This type of legislative acquiescence is impermissible because the word accommodation was never meant to compromise the word neutrality. Instead, accommodation is permissible only to the extent that it does not derogate the Establishment Clause's mandate of neutrality. And when we examine exemptions, there is little doubt that their purpose is to placate the religious while ignoring the non-religious. If we allow accommodation in this sense, then the word neutrality has nominal significance. Furthermore, if we allow these statutes to prevail, then the Establishment Clause no longer has meaning. In short, when legislatures adduce a viewpoint preference for religion as overtly as they are here, there is no room for accommodation if the Establishment Clause is to have any practical impact.

In sum, the previous discussion underscores the clear conclusion that the Establishment Clause, as a legal matter, prohibits the imposition of exemption policies that favor some religions over others, or that favor religious believers over non-believers. In this sense, the Establishment Clause works a negative justice in that it constitutionally prohibits the practice of exposing an identified class of children to harm at the cost of compromising the wall of separation between church and state. The preceding discussion also highlights that the Establishment Clause is not meant to diminish the important function of religion in our society, but it is meant to prohibit government from having any significant and direct influence in such a function. In essence, the legality of the religious conduct at issue must maintain some independent and separate justification, and not be created and sanctioned solely by result of legislative enactment. In the child-neglect context, the government, by enacting exemption policies, was the "Creator" of the inequality that spawned religious immunization from religious conduct. This type of primary influence, this type of direct association, indeed, this type of legislative construction cannot withstand Establishment Clause strictures if the wall of separation is made of something more than abstract principle.

Most importantly, as a policy matter, the invalidation of these exemptions via the Establishment Clause works to validate the important principle that a child's right to life deserves judicial recognition over and above claims of religious freedom. In this way, the Establishment Clause's declaration of exemptions as unconstitutional implicitly constitutionalizes a novel, cognizable right: children have the right to live their life free from the unfettered spiritual proclivities of others. This type of rights-based secular approach is exactly what the Establishment Clause is meant to protect—the notion that rights of the secular must not be infringed or compromised by the rights of the non-secular—at least by the legislature. Such an approach maintains the important principle that, while some degree of religious accommodation

is permissible, the business of government lies in temporal matters, not extra-terrestrial endeavors. This premise implies the highest duties on government in terms of priorities—it must be primarily concerned with life here on earth before it is allowed to accommodate those concerned with life hereafter. This type of approach, and the resulting dichotomy of church and state, is congruous with the Framers' intent and represents the notion that government, at all times, should and must retain a primarily secular posture.

However, our problem is not yet solved. Merely declaring exemption policies to be unconstitutional will not necessarily afford the type of protection that guarantees that no child will ever perish at the altar of religious freedom. This is a *fortiori* true when the Free Exercise Clause affords the right to practice religion significant constitutional latitude. We are thus thrust into confronting the second prong of our inquiry, namely, the issue of whether generally applicable criminal laws can withstand constitutional scrutiny in light of the Free Exercise Clause. While the negation of exemption policies via the Establishment Clause aids in this query, it must be affirmatively shown that generally applicable criminal laws, were they to replace current exemption policies, would, as a constitutional matter, not violate the Free Exercise Clause. As we will see *infra*, generally applicable criminal laws that criminalize child neglect, regardless of belief, pass muster under constitutional scrutiny.

#### VI. The Constitutionality of Criminalizing A Parent's Refusal To Consent to Medical Treatment on Religious Grounds In Light of the Free Exercise Clause

Of crucial importance to this article is the notion that, with the preservation of a child's life and well being as our guiding and supreme principle, legislative bodies must take affirmative steps to criminalize the neglect of a child, regardless of the beliefs or motivations that are relied upon by the parent in the decision making process. Such a statute might be drafted as follows:

(1) Whoever, willfully or by neglect, deprives a child of necessary food, shelter, clothing, or who, by will or neglect, inflicts or permits physical or mental injury to the child, and in doing so creates bodily harm, disability, or death, shall be guilty of a criminal offense, up to and including homicide in the second degree.<sup>212</sup>

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212. This model statute is merely a hypothetical statutory scheme and not meant to resemble any currently enacted laws.

(a) The operation of this section shall apply *regardless of the beliefs upon which a parents predicates such conduct in causing one of the above circumstances to inhere upon the child.*<sup>213</sup>

Such a statute, if enacted by legislative bodies, would be consonant with the directives of the Free Exercise Clause because it would not unconstitutionally burden or infringe an individual's right to believe freely in any type of religious doctrine. Rather, it would adequately reduce the scope of the Free Exercise Clause to reflect that notion that an individual's right to unfettered religious belief cannot and must not transform into conduct that adversely impacts another individual's fundamental liberty interest in a healthy and prolonged life. In short, the latter interest must retain primacy over the former. This Part will endeavor to demonstrate that a law of general applicability criminalizing the neglect of a child, regardless of religious belief, would not offend the Free Exercise Clause in a facial or as applied context.

#### A. *The Free Exercise Clause*

The right to freedom of religion is an integral aspect of both our Constitution and our nation's history. The purpose underlying the Free Exercise Clause was, and still continues to be, the tolerance of a diverse array of religious beliefs in our culture. The ideals of liberty, tolerance, and respect that underscore the Free Exercise Clause were enunciated during the founding of our nation, and in this way, reflect the sanctity with which we hold this constitutional guarantee. For a fuller discussion of the Free Exercise Clause in the parent-child context, refer to the discussion *supra* Part II.

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213. In recent years, neglect and abuse statutes that exempted faith healing were relied upon in part to overturn the convictions of many parents whose children died as a result of failure to seek medical care. Specifically, courts would often cite a "failure to warn" defense, where the parents, because of the exemptions, could not reasonable be aware of when their conduct became criminal, as opposed to when it was protected by the exemption. Such reasoning formed the basis, in many courts' views, that it would amount to a due process violation to convict parents of a crime in light of the confusion created by the exemption policies. *See, e.g., Hermanson*, 604 So.2d 775 (Fla. 1992).

*B. Generally Applicable Criminal Laws Do Not Violate the Free Exercise Clause*

As stated *supra* Part IV, *Smith* involved two individuals who were fired from their jobs at a drug rehabilitation center because they ingested peyote, a drug declared illegal by Oregon's criminal laws, at a religious ceremony at the Native American Church.<sup>214</sup> The respondents appealed, arguing that since their conduct was religiously motivated, it was exempted from Oregon's general criminal prohibition on the use of peyote.<sup>215</sup>

The Supreme Court, per Justice Scalia, issued a landmark ruling rejecting respondents contentions. In doing so, the Court held that criminal laws of general applicability need not accommodate the free exercise inclinations of some of its citizens.<sup>216</sup> The Court, first examining the practicality of allowing religious exemptions for criminally applicable laws, held:

The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.' To make an individual's obligation to obey such law contingent upon the laws coincidence with his religious beliefs, except where the state's interest is 'compelling'—permitting him, by virtue of his beliefs, 'to become a law unto himself', *Reynolds v. United States*—contradicts both constitutional tradition and common sense.<sup>217</sup>

The Court in *Smith* also held that the historical tradition of religious freedom in this country did not encompass exemptions from generally applicable criminal laws. Justice Scalia explained:

Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of

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214. 494 U.S. at 874.

215. *Id.* at 875.

216. *Id.* at 878-79 ("[W]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate.") (Scalia, J.).

217. *Id.* ("It is a permissible reading of the text, in the one case as in the other, to say that if prohibiting the exercise of religion... is not the object... but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.").

religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities...laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices...can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself...the rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind...the First Amendment's protection of religious liberty does not require this.<sup>218</sup>

Lastly, the Court assessed respondents' argument from a precedential standpoint, holding that "subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"<sup>219</sup> Therefore, the Court held, in *Smith*, that, on practical, historical, and precedential grounds, an individual could not resist compliance with a generally applicable criminal law on the grounds that it violates his free exercise rights.

In making this ruling, the *Smith* court was implicitly holding that the interests of society in a well functioning, efficacious democracy are contingent upon compliance with law—and compliance with law presumes an equality among men that cannot be derogated by abstract religious motivations. In this way, the Court was equalizing all citizens in the interest of civic imperatives, political duties, and societal responsibilities; holding that religion cannot make man above the law, or worse yet, make every man a law unto himself. It is this very "equality norm" that transforms the notion of a democratic society from a mere theoretical ideal into a concrete reality. Most of all, it targets no individuals; instead, it holds accountable all citizens for conduct that the state has declared criminal, notwithstanding the beliefs and motives upon which such acts are premised. In essence, *Smith* stands for the

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218. The Court echoed similar sentiments in *Sherbert v. Verner*, where it held, "the door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such. Government may neither compel affirmation of a repugnant belief, nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities; on the other hand, the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for even when the action is in accord with one's religious conviction [it] is not totally free from legislative restrictions." 374 U.S. 398, 402 (1963).

219. 455 U.S. 252, 263, n.3 (1982) (Stevens, J., concurring).

proposition that equality promotes integration; that religious belief should not be the means by which to segregate individuals from responsibilities that lie at the core of a well-functioning democracy.

*Smith* does not mean that the interests of parent vs. state will never be weighed in the free exercise context. However, in the specific context of exemption policies, *Smith* has direct implications that may preclude such a balancing. Thus, it follows logically from *Smith* that laws of general applicability, in the child-neglect context, which categorically exclude exemptions would not offend the Free Exercise Clause in either a facial or as applied context. This result is not anachronistic, however, because a plethora of cases exist which pre-date *Smith*, including *Minersville School Dist. Bd. Of Educ. v. Gobitis*,<sup>220</sup> and *United States v. Lee*,<sup>221</sup> that stand for same propositions proffered by Justice Scalia in *Smith*. Importantly, generally applicable child-neglect laws also reflect the intent underlying the seminal words echoed in *Prince v. Massachusetts*:<sup>222</sup>

Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.<sup>223</sup>

With the protection of the child's health and well-being as our guiding principle, it will become possible to affirmatively guarantee a child's health by enacting laws which specifically state that conduct which is abusive or neglectful will not be exempted simply because it is predicated upon religious belief.

This result is entirely consonant with the responsibility with which we hold all citizens in the eyes of the law. By way of analogy, a glimpse into the criminal law reveals that exemptions to generally applicable criminal laws are virtually non-existent. This scheme is not accidental because the concept of equal justice for all implies equal responsibility to all. Such an approach underscores the need to hold all individuals accountable if the infrastructure of our criminal system is to retain integrity, fidelity, and public trust. The notion of retributive justice is dealt a paradoxical blow when we allow otherwise criminal conduct to be immunized merely because of underlying belief. If anything will eviscerate the public trust, it will happen when we segregate responsibility based on subjective values. This breeds an unfairness, an inequality, and ultimately, an injustice that must never be tolerable if

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220. 310 U.S. 586 (1940).

221. 455 U.S. 252 (1981).

222. 321 U.S. 158 (1943).

223. *Id.* at 170.

equality is to rise above abstraction. Thus, exemption policies that immunize otherwise abusive conduct is an anachronistic response to acts that are morally repugnant. Such an approach compromises our reverence for children, our reverence for criminal justice, and for every ideal that a democratic society is expected to uphold. Thus, a law of general applicability in the child-neglect context represents a furtherance of, not a departure from, the objectives of criminal jurisprudence and retributive justice. In short, parents who abuse and neglect children, no matter what their motives, must be punished if children are to receive equal justice and right in our system.

There are several counter-arguments, however, that may be adduced to rebut the above propositions. First, opponents of a criminal law of general applicability in the child-neglect context may assert that by not accommodating the important needs of religion, the legislature is assuming a religious posture of its own: a posture of Secular Humanism,<sup>224</sup> which itself would violate the Establishment Clause. In essence, opponents may argue that the exclusion of religious exemptions represents a government-sponsored rejection of religious doctrine in favor of temporal realities. Such a posture by the legislature would amount to an implicit rejection of, or suspicion about, the existence of a supernatural being in the natural world. Such an approach would cease to be neutral at all because the legislature is actually favoring and preferring the non-religious over the religious, the non-believers over the believers. In essence, the government would be establishing a temporal ideological framework that works to the exclusion of, and hostility toward, celestial preferences. This is not government neutrality; this is government sponsorship in an implicitly atheistic sense.

The problem with this argument is that it confuses the concept of neutrality with that of partiality. Indeed, it is inherently problematic to argue that favoritism exists in a statute that assumes an egalitarian function. A law of general applicability that holds everyone accountable confers a benefit upon no one. This is the crucial point, because the unconstitutionality of present exemption policies is premised on the notion that they confer a special benefit, a special status, and an unconstitutional immunization, to identical conduct that would otherwise be criminal. In this way, only certain religions receive a special insulation to, and concomitant benefit from, the reach of the criminal law. This type of legislative conduct expressly violates the Establishment Clause. On the other hand, a law of general applicability confers no such benefits, establishes no such hierarchy, and thereby violates no such freedoms. Accountability is purely conduct-based, regardless of predicate motivations, causal roots or external beliefs. As

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224. See DiCamillo, *supra* note 120, at 142-45 (“[A]lthough the Supreme Court has recognized Secular Humanism as a religion, and has recognized the danger of adhering to a policy of non-religion, the Court has not found that neutrality results in the establishment of Secular Humanism.”).

such, responsibility is disseminated to all, and not limited to the few. Hence, if such a law were construed to confer an unconstitutional preference on a group or evince a legislative predilection, then the word neutrality would cease to exist in our lexicon, and most laws currently existing would be struck down as a violation of the Establishment Clause. Such a result reveals the absurdity of a claim that Secular Humanism inheres in every statute that operates in a uniform manner. Something more is clearly needed to successfully assert such a position.

Opponents may cite yet another line of attack, arguing that a law of general applicability nonetheless produces a special burden upon spiritual healing advocates because it compels them to seek medical treatment against their will. For example, individuals that do not rely on spiritual healing may readily seek conventional medical treatment for their ill child. A law of general applicability does not compel most parents to receive conventional medical treatment, because with or without the statute, this course of action would normally be followed. However, believers in spiritual treatment will be forced to seek and receive conventional treatment that is contrary to, and inconsistent with, their religious faith. Thus, while the burden appears equally dispersed, the statute is actually compelling certain individuals to engage in conduct that they would not otherwise engage in because of their deeply held religious practices. In this way, the actions of spiritual healers are directly affected and altered because of the legislative regulation. This type of compulsion clearly shows that while the statute appears to promote equality, it is quite discriminatory, in its effect, on those religions that practice spiritual healing. Opponents will posit that this is exactly the type of government conduct that the Free Exercise Clause was meant to protect against.

This argument retains only superficial appeal though, because, just as incidental benefits to religion will be tolerated in certain instances, so will incidental burdens. Former Supreme Court Justice Warren Burger clearly explained, "the mere fact that the petitioner's religious practice is burdened by a governmental program does not mean that an exemption accommodating his practice must be granted."<sup>225</sup> Clearly, the burden here is so minute that it is even questionable to classify it as such. The legislature is merely commanding that if a child suffers from illness, that he/she is treated by those conventional means which have proven beneficent in our society. It does not ask spiritual healers to engage in conduct above and beyond that which it does of other individuals. It does not prohibit spiritual healers from practicing their alternative spiritual healing methods as a supplement to conventional medicine. Instead, it merely distributes an obligation to care for a child utilizing means that have been proven successful in combating illness. Now, if

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225. *Thomas*, 450 U.S. at 718 ("the state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest").

spiritual healers seek to classify conventional medicine as a burden, then this provides more justification to enact the general law requiring it, because it demonstrates that, without it, these children would not get the care they need to preserve their health and well being. This leads into the most important point: even if we want to call this a burden, it is outweighed by the state's interest in providing the child with access to the proven benefits of conventional medical care. Without such benefits, religious parents will not protect the child's liberty interest, and the state may not be able to intervene until it is too late to effectuate cure. Thus, such a state interest justifies the burden because all children deserve protection, regardless of the beliefs, religious or non-religious, of parents would not otherwise seek medical care.

Opponents may also attack from a practical standpoint by asserting that a law of general applicability cannot force a parent to seek a doctor. In short, parents with deeply held religious beliefs may still refuse to seek medical treatment, and by the time the state becomes aware of this, it will be too late to save the child's life. The problem with this overly pessimistic argument is that it fails to account for the deterrent effect that consistent enforcement of this statute will engender. If religious parents continually observe other parents facing manslaughter charges because of refusing medical treatment, then it is likely that they will alter their conduct to avoid such a predicament. After all, they not only risk losing their freedom, but also risk losing their children. Furthermore, since the non-emergency/emergency distinction will be discarded, the state, upon the slightest evidence of medical neglect, will have grounds for intervention. At the very least, a law of general applicability offers much better prospects for protecting children than the current state of affairs.

In addition, critics may assert that a law of general applicability significantly underestimates the value of faith and the crucial role that it plays in the lives of religious citizens. For example, commentator Anne Lederman explains that religion can have a paramount effect in the lives of its citizens, as a vehicle to endure the tragedies that are engendered by human existence.<sup>226</sup> Lederman explains:

Religion...is not the only means with which humans assuage existential anxiety. Yet, religion holds infinite and unique value in the ultimate quest of the human race...[R]eligion also gives hope, because it holds open the dimension of the unknown and the unknowable...in doing so, it relieves the absurdity of earthly life, all the impossible limitations and frustrations of living matter.... Religion takes one's very

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226. See Anne D. Lederman, *Understanding Faith: When Religious Parents Decline Conventional Medical Treatment For Their Children*, 45 CASE W. RES. L. REV. 891, 905-10 (1995) ("understanding the nature of religious faith casts doubt upon the appropriateness of weighing the state's abstract interest in child welfare more heavily than the parent's religious interest").

creatureliness, one's insignificance, and makes it a condition of hope.<sup>227</sup>

For Lederman, the important role of religious belief is especially crucial to the believer when tragedy is imminent, for it provides the support by which the believer can make sense out of a seemingly senseless occurrence. For a parent whose child is about to die, "religion performs the ultimate function of providing meaning amidst apparent meaningless in the believer's life."<sup>228</sup> Laws of general applicability, Lederman would assert, ignore and undervalue the important role of religious belief and the role that it can play in times of tragedies such as the death of a child.

This argument fails to persuade, as it does not assess the totality of the situation at issue, namely, countervailing interest in the life of a child. The courts, the government, and the Constitution are circumspect to safeguard the rights of religious believers to worship in freedom, unencumbered by the will of others. The validation of countless statutes that afford some benefit or exemption to religion is demonstrative of the reverence with which we hold religious autonomy. However, the freedom accorded to religious faith and the respect contained therein is not limitless. Laws of general applicability in the child neglect context do not purport to diminish the role of faith in people's lives. In fact, the role and value of faith receives affirmation via daily reference to the First Amendment. Instead, laws of generally applicability hold that, while faith and religion are of the utmost importance, the importance of the health and well being of the child commands higher reverence. This, therefore, is not a diminishing of religious belief as much as it is a prioritizing of deeply held values.

Anne Lederman, in defending death in the face of religion, states "freedom in its highest form is the power to sustain continuity in the face of death—not to eliminate death."<sup>229</sup> While it is true death may be inevitable, its inevitability must not be exacerbated by tragedies that are easily escapable by simple regard for, and obedience to, every individual's fundamental right to life. Lederman's sanction of religiously motivated death is thus both incorrect and insensitive to the plight of those whose lives are unnecessarily and unconstitutionally

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227. *Id.* at 911 ("the unique ability of humans to reason renders the propensity to hope as more than a biological possibility; forced to recognize these realities, hope is perhaps a biological and spiritual human need. If religion sustains this hopefulness throughout the 'outrages of human existence,' its value is immeasurable." (quoting Andrew M. Greely, *RELIGION: A SECULAR THEORY* 33-42 (1982))).

228. *Id.* at 907 ("[T]he parents' reliance on faith reflects the incredible significance of religion's role in their lives. This unusual if not unique value supports the parents exemption from punishment for their decision under the free exercise clause of the First Amendment, regardless of the traditionally 'compelling' nature of the state's interest in protecting children.").

229. *Id.* at 926 (quoting James P. Carse, *DEATH AND EXISTENCE: A CONCEPTUAL HISTORY OF HUMAN MORTALITY* 7 (1980)).

contingent on the religious whims of others. The very freedom Lederman speaks of implies much more than elimination of death—it implies a right of self-determination that can never be abrogated by the celestial predilections of others. In this way, Lederman actually undervalues the very notion of freedom that she supports, and transforms religious faith into a vehicle for the untimely demise of those who would otherwise live according to their own commands. Moreover, religion is universally viewed as a way to enhance the presence and meaning of temporal existence, not to accelerate the death of individuals against their will, or for that matter, against the will of their Creator. In sum, Lederman’s argument misapprehends the meaning of religion, freedom, and the inherent right to life borne out of natural law.

Finally, opponents may assert that *Smith* is inapposite in the context of child neglect exemptions because parents have a hybrid rights claim,<sup>230</sup> thereby barring a law of general applicability in this context. The rights at issue involve not only the free exercise of religion, but also the right of parents to raise children as they see fit, discussed supra Part II. At the very least, opponents may argue that, pursuant to *Yoder* and *Sherbert*, the courts must balance the hybrid interests of parents with those of the state by use of the “compelling interest” standard.<sup>231</sup> In *Smith*, since Justice Scalia intimated that hybrid rights would be treated differently concerning laws of general applicability, *Smith* has no relevance here.<sup>232</sup>

To say that we are dealing with a “hybrid rights” situation here is an act of sophistry that ignores the core constitutional issues that are at stake. Exemption policies were not drafted in response to concerns emanating from the parental control doctrine. Instead, they were engrafted into respective statutes because of free exercise of religion concerns. This is the fundamental issue at stake here, and the parental control doctrine is encapsulated within, not separated from, this claim. Simply stated, the parental control doctrine could never stand independently as a claim against equal enforcement of criminal laws. Neither is the parental control doctrine ever a central issue on the constitutionality of exemption statutes. If anything, they retain a wholly collateral, if not entirely removed, role in the constitutional assessment of these laws. It is simply a matter of common sense to acknowledge that notions of religious accommodation, religious freedom, and religious exercise motivate the very purpose of statutory exemptions. Legislative

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230. In the *Smith* decision, Justice Scalia explained, “the only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as...the right of parents...to direct the education of their children.” In these situations, Scalia intimated, the “compelling state interest” test proffered in *Sherbet* would be controlling. *Smith*, 494 U.S. at 881.

231. These cases utilized the “compelling state interest” test to analyze claims involving the Free Exercise of Religion.

232. *Smith*, 494 U.S. at 881.

bodies were clearly concerned that without the exemptions, the statute would be constitutionally infirm on Free Exercise, rather than parental control, grounds. This situation is wholly distinguishable from *Yoder*, where parental rights were an integral part of the parents' decision not to allow the child to attend school.<sup>233</sup> It was a parental decision collaterally motivated by religious belief, whereas exemption policies represent legislative conduct motivated solely by core free exercise concerns. Here, unlike *Yoder*, we are dealing with affirmatively religious conduct by parents, not parental decisions motivated peripherally by religion. This distinction represents the difference in the type of issues involved and their relative degree of involvement. As such, these cases differ not only in degree but in kind as well, and a hybrid rights assertion is clearly misplaced.<sup>234</sup>

As a practical matter, it should be pointed out that a law of general applicability would avoid the problems arising in conjunction with the failure to warn defense. This problem arises in many states where parents rely on exemptions that allow them to utilize spiritual healing to cure their children's illness, but then find that they are charged with manslaughter when their children are injured as a result of reliance on such methods. In effect, parents' assert the defense that they believed their conduct to be immunized from liability as a result of the exemption scheme. This defense has been successful in several instances where courts have held that it is impermissible for the state to criminally charge parents for injury to a child when that conduct was specifically exempted under the child-neglect laws.<sup>235</sup> However, laws of generally applicability, like the one proffered above, are not subject to such a defense because they afford parents a fixed and unambiguous pronouncement about the nature of their obligation relating to the medical care of their children. Consequently, the failure to warn defense will be vitiated and not serve to hinder the state's ability to adequately and definitively protect a child's welfare.

In sum, it is important to note that laws of general applicability aim to reasonably regulate conduct, not belief.<sup>236</sup> Religions like Christian Science are free to continue their doctrinal support for religious healing free from the reach of government regulation. The manifestation of their beliefs, however, does not engender the same degree of constitutional protection, and a conduct-based regulation, especially being one of general applicability, will carry with it the precedential force of *Smith*, *Reynolds*, and *Braunfeld*. Lastly, and summarily, it is clear from the preceding two sections that current statutory exemption policies are

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233. 406 U.S. at 233-34.

234. However, even if the "compelling state interest" analysis were utilized, it is probable that the state's interest in protecting children from serious illness and death would trump the post-*Smith* construction of the Free Exercise Clause.

235. See, e.g., *Hermanson v. State*, 604 So.2d 775.

236. The belief/conduct dichotomy was first enunciated in *Reynolds v. U.S.*, 98 U.S. 145 (1879).

constitutionally infirm under the Establishment Clause. It is also clear that a child neglect statute of general applicability will not offend the Free Exercise Cause.<sup>237</sup> With this in mind, what is next for legislative bodies?

## VII. Conclusion: Statutory Exemption Policies—Sound Policy For Preserving the Child’s Right to Health and Well-Being

As a normative matter, legislative bodies across the country must repeal statutory exemption policies in child neglect statutes. Not only are they constitutionally infirm, but they evoke a startling imbalance among rights that have always been perceived as fundamental—namely, the right to self-determination, freedom, and health and well being. The latter proposition seems to be forgotten in these exemption policies, and children like Robyn Twitchell and Amy Hermanson have needlessly perished based on the belief that religious freedom can constitutionally trump another individual’s fundamental right to life. Such a proposition represents an inverted hierarchy of rights in the constitutional scheme, and fails to prioritize our fundamental liberty interests over those individuals who would see those interests evaporate in favor of their self-interested religious prerogatives.

The Constitution must stand for more than this abysmal reality. It must stand for the proposition that the religious predilections of one individual need not become the pre-determined destiny for another autonomous individual. While humans are inextricably linked in many ways, each individual is a separate and autonomous “rights-holder,” and the former statement must never compromise the inherent integrity of the latter. Individuals, including children, have the right, even the responsibility, to mark their own course and make their own contribution—unencumbered and unrestrained by the celestial will of others.<sup>238</sup> The Constitution guarantees this framework, and exemption policies compromise it to an unconstitutional degree. Consequently, they must be overturned.

They must be overturned because the rights of individuals to chart their own course, whether it be positive or negative, must be theirs and theirs alone. While parents must assist children in their upbringing, there

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237. As a side note, there is another issue within this context concerning at what point the state could constitutionally intervene to save the child. For example, it may be asserted that the state could only exercise its role as *parens patriae* in an emergency situation, whereas it could not intervene in a non-emergency situation. This issue, while controversial, is beyond the scope of this article, suffice to say that it is an issue of intense debate.

238. This argument is tangentially related to the assertion that children should have more autonomy in making decisions for their health and well being, instead of being subservient to the will of their parents. See generally Sigman & O’Connor, *supra* note 19.

exist certain inalienable rights that require no such breeding—such as the right to life. To hold otherwise would be to hold the individual captive to the pre-determined will of those who believe that they have found the answers to life's temporal and celestial conundrum. This is simply not permissible, and we must therefore repeal statutory exemption policies on such grounds. In their place must arise laws of general applicability—laws that affirmatively and without ambiguity stand for the premise that the child's right to life retains primacy in the eyes of the state, even against claims of religious freedom. Not only will this safeguard the right to life but it will also accord responsibility in an egalitarian manner, which will restore the "equality norm" that is so crucial to a properly functioning democratic society.

It is important to point out that we are not diminishing the important role of religion and the beliefs that accompany our diverse religious heritage. But we are saying that the beliefs of certain religions must, in some instances, yield to the temporal will of the majority. Such a will accords no "preferential" status for acts that have historically been condemned, but holds everyone to a standard of accountability that reflects our respect for the right to life and to the individual who must live that life. In this way, the deaths of innocent children like Robyn Twitchell and Amy Hermanson will be forever averted, and we will once again restore harmony with the Constitution and the notion that life must be valued above all else, including religious ideology. If we accomplish this, we will be giving a voice to those whose lives have died because of a will that was not their own, and accord a right that has lost its way in current legislative policy.