Religious Healing Exemptions and the Jurisprudential Gap Between Substantive Due Process and Free Exercise Rights

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Religious healing parents have vexed state courts for almost a century. Religious healing is the belief that "prayer" or "spiritual means," rather than modern medicine, can cure individuals. Adults and emancipated minors have the right to refuse medical treatment. Some states go further and grant religious healing parents a statutory exemption against criminal and civil actions for child endangerment, neglect, negligence, manslaughter, and even homicide. This Article identifies these types of exemptions as an issue of religious childrearing.

Religious healing exemptions demonstrate the difficulty delineating the line between childrearing rights of parents and the state's duty to protect children. Professor James Dwyer argues that exemptions undermine a state's legitimate interest in the wellbeing of its most vulnerable citizens—minor children. Those who, like Dwyer, find exemptions untenable also have difficulty understanding why a state would allow a parent or guardian to refuse lifesaving medical treatment for a child in need. Proponents of religious healing argue that exemptions do nothing more than accommodate free exercise and substantive due process rights to the care, custody, and control of minor children and dependents. Those who support this view of exemptions may also have difficulty understanding how or why a state could have authority to intrude on the privacy rights of parents or guardians.

This Article uniquely contributes to the religious healing debate by bringing together substantive due process and the Free Exercise Clause

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jurisprudence. Part I of this Article discusses the nature and scope of statutory exemptions in U.S. States. Parts II and III of this Article explore exemptions from the perspective of substantive due process and the Free Exercise Clause, respectively. Parts II and III also examine the impact of exemptions on those left in the gap: children, nonconsenting parents, and the state itself. Regardless of intent, exemptions can trump both a nonconsenting parent's right to childrearing and a child's independent right to life. Exemptions may also expose inconsistencies in the exercise of government intrusion on constitutionally recognized fundamental rights.

INTRODUCTION

Cruzan v. Director, Missouri Department of Health[1] recognizes the right to refuse medical treatment, but the question remains whether parents have the right to elect religious healing rather than modern medicine when a child suffers from a curable disease, illness, or injury. Religious healing is the belief that "prayer" or "spiritual means," rather than modern medicine, can cure. Many U.S. states provide an exemption when a parent objects to childhood vaccinations and school immunizations. Some states go further and grant statutory exemptions to religious healing parents as a defense against criminal convictions. These types of exemptions apply to misdemeanors like child endangerment or nonsupport. Other exemptions include felonies like manslaughter and homicide. Exemptions also apply in civil cases and can prevent recovery of damages when a parent abuses or neglects a child. Approximately forty-three U.S. states and the District of Columbia have some type of exemption.

The existence of a religious healing exception is not always outcome determinative on whether a parent will escape criminal prosecution or civil liability for the failure to seek medical care. One state court struck down a religious healing statute because neither the First Amendment nor substantive due process required the exemption. Other state courts found the exemption did not apply to the charged crime. At least one state court found the exercise of an exemption did not constitute any type of criminal offense. Other state courts overturned convictions because the defendants did not receive proper notice of the exemption's inapplicability to criminal conduct.

1. *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990).

Religious healing exemptions lie at the intersection of religious freedom and parental rights to childrearing. Scholars, like state courts, disagree on the necessity of religious healing exemptions. Some argue exemptions undermine a state's legitimate interest in the wellbeing of its most vulnerable citizens—minor children. Those who find exemptions untenable also find it difficult to understand why the state would allow a parent or guardian to refuse lifesaving medical treatment for a child in need. Others argue that exemptions do nothing more than accommodate religious childrearing by protecting parental rights to the care, custody, and control of children and dependents. Those who support this view of exemptions may also find it difficult to understand how or why a state has authority to intrude on the privacy and religious rights of parents or guardians.

This Article contemplates how religious healing exemptions implicate a child's right to life. Professor James Dwyer rejects the view that parents are "entitled to control the life" of children "in accordance with their own preferences."[2] Applying an exemption to involuntary manslaughter may be helpful to understanding Dwyer's point. Many states define involuntary manslaughter as a type of "unlawful killing" that results from the perpetration or attempted perpetration of an "unlawful act." Where an exemption applies, the state is unable to meet its burden of proof to show an unlawful act because a death that occurs after the pursuit of religious healing is "lawful." In purpose and in effect, these parents have absolute control to determine whether a child lives or dies—free from state interference.

Religious healing is a lightning rod in a number of U.S. states. In early 2018 in Idaho, which has the strongest of all state exemptions, hundreds of demonstrators marched the state capitol in Boise with baby sized coffins in protest of the state's religious healing exceptions.[3] Various provisions of the Idaho Code protect parents who choose to treat a minor dependent's medical condition through "prayer" or "spiritual means" alone.[4] These protections apply in different contexts. First, Idaho requires courts to take any spiritual treatment given "by prayer of spiritual means alone" into consideration when ordering emergency medical treatment for a child.[5] Second, Idaho prevents criminal prosecutions for nonsupport,[6] neglect,[7]

2. James G. Dwyer, *Spiritual Treatment Exemptions to Child Medical Neglect Laws: What We Outsiders Should Think*, 76 NOTRE DAME L. REV. 147, 163 (2000).

3. Kyle Pfannenstie, *March to Capitol Calls for Removal of Faith-Based Healing Exemptions*, IDAHO COUNTRY FREE PRESS (Feb. 26, 2018), http://www.idahocountyfreepress.com/news/2018/feb/26/march-capitol-calls-removal-faith-based-healing-ex/ [https://perma.cc/58BP-2Z3J].

4. *See generally* IDAHO CODE ANN. §§ 16-1602(28) (West 1976), 16-1627(3) (West 1976), 18-401(2) (West 1972), 18-1501(4) (West 1977), 18-4006(2) (West 1972).

5. *See* IDAHO CODE ANN. § 16-1627(3) (West 1976).

6. *See* IDAHO CODE ANN. § 18-401(2) (West 1972).

7. *See* IDAHO CODE ANN. § 16-1602(28) (West 1976).

criminal injury to a child,[8] and involuntary manslaughter.[9] Finally, Idaho prohibits civil actions for child endangerment and neglect.[10]

Religious healing costs lives. In 2013, an Idaho child fatality team reported "five [preventable] deaths of infants less than a month old" in one religious healing community.[11] Three years later, the team reported two more child deaths "under circumstances where medical care would have prevented death."[12] That same report determined that from 2002 to 2011, the number of child deaths in one religious healing community exceeded ten times the statewide average.[13]

In Idaho, exemptions expose a dual system of investigating criminal law violations. Canyon County Sheriff, Kieran Donahue, recently shared how religious healing parents have often moved a deceased child's body or changed the deceased child's clothing before law enforcement arrives at the scene.[14] Donahue argues the failure to preserve the scene and the body can prevent investigations into causes of death,[15] which implicates application of the exemption itself.

Amending statutory exemptions for religious healing has been a challenge in some states, nowhere more so than Idaho. In the 2017 legislative session, Dan Johnson introduced Senate Bill 1182, which he intended to "reach a balance between protecting children and honoring parents' free exercise of religion under the First Amendment."[16] Senate Bill 1182 would have amended Idaho's exemptions to allow greater judicial intervention when a child's life is at risk and would have

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8. *See* IDAHO CODE ANN. § 18-1501(4) (West 1977).

9. *See* IDAHO CODE ANN. § 18-4006(2) (West 1972).

10. *See* IDAHO CODE ANN. §§ 16-1602(28)(a) (West 1976), 16-1627(3) (West 1976).

11. Karen Lehr, *Canyon County Sheriff Urging Lawmakers to Make Change to Faith Healing Laws in Idaho*, KIVI 6 (Feb. 3, 2017), http://www.kivitv.com/news/canyon-county-sheriff-urging-lawmakers-to-make-change-to-faith-healing-laws-in-idaho [https://web.archive.org/web/20171118230212/http://www.kivitv.com/news/canyon-county-sheriff-urging-lawmakers-to-make-change-to-faith-healing-laws-in-idaho]; *see also* IDAHO CHILD FATALITY REVIEW TEAM, CHILD DEATHS IN IDAHO 2012 4, 59–60 (2015), http://www.idcartf.org/ckfinder/userfiles/files/Annual%20Report%20Child%20Deaths%2012CFRT_final.pdf [https://perma.cc/TTZ3-KYE8] [hereinafter CHILD DEATHS IN IDAHO 2012] (reporting two child deaths in 2012); IDAHO CHILD FATALITY REVIEW TEAM, CHILD DEATHS IN IDAHO 2013, 6, 77–78 (May 2016), http://idcartf.org/ckfinder/userfiles/files/annual%20report%20child%20deaths%202013-may2016.pdf [https://perma.cc/ND8A-JN59] [hereinafter CHILD DEATHS IN IDAHO 2013] (in 2013 reporting five infant deaths in families whose religious beliefs prevented medical intervention).

12. Lehr, *supra* note 11.

13. *Id.*

14. *Id.*; *see also* Nigel Duara, *An Idaho Sheriff's Daunting Battle to Investigate When Children of a Faith-Healing Sect Die*, L.A. TIMES, Apr. 18, 2017, http://www.latimes.com/nation/la-na-idaho-children-20170418-story.html [https://perma.cc/9QRJ-XJDV]; Carissa Wolf, *In Idaho, Medical-Care Exemptions for Faith Healing Come Under Fire*, WASH. POST, Feb. 19, 2018, https://www.washingtonpost.com/national/in-idaho-medical-care-exemptions-for-faith-healing-come-under-fire/2018/02/19/18ef29f0-11b5-11e8-8ea1-c1d91fcec3fe_story.html?utm_term=.550f8b6f56c2.

15. *See* Lehr, *supra* note 11; Duara, *supra* note 14.

16. Betsy Russell, *Johnson on Faith Healing Bill: 'Not Sure if It Changes a Whole Lot'*, SPOKESMAN-REV., Mar. 20, 2017, http://www.spokesman.com/blogs/boise/2017/mar/20/johnson-his-faith-healing-bill-not-sure-it-really-changes-whole-lot/ [https://perma.cc/C8KA-9TLW].

removed the requirement for a "bona fide religious denomination."[17] Senate Bill 1182 also sought to replace Idaho's civil exemption with language similar to Idaho's Religious Freedom Restoration Act.[18] The Idaho Senate ultimately rejected the bill, 11–24.[19]

Religious healing demonstrates the difficulty delineating the line between the free exercise and childrearing rights of parents, and the state's duty to protect children. Like most states, Idaho generally requires parents to ensure the health and safety of children. On this, section 16-1601 of the Idaho Code provides clarity:

> At all times, the health and safety of the child shall be the primary concern. Each child coming within the purview of this chapter shall receive, preferably in his own home, the care, guidance, and control that will promote his welfare and the best interest of the state of Idaho . . . .[20]

Contemplating section 16-1601 and other similar state statutes, Jennifer Rosato argues religious healing exemptions contravene child protection and anti-abuse laws.[21]

Idaho is not the only state that has struggled with a religious healing exemption. After many years of debate, in 1999, Oregon repealed its exemption and soon thereafter began prosecuting religious healing parents who refused to provide medical care to children.[22] Oregon is not alone in its repeal. Maryland, Tennessee, and South Carolina have removed some or all of their exemptions. Some states like Massachusetts, Nebraska, and Hawaii never enacted a statutory exemption.[23]

The United States Supreme Court has yet to analyze a statutory exemption for religious healing parents.[24] In 1968 the Court affirmed a federal district court's denial of an exemption,[25] but that one sentence affirmance provides little guidance to state courts and legislatures. Nor did the Court provide guidance to legal scholars

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17. *Id.*

18. *See id.*

19. Betsy Russell, *Canyon Sheriff: 'In My County Alone I've Had 3 Deaths in the Last 4 Months, One Yesterday'*, SPOKESMAN-REV., Mar. 20, 2017, http://www.spokesman.com/blogs/boise/2017/mar/20/canyon-sheriff-my-county-alone-ive-had-3-deaths-last-4-months-one-yesterday [https://perma.cc/CQ2A-EUPL].

20. IDAHO CODE ANN. § 16-1601 (West 1976).

21. *See* Jennifer L. Rosato, *Putting Square Pegs in a Round Hole: Procedural Due Process and the Effect of Faith Healing Exemptions in the Prosecution of Faith Healing Parents*, 29 U.S.F. L. Rev. 43, 59 (1994).

22. Isolde Raftery, *Changes in Oregon Law Put Faith-Healing Parents on Trial*, N.Y. TIMES, May 29, 2011, http://www.nytimes.com/2011/05/30/us/30followers.html [https://web.archive.org/web/20150610230118/http://www.nytimes.com/2011/05/30/us/30followers.html].

23. *See* Rosato, *supra* note 21, at 51 n.39.

24. *See also* James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. Rev. 1321, 1365–1476 (1996) (contemplating child's equal protection claims against parental exemptions for religious healing as well as practical obstacles to such challenges). *But see* Jehovah's Witnesses in Wash. v. King Cty. Hosp. Unit No. 1, 390 U.S. 598 (1968), *reh'g denied* 391 U.S. 961 (1968).

25. *Jehovah's Witnesses*, 390 U.S. 598; *see also* Paula A. Monopoli, *Allocating the Costs of Parental Free Exercise: Striking a New Balance Between Sincere Religious Belief and a Child's Right to Medical Treatment*, 18 PEPP. L. REV. 319, 341–42 (1991); Jennifer Trahan, *Constitutional Law: Parental Denial of a Child's Medical Treatment for Religious Reasons*, 1989 ANN. SURV. AM. L. 307, 311–12 (1990).

and members of the public who struggle with the issue. As a result, a majority of states continue to bar some civil actions and criminal prosecutions against parents who pursue religious healing.

Recently, I joined leading family law scholar, Robin Fretwell Wilson, to examine statutory exemptions for religious healing.[26] This co-authored work considered how parental decisions to discipline one's child, like decisions to treat by faith alone, run deep into religious and cultural belief systems. This work also explored the limits of parental autonomy and showed that risks to children from corporal punishment are not as great as once feared, unlike the profound risks from religious healing.

This Article goes further than my previous co-authored work with Fretwell Wilson by exploring religious healing exemptions from the perspective of both substantive due process and the Free Exercise Clause. *Prince v. Massachusetts*[27] limits the parental autonomy recognized under substantive due process to prevent harm to a child, even if such harm is in furtherance of religious faith, and even if such harm is unintentional. *Employment Division, Department of Human Resources of Oregon v. Smith*[28] denied a right to a religious exemption as a matter of free exercise from neutral and generally applicable criminal codes. Part of this Article's purpose is to provide an understanding of the interplay between *Prince* and *Smith* to demonstrate how religious healing exemptions lie at the intersection of both. Such an understanding is necessary to any thoughtful consideration of this issue.

This Article hypothesizes that religious healing exemptions expose jurisprudential gaps between substantive due process and free exercise rights. Part I of this Article discusses the nature and scope of religious healing exemptions. Part I also describes the effects of religious healing on children, a subject of reporting by researchers in the field. Part I then concludes with a discussion of state court jurisprudence where parents argued entitlement to a religious healing exemption.

Part II of this Article explores religious healing from the perspective of substantive due process rights to parental care, custody, and control of minor children and dependents. In general, this jurisprudence demonstrates the "play within the joint"[29] between "the private realm of family life" and the state's *parens patriae* police powers.[30] *Meyer v. Nebraska*[31] and *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*[32] establish rights to family privacy and autonomy.

26. *See* Robin Fretwell Wilson & Shaakirrah R. Sanders, *By Faith Alone: When Religious Beliefs and Child Welfare Collide*, *in* THE CONTESTED PLACE OF RELIGION IN FAMILY LAW 308 (Robin Fretwell Wilson ed., 2018); *see also* Robin Fretwell Wilson, *The Overlooked Costs of Religious Deference*, 64 WASH. & LEE L. REV. 1363 (2007).

27. *See* Prince v. Massachusetts, 321 U.S. 158 (1944).

28. *See* Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872 (1990).

29. Locke v. Davey, 540 U.S. 712, 718–19 (2004).

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

31. *See* Meyer v. Nebraska, 262 U.S. 390 (1923).

32. *See* Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510 (1925).

Prince[33] limited parental autonomy to dictate religious training that threatened the health or safety of children. *Wisconsin v. Yoder*[34] affirmed substantive due process as the source of the right to childrearing, but also preserved the state's ability to interfere when there is potential harm to a child. Neither *Meyer*, *Pierce*, *Prince*, nor *Yoder* involved parental rights to make medical decisions on behalf of a minor child or dependent, but this jurisprudence demonstrates how physical and psychological harm have traditionally provided a baseline for terminating or interrupting parental rights. Part II highlights another major flaw of most state exemptions: the failure to explicitly account for the substantive due process rights of nonconsenting parents. Part II then concludes by pointing out how exemptions threaten the rights of parents who object to religious healing, including those parents with sole or joint legal custody of a child.

Part III of this Article explores the First Amendment's Free Exercise Clause[35] and its jurisprudence surrounding exemptions for religious practice. Part III discusses *Reynolds v. United States*,[36] *Sherbert v. Verner*,[37] *United States v. Seeger*,[38] and *Employment Division, Department of Human Resources of Oregon v. Smith*,[39] which establish the necessity and scope of religious exemptions. Part III points out that while none of this jurisprudence concerns an exemption for religious healing parents, the Court did delineate the boundaries of free exercise rights. Part III also highlights how exemptions fail to explicitly take into account the independent right to life of children who suffer from curable diseases and injuries. In this sense, exemptions expose inconsistencies of government intrusion on constitutionally recognized fundamental rights.

I. STATUTORY EXEMPTIONS FOR RELIGIOUS HEALING PARENTS

As defined in this Article, "religious healing"[40] is the belief that "prayer" or "spiritual means," rather than modern medicine can cure individuals. Professor Barry Nobel traces the origin and history of religious healing in the West and "the development of religious healing in American culture."[41] Nobel describes the

33. *See Prince*, 321 U.S. at 158.
34. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972).
35. *See* U.S. CONST. amend. I.
36. *See* Reynolds v. United States, 98 U.S. 145 (1878).
37. Sherbert v. Verner, 374 U.S. 398 (1963).
38. *See* United States v. Seeger, 380 U.S. 163 (1965).
39. *See* Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872 (1990).
40. See Barry Nobel, *Religious Healing in the Courts: The Liberties and Liabilities of Patients, Parents, and Healers*, 16 PUGET SOUND L. REV. 599, 606–12 (1993), for a thorough overview of religious healing among western faiths and in the United States.
41. *Id.* at 602.

connection between religion and healing as undeniable and historical.[42] Nobel recounts how pre-Augustinian Christians revered "spiritual healing."[43]

Early U.S. Christians embraced the freedoms that came with a constitutionalized right to religious practice, as evidenced by reports of religious curing at "revival meetings" and "the establishment of 'healing homes'—in which various forms of treatment were combined with prayer."[44] During the eighteenth and nineteenth centuries, "[t]he spread of Enlightenment theories regarding the material causation of disease" and "intellectual secularism and social pluralism" undercut belief in prayer as a sole means of healing.[45] Up until this time, religious healing was discouraged, but never completely discontinued, in Western Europe.[46]

Contemporary Americans seek and entertain a wide diversity of non-medical practices that connect "healing and mental states."[47] Nobel observes how modern religious and nonreligious practitioners "make use of material and performative aids to diagnose, prescribe remedies, and cure illness."[48] These practitioners employ eastern, spiritualist, psychotherapeutic, and shamanic methods of healing. Nonmedical healing has not subsided and now includes religious and nonreligious practices from around the world.[49] In 1998, Professor Meredith McGuire "located one hundred thirty religious healing groups in one suburban New Jersey county alone."[50]

Cruzan v. Director, Missouri Department of Health recognizes that adults and emancipated minors have the right to refuse medical treatment;[51] however, the question remains whether parents have the right to exercise that choice on behalf of their minor children and dependents. Despite widespread acceptance of non-medical methods of healing in U.S. culture, religious healing exemptions are of "fairly recent vintage."[52] Professors Janna Merrick and Ann Massie observed that by 1974, only eleven states had an exemption.[53] At that time, "[t]he very premise of

42. *See id.* at 606.

43. *See id.* at 607. Nobel describes how Augustine "declared that Christians were no longer to seek a continuation of the gift of physical healing." By the Reformation era, Protestant theologians warned their followers against expecting "miracle cures."

44. *Id.*

45. *Id.* at 607–08.

46. *Id.* at 607 ("Reformers criticized what they considered Roman Catholic magical practices and questioned the belief that prayer and other ritual acts would lead to physical healing.").

47. *See id.* at 608–11.

48. *Id.* at 611.

49. *See id.*

50. *Id.* (citing MEREDITH MCGUIRE, RITUAL HEALING IN SUBURBAN AMERICA 9 (1988)).

51. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990).

52. Monopoli, *supra* note 25, at 331.

53. *See generally* Ann MacLean Massie, *The Religion Clauses and Parental Health Care Decision-Making for Children: Suggestions for a New Approach*, 21 HASTINGS CONST. L.Q. 725, 734 (1994); Janna C. Merrick*, Spiritual Healing, Sick Kids, and the Law: Inequities in the American Healthcare System*, 29 AM. J.L. & MED. 269, 278 (2003).

an abuse or neglect statute [was] that parental rights do not encompass certain types of behavior and that parental duties necessarily require others."[54]

Religious healing exemptions hold no historic place in the common law that could have led to early recognition under the U.S. Constitution.[55] In 1868, a common law jury declined to impose criminal liability on religious healing parents who failed to provide medical care for a sick child in *Regina v. Wagstaffe*.[56] The jury acquitted the parents in *Wagstaffe*,[57] who belonged to a religious sect known as the "Peculiar People."[58] Professor Paula A. Monopoli questions whether *Wagstaffe* reached the ultimate question of whether the common law required an exemption.[59] Instead, according to Monopoli, *Wagstaffe* did nothing more than "leave to the jury the question of whether the religious belief of the parent was reasonable."[60] Monopoli points to two post-*Wagstaffe* developments to support her argument. First, Parliament amended the Poor Law Amendment in response to *Wagstaffe*.[61] That Amendment required parents to provide medical aid to children.[62] Second, several years after passage of the Amendment, the Crown brought successful prosecutions against parents whose religious beliefs prevented them from seeking medical treatment for their sick child in *Regina v. Downes*.[63]

Despite the lack of constitutional or statutory protections, religious healing parents have vexed state supreme courts for over a century.[64] In 1903, the New

54. Massie, *supra* note 53, at 743.

55. *But see* Reynolds v. United States, 98 U.S. 145, 167 (1878).

56. *See* Regina v. Wagstaffe, 10 Cox's Crim. Cases 531 (1868) (U.K.).

57. Robert L. Trescher & Thomas N. O'Neill, Jr., *Medical Care for Dependent Children: Manslaughter Liability of the Christian Scientist*, 109 U. PA. L. REV. 203, 205–06 (1960).

58. *Id.*

59. Monopoli, *supra* note 25, at 327.

60. *See id.*

61. *See id.*

62. *See id.* at 329–30.

63. Regina v. Downes [1875] QBD 25 (Eng.).

64. *See generally* Matter of Appeal of Cochise Cty. Juvenile Action No. 5666-J, 650 P.2d 459 (Ariz. 1982); Walker v. Superior Court, 763 P.2d 852 (Cal. 1988); In re D.L.E., 645 P.2d 271 (Colo. 1982); People v. Lybarger, 700 P.2d 910 (Colo. 1985); Lybarger v. People, 807 P.2d 570 (Colo. 1991); Newmark v. Williams, 588 A.2d 1108 (Del. 1991); Bradley v. State, 84 So. 677 (Fla. 1920); Hermanson v. State, 604 So. 2d 775 (Fla. 1992); People *ex rel.* Wallace v. Labrenz, 104 N.E.2d 769 (Ill. 1952); State v. Chenoweth, 163 Ind. 94 (1904); Craig v. State, 220 Md. 590, 155 A.2d 684 (1959); Dalli v. Bd. of Educ., 267 N.E.2d 219 (Mass. 1971); Custody of a Minor, 393 N.E. 836 (Mass. 1979); Commonwealth v. Twitchell, 617 N.E.2d 609 (Mass. 1993); State v. McKown, 475 N.W.2d 63 (Mass. 1991); Brown v. Stone, 378 So. 2d 218 (Miss. 1979); People v. Pierson, 176 N.Y. 201, 68 N.E. 243 (1903); In re Sampson, 317 N.Y.S.2d 641 (Fam. Ct. 1970), *aff'd*, 323 N.Y.S. 253 (1971), *aff'd*, 278 N.E.2d 918 (N.Y. 1972); Matter of Hofbauer, 393 N.E.2d 1009 (N.Y. 1979); Owens v. State, 6 Okla. Cr. 110, 116 P. 345 (Crim. App. 1911); Beck v. State, 233 P. 495 (Okla. Crim. App. 1925); Commonwealth v. Nixon, 761 A.2d. 1151 (Pa. 2000); In re Green, 292 A.2d 387 (Pa. 1972); *see also* Jehovah's Witnesses in Wash. v. King Cty. Hosp. Unit No. 1, 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd*, 390 U.S. 598 (1968), *reh'g denied*, 391 U.S. 961 (1968); In re Phillip B., 156 Cal. Rptr. 48 (Ct. App. 1979); In re Eric, 189 Cal. Rptr. 22 (Ct. App. 1987); People v. Rippberger, 231 Cal. App. 3d 1667 (1991); J.V. v. State, 516 So. 2d 1133 (Fla. Dist. Ct. App. 1987); Muhlenberg Hosp. v. Patterson, 320 A.2d 518 (N.J. Super. Ct. Law Div. 1974); State v. Miskimens, 490 N.E.2d 931 (Ohio

York Court of Appeals in *People v. Pierson*[65] held that religious belief was not a defense against criminal charges arising from the failure to provide medical treatment.[66] In 1911 in *Owens v. State*,[67] and again in 1925 in *Beck v. State*,[68] the Oklahoma Court of Criminal Appeals upheld a father's criminal conviction arising from attempting to heal a child through prayer.[69] In 1959 in *Craig v. State*,[70] the Maryland Court of Appeals ruled that religious belief was not a defense to criminal charges for the failure to provide medical treatment to a child.[71] However, not all state courts agreed with New York, Oklahoma, and Maryland. In 1920 in *Bradley v. State*,[72] the Florida Supreme Court held "manslaughter" excluded death by denial of medical treatment to a child.[73] By the 1960s, a majority of state supreme courts had disagreed with *Bradley* and held that religious belief was not a defense against prosecution for the failure to provide medical treatment to a child.[74]

Ct. C.P. 1984); In re Willmann, 493 N.E.2d (Ohio Ct. App. 1986); Commonwealth v. Barnhart, 497 A.2d 616 (Pa. Super. Ct. 1985); State v. Norman, 808 P.2d 1159 (Wash. Ct. App. 1991).

65. *See Pierson*, 176 N.Y. 201, 68 N.E. 243; *see generally* Monopoli, *supra* note 25, at 328.

66. *See Pierson*, 68 N.E. at 244–47; *see also Hofbauer*, 393 N.E.2d 1009 (explaining that parents are not required to accept treatment that is not widely embraced by the medical community).

67. *Owens*, 116 P. 345; *see generally* Monopoli, *supra* note 25, at 328.

68. *Beck*, 233 P. 495; *see generally* Monopoli, *supra* note 25, at 328.

69. *See Owens*, 116 P. at 345–46; *Beck*, 233 P. at 495–96.

70. Craig v. State, 220 Md. 590, 155 A.2d 684 (1959); *see generally* Monopoli, *supra* note 25, at 328.

71. *Craig*, 155 A.2d at 689; *see also* People *ex rel.* Wallace v. Labrenz, 104 N.E.2d 769, 771–74 (Ill. 1952) (holding that appointment of guardian for child of religious healing parents who refused a blood transfusion did not violate the First Amendment).

72. Bradley v. State, 79 Fla. 651, 84 So. 677 (1920); *see generally* Monopoli, *supra* note 25, at 328.

73. *Bradley*, 84 So. at 679.

74. *Compare* People v. Pierson, 176 N.Y. 201, 68 N.E. 243 (1903), State v. Chenoweth, 163 Ind. 94, 71 N.E. 197 (1904), *Owens*, 116 P. 345, *Beck*, 233 P. 495, *Labrenz*, 104 N.E.2d 769 (Ill. 1952), *and Craig*, 155 A.2d 684, *with Bradley*, 84 So. 677.

In the last fifty years, religious healing exemptions have frustrated legal scholars[75] and fascinated law students.[76] In 1974, the federal Child Abuse

75. *See generally* Jennifer E. Chen, *Family Conflicts: The Role of Religion in Refusing Medical Treatment for Minors*, 58 HASTINGS L.J. 643 (2007); Jennifer M. Collins, *Crime and Parenthood: The Uneasy Case for Prosecuting Negligent Parents*, 100 N.W.U. L. REV. 807 (2006); James M. DeLise, *Religions Exemptions to Neutral Laws of General Applicability and the Theory of Disparate Impact Discrimination*, 6 COL. J. RACE & L. 115, 120 (2016); James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371 (1994); Dwyer, *supra* note 24; Dwyer, *supra* note 2, at 163; Jared A. Goldstein, *Is There a "Religious Question" Doctrine?: Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497 (2005); Adam Lamparello, *Taking God out of the Hospital: Requiring Parents to Seek Medical Care for Their Children Regardless of Religious Belief*, 6 TEX. F. ON C.L. & C.R. 47 (2001); Sana Loue, *Parentally Mandated Religious Healing for Children: A Therapeutic Justice Approach*, 27 J.L. & REL. 397 (2012); Ann MacLean Massie, *The Religion Clauses and Parental Health Care Decision-Making for Children: Suggestions for a New Approach*, 21 HASTINGS CONST. L.Q. 725, 746 (1994); Janna C. Merrick, *Spiritual Healing, Sick Kids, and the Law: Inequities in the American Health Care System*, 29 AM. J.L. & MED. 269, 274 (2003); Paula A. Monopoli, *Allocating the Costs of Parental Free Exercise: Striking a New Balance Between Sincere Religious Belief and a Child's Right to Medical Treatment*, 18 PEPP. L. REV. 319 (1991); Barry Nobel, *Religious Healing in the Courts: The Liberties and Liabilities of Patients, Parents, and Healers*, 16 PUGET SOUND L. REV. 599 (1993); Jennifer L. Rosato, *Putting Square Pegs in a Round Hole: Procedural Due Process and the Effect of Faith Healing Exemptions in the Prosecution of Faith Healing Parents*, 29 U.S.F. L. Rev. 43 (1994); Jennifer Trahan, *Constitutional Law: Parental Denial of a Child's Medical Treatment for Religious Reasons*, 1989 ANN. SURV. AM. L. 307, 337 (1990); Trescher & O'Neill Jr., *supra* note 57, at 208–12; Wilson, *supra* note 26.

76. *See generally* Janet J. Anderson, Note, *Capital Punishment of Kids: When Courts Permit Parents to Act on Their Religious Beliefs at the Expense of Their Children's Lives*, 46 VAND. L. REV. 755 (1993); Josh Burk, Note, *Mature Minors, Medical Choice, and the Constitutional Right to Martyrdom*, 102 VA. L. REV. 1355 (2016); Emily Catalano, Comment, *Healing or Homicide? When Parents Refuse Medical Treatment for Their Children on Religious Grounds*, 18 Buff. Women's L.J. 157 (2010); Brittany S. Davis, Note, *Hospitalized by Law: The Abrogation of Parental Rights by Hospitals and Child Welfare Courts*, 59 HOW. L.J. 527 (2016); Annamaria Del Buono, Note, *Living on a Prayer: Faith Healers Escaping Criminal Liability for Child Abuse Through Religious Affirmative Defenses & Exemption Laws*, 17 RUTGERS J.L. & REL. 449 (2016); LaDonna DiCamillo, Comment, *Caught Between the Clauses and the Branches: When Parents Deny Their Child Nonemergency Medical Treatment for Religious Reasons*, 19 J. JUV. L. 123 (1998); Ivy B. Dodes, Note, *"Suffer the Little Children. . .," Toward a Judicial Recognition of a Duty of Reasonable Care Owed Children by Religious Faith Healers*, 16 HOFSTRA L. REV. 165 (1987); JoAnna A. Gekas, Note, *California's Prayer Healing Dilemma*, 14 HASTINGS CONST. L.Q. 395 (1987); Jennifer L. Hartsell, Comment, *Mother May I. . .Live? Parental Refusal of Life-Sustaining Medical Treatment for Children Based on Religious Objections*, 66 TENN. L. REV. 499, 502 (1999); Kei Robert Hiraswa, Note, *Are Parents Acting in the Best Interests of Their Children when They Make Medical Decisions Based on Their Religious Beliefs?*, 44 FAM. CT. REV. 316 (2006); Daniel J. Kearney, Comment, *Parental Failure to Provide Child with Medical Assistance Based on Religious Beliefs Causing Child's Death—Involuntary Manslaughter in Pennsylvania*, 90 DICK. L. REV. 861 (1986); Catherine W. Laughran, *Religious Beliefs and the Criminal Justice System: Some Problems of the Faith Healer*, 8 LOY. L.A. L. REV. 396, 408 (1975); Donna K. LeClair, Comment, *Faith Healing and Religious-Treatment Exemptions to Child-Endangerment Laws: Should Parental Religious Practices Excuse the Failure to Provide Necessary Medical Care to Children?*, 13 U. DAYTON L. REV. 79 (1987); Anne D. Lederman, Note, *Understanding Faith: When Religious Parents Decline Conventional Medical Treatment for Their Children*, 45 CASE W. RES. L. REV. 891 (1995); Elizabeth A. Lingle, Commentary, *Treating Children by Faith: Colliding Constitutional Issues*, 17 J. LEGAL MED. 301 (1996); Laura M. Plastine, Comment, *"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, 124 n.3 (1993); Shelli D. Robinson, Comment, *Commonwealth v. Twitchell: Who Owns the Child?*, 7 J. CONTEMP. L. & POL'Y 413 (1991); Judith L. Scheiderer, Note, *When Children Die as a Result of Religious Practices*, 51 OHIO ST. L.J. 1429 (1990); Elizabeth J. Sher,

Prevention and Treatment Act motivated state legislatures to codify exemptions[77] when the Department of Health and Human Services (formerly the Department of Health, Education, and Welfare) interpreted the Act to "require states to amend their child abuse and neglect statutes to include an exemption."[78] The Department also deemed states who failed to amend their statutes ineligible for federal child abuse prevention funding.[79] According to Monopoli, this interpretation caused almost every state to amend their statute.[80] Rosato reports that thirty-three states passed exemptions after 1974.[81] The 1983 amendments to the federal act removed the requirement for an exemption,[82] but the legacy of exemptions remains.[83]

The Court sidestepped the question of religious healing exemptions in 1968 in *Jehovah's Witnesses in State of Washington v. King County Hospital Unit No. 1*.[84] There, members of the Jehovah's Witnesses faith argued that forced blood transfusions for child members violated the federal Civil Rights Act as well as the First, Fifth, Ninth, and Fourteenth Amendments to the U.S. Constitution.[85] The lawsuit challenged two sections of the Revised Code of Washington. The first was section 13.04.010(12), which declared children a dependent of the state when their health was "grossly and willfully neglected" such that medical care becomes a necessity.[86] The second was section 13.03.095, which required the court to make an

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Note, *Choosing for Children: Adjudicating Medical Care Disputes Between Parents and the States*, 58 N.Y.U. L. Rev. 157 (1983); Edward E. Smith, Note, *The Criminalization of Belief: When Free Exercise Isn't*, 42 HASTINGS L.J. 1491 (1991); Scott St. Amand, Comment, *Protecting Neglect: The Constitutionality of Spiritual Healing Exemptions to Child Protection Statutes*, 12 RICH. J.L. & PUB. INT. 139 (2009); Deborah S. Steckler, Note, *A Trend Toward Declining Rigor in Applying Free Exercise Principles: The Example of State Courts' Consideration of Christian Science Treatment for Children*, 36 N.Y.L. SCH. L. REV. 487 (1991); Eric W. Treene, Note, *Prayer-Treatment Exemptions to Child Abuse and Neglect Statutes, Manslaughter Prosecutions and Due Process of Law*, 30 HARV. J. ON LEGIS. 135 (1993); Rebecca Williams, Note, *Faith Healing Exemptions Versus Parens Patriae: Somethings' Gotta Give*, 10 FIRST AMEND. L. REV. 692 (2012).

77. Rita Swan, *On Statutes Depriving a Class of Children Rights to Medical Care: Can This Discrimination Be Litigated?*, 2 QUINNIPIAC HEALTH L.J. 73, 78 (1998). Swan also suggests that Congress was motivated by heavy lobbying by religious organizations—particularly the Christian Science Church. *See also* Monopoli, *supra* note 25, at 331–32. *But see* Merrick, *supra* note 53, at 278 (questioning the role of Christian Science Church in passage of requirement for a religious exemption to the Federal Child Abuse and Prevention and Treatment Act of 1974).

78. Monopoli, *supra* note 25, at 331; *see also* Merrick, *supra* note 53, at 277; Rosato, *supra* note 21, at 59; Massie, *supra* note 53, at 734.

79. Monopoli, *supra* note 25, at 331.

80. *Id.*; *see also* Merrick, *supra* note 53, at 278; Rosato, *supra* note 21, at 58–59.

81. Rosato, *supra* note 21, at 59.

82. Massie, *supra* note 53, at 735.

83. *See* Merrick, *supra* note 53, at 278–80; Monopoli, *supra* note 25, at 332–34; Rosato, *supra* note 21, at 60–61.

84. Jehovah's Witnesses in Wash. v. King Cty. Hosp. Unit No. 1, 390 U.S. 598, 598 (1968), *reh'g denied* 391 U.S. 961 (1968); *see also* Monopoli, *supra* note 25, at 342; Trahan, *supra* note 25, at 311–12.

85. *See* Jehovah's Witnesses in Wash. v. King Cty. Hosp. Unit No. 1, 278 F. Supp. 488, 499–501 (W.D. Wash. 1967), *aff'd*, 390 U.S. 598 (1968), *reh'g denied*, 391 U.S. 961 (1968); *see also* Monopoli, *supra* note 25, at 341–42; Trahan, *supra* note 25, at 312.

86. *Jehovah's Witnesses*, 278 F. Supp. at 506; *see also* WASH. REV. CODE § 13.04.010(12) (repealed 1977).

order for care, custody, or commitment when the order served the child's welfare and the interest of the state.[87]

The Court's brief affirmance in *Jehovah's Witnesses* provides little to guide a constitutional analysis of religious healing statutes. The district court held neither section invalid, even though Washington's purpose was to compel blood transfusions.[88] The district court relied on *Prince v. Massachusetts*,[89] where in 1944 Justice Rutledge presciently reasoned:

> 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.[90]

Rutledge portents that harm to a child falls outside the scope of parental rights to religious freedom.[91] The district court in *Jehovah's Witnesses* reasoned, "neither the rights of religion nor rights of parenthood are beyond limitation."[92] The district court also cited *People v. Pierson*,[93] where the New York Court of Appeals held in 1903 that free exercise rights do not encompass exposing a child to communicable diseases, ill health, or death.[94]

Forty-three states and the District of Columbia have had at least one type of religious healing exemption.[95] Professor Jennifer Trahan points out that some states

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87. *Jehovah's Witnesses*, 278 F. Supp. at 501–02; *see also* WASH. REV. CODE § 13.03.095 (repealed 1977).

88. *See Jehovah's Witnesses*, 278 F. Supp. at 504–05; *see also* Monopoli, *supra* note 25, at 342; Trahan, *supra* note 25, at 312.

89. Prince v. Massachusetts, 321 U.S. 158 (1944).

90. *Id.* at 170.

91. *See id.*

92. *Jehovah's Witnesses*, 278 F. Supp. at 504 (quoting *Prince*, 321 U.S. at 166); *see also* Monopoli, *supra* note 25, at 342; Trahan, *supra* note 25, at 312.

93. People v. Pierson, 68 N.E. 243 (N.Y. 1903).

94. *Id.* at 246.

95. *See* ALA. CODE § 26-14-1(2) (1986); ALASKA STAT. § 11.51.120(b) (1987); ARIZ. REV. STAT. ANN. § 8-531.01 (1989); CAL. PENAL CODE § 270 (West 1988); ARK. CODE ANN. § 12-12-502(3) (repealed 2009); *see also* CAL. WELF. & INST. CODE §§ 300, 300.5 (West 1984 & Supp. 1990); COLO. REV. STAT. § 19-3-103(1) (Supp. 1989); CONN. GEN. STAT. ANN. § 17-38d (West 1988); DEL. CODE ANN. tit. 11, § 1104 (1974); FLA. STAT. ANN. § 415.503(9)(f) (repealed 1998); IDAHO CODE § 18-401(2) (1987); 325 ILL. COMP. STAT. 5/4 (2018); IND. CODE ANN. § 35-46-1-4(a), -5(c) (West 1985); IOWA CODE ANN. § 726.6(l) (West 1979 & Supp. 1990); KY. REV. STAT. ANN. § 600.020(1) (West 1990); LA. STAT. ANN. § 14:403(B)(5) (West Supp. 1990); ME. REV. STAT. ANN. tit. 22, § 4010 (Supp. 1988); MD. CODE ANN., FAM. LAW § 5-701(n)(2) (Supp. 1990); MASS. GEN. LAWS ANN. ch. 273, § 1(4) (West 1990); MICH. COMP. LAWS ANN. § 722.634 (West Supp. 1990); MINN. STAT. ANN. § 609.378(1)(a)(1) (West 1987); MISS. CODE ANN. § 43-21-105(l)(i), (m) (1972 & Supp. 1988); MO. ANN. STAT. § 210.115(3) (West 1983); MONT. CODE ANN. § 41-3-102(4) (1987); NEV. REV. STAT. § 200.5085 (1987); N.H. REV. STAT. ANN. § 169-C:3, (XIX)(c) (Supp. 1988); N.J. STAT. ANN. § 9:6-1 (West 1976); N.M. STAT. ANN. § 32-1-3(L)(5), -3(M)(4) (1978); N.Y. PENAL LAW § 260.15 (McKinney 1989); N.C. GEN. STAT. § 7A-517(21) (1989); N.D. CENT. CODE § 50-25.1-05.1(2) (1989); OKLA. STAT. ANN. tit. 21, § 852 (West 1983 & Supp. 1990); OR. REV. STAT. § 419.500(l) (1989); 40 R.I. GEN. LAWS § 40-11-15 (1984); S.C. CODE ANN. § 20-7-490(C)(3) (1976); S.D. CODIFIED LAWS § 26-10-1.1 (1984 & Supp. 1990); TENN. CODE ANN. § 37-1-157(c) (1984); UTAH CODE ANN. § 78-3a-19.5 (West 1987); VT. STAT. ANN. tit. 33, §

"empower courts to authorize medical treatment" despite the exemption.[96] According to Trahan only about a quarter of states with a parental exemption actually do so.[97]

Rosato provides a thorough overview of the type and the scope of religious healing exemptions.[98] Exemptions appear in both criminal and civil codes. Criminal exemptions include prosecutions for murder and homicides,[99] child abuse,[100] child endangerment,[101] child neglect,[102] contributing to neglect[103] or deprivation,[104] criminal injury,[105] cruelty,[106] delinquency,[107] failure to provide medical and surgical attention,[108] failure to report suspected child neglect or abuse,[109] manslaughter,[110]

682(3)(C) (Supp. 1989); VA. CODE ANN. § 16.1-228(2) (1988); WASH. REV. CODE ANN. § 26.44.020(3) (Supp. 1990); W. VA. CODE § 49-1-3(g)(2)(A) (1986); WIS. STAT. ANN. § 48.981(3)(c)(4) (West 1987); WYO. STAT. ANN. § 14-3-202(a)(vii) (1978); HAW. REV. STAT. § 350-4 (repealed 1992); KAN. STAT. ANN. § 21-3608(l)(c) (repealed 2010); OHIO REV. CODE ANN. § 2919.22(A) (West 1987) (invalidated in State v. Miskimens, 490 N.E.2d 931 (Ct. Com. Pl. 1984) & OHIO REV. CODE ANN. § 2151.03, .421(A)(1) (West 1990)); 11 PA. STAT. AND CONS. STAT. ANN. § 2203 (repealed 1990).

96. Trahan, *supra* note 25, at 337.

97. *Id.*

98. *See generally* Rosato, *supra* note 21, at 43.

99. *See* ARK. CODE ANN. § 5-10-101(a)(9)(B) (1975); WASH. REV. CODE § 9A.32.050(1) (1975); W. VA. CODE § 61-8D-2(d) (1988).

100. *See* FLA. STAT. § 39.01(30)(f) (1951); FLA. STAT. § 984.03(37) (1997); N.J. STAT. ANN. § 2C.9:6-8.21 (West 1974); UTAH CODE ANN. § 76-5-109(4) (West 1981); UTAH CODE ANN. § 76-5-110(d)(3)(a) (West 1988); VA. CODE ANN. § 18.2-371.1(C) (West 1975); W. VA. CODE § 61-8D-4a(b) (1997); WIS. STAT. § 948.03(6) (1987).

101. *See* ALA. CODE § 13A-13-6(b) (1977); DEL. CODE ANN. tit. 11, § 1104 (1972) (applying only to misdemeanors that do not cause serious physical injury); IOWA CODE § 726.6 (West 1976); ME. REV. STAT. ANN. tit. 17-A, § 557 (1975); MINN. STAT. § 609.378 (1983); MO. REV. STAT. § 568.050(4)(2) (1977); N.H. REV. STAT. ANN. § 639:3 (1971); N.J. STAT. ANN. § 2C:24-4 (West 1978); N.Y. PENAL LAW § 260.15 (McKinney 1965); OHIO REV. CODE § 2919.22(A) (West 1973); OKLA. STAT. tit. 21, § 852.1 (West 1983 & Supp. 1990); KAN. STAT. ANN. § 21-3608(1)(c) (repealed 2010) (applying to misdemeanors only).

102. *See* CAL. PENAL CODE § 11165.2(b) (West 1987); IND. CODE § 35-46-1-14 (1981); LA. STAT. ANN. § 14:93(B) (1942); MINN. STAT. § 609.378 (1983); MISS. CODE ANN. § 43-21-105(l)(i) (1972 & Supp. 1988); N.J. STAT. ANN. § 2C.9:6-8.21 (West 1974); OKLA. STAT. tit. 10A, § 1-1-105 (1968); OKLA. STAT. tit. 21, § 843.5(C) (1963); 11 R.I. GEN. LAWS ANN. § 11-9-5(b) (West 1909); 40 R.I. GEN. LAWS ANN. § 40-11-15 (West 1976) (does not apply if a child is harmed); UTAH CODE ANN. § 76-5-109(4) (West 1981); UTAH CODE ANN. § 76-5-110(3)(a) (1988); VA. CODE ANN. § 18.2-371.1(C) (1975); W. VA. CODE § 61-8D-4(d) (1988).

103. *See* MISS. CODE ANN. §§ 43-21-105(l)(i), 97-5-39 (1972 & Supp. 1988).

104. *See* GA. CODE ANN. §§ 15-11-2, 16-12-1(b)(3) (2013).

105. *See* IDAHO CODE §§ 18-401(2), 18-1501(4) (1987); TEX. PENAL CODE ANN. § 22.04(l)(1) (West 1973).

106. *See* LA. STAT. ANN. § 14:93(B) (1942); 11 R.I. GEN. LAWS ANN. § 11-9-5(b); 40 R.I. GEN. LAWS ANN. § 40-11-15 (does not apply if a child is harmed).

107. *See* MISS. CODE ANN. §§ 43-21-105(l)(i), 97-5-39 (West 1972 & Supp. 1988).

108. *See* MO. REV. STAT. § 568.040(2)(4) (1979); VA. CODE ANN. § 18.2-314 (1975); WASH. REV. CODE § 9A.42.005 (1997).

109. *See* CAL. PENAL CODE § 270 (West 1988); MINN. STAT. §§ 609.378(1), 626.556(6)(c).

110. *See* IDAHO CODE §§ 18-401(2), 18-1501(4), 18-4006(2); LA. STAT. ANN. §§ 14:31, 14:93(B); MISS. CODE ANN. § 97-5-29 (1979). States that require prosecutors to prove misdemeanors in order to prove manslaughter also essentially provide an exemption to manslaughter. *See* MISS. CODE ANN. § 97-5-29; OHIO REV. CODE ANN. § 2903.04 (West 1973); VA. CODE ANN. §§ 18.2-314, 18.2-371.1(C)

nonsupport,[111] and omission to provide for a child.[112] One state, Louisiana, shields communications with religious healing practitioners in a criminal case.[113] Civil exemptions apply to claims for child abuse,[114] child neglect,[115] contributing to neglect,[116] dependency proceedings,[117] failure to provide medical care or adequate

(1975). Those states that require proof of a separate felony in order to prove manslaughter provide an exemption as well. *See* LA. STAT. ANN. §§ 14:31, 14:93(B), 14:403(b)(5) (West Supp. 1990). In Iowa, manslaughter requires proof of a public offense, which essentially acts as an exemption. IOWA CODE §§ 707.5, 726(d) (1978).

111. *See* ALASKA STAT. § 11.51.120 (1987); CAL. PENAL CODE § 270; COLO. REV. STAT. 19-3-103; IDAHO CODE §§ 18-401(2), 18-1501(4) (1987); IND. CODE § 35-46-1-5 (1976); MO. REV. STAT. § 568.050(4)(2) (1977); S.D. CODIFIED LAWS § 25-7-17.1 (1982).

112. *See* OKLA. STAT. tit. 21, § 852 (West 1983 & Supp. 1990).

113. *See* LA. STAT. ANN. § 14:403(b)(5) (West Supp. 1990).

114. *See* ALA. CODE. § 26-14-7.2 (1993); ARIZ. REV. STAT. ANN. § 8-201.01 (1970); ARK. CODE ANN. §§ 9-30-103(5)(B) (1987), 12-18-618 (2009); CAL. WELF. & INST. CODE § 18950.5 (West 1978); FLA. STAT. § 39.01(a)(f) (1951); GA. CODE ANN. § 15-11-2(8) (2013); 325 ILL. COMP. STAT. 5/4 (2018); IOWA CODE § 232.68(d) (1979); LA. CHILD. CODE ANN. art. 1003(10) (West 1995); MO. ANN. STAT. § 210.115(4) (West 1983); MON. CODE ANN. § 41-3-102(4)(b) (1974); N.J. STAT. ANN. § 9:6-8.21(1)(c) (West 1974); N.D. CENT. CODE § 50-25.1-05.1(2) (1989); OKLA. STAT. tit. 10A, § 1-1-105(47) (1968); 23 PA. CONS. STAT. AND CONS. STAT. ANN. § 6303(b)(3) (West 1990); 40 R.I. GEN. LAWS ANN. § 40-11-15 (West 1976); VA. CODE ANN. § 16.1-228(2) (1988); WIS. STAT. § 48.981(3)(c)(4) (West 1987); ME. REV. STAT. ANN. tit. 22, § 4010 (repealed 1976).

115. *See* ALA. CODE § 26-14-7.2; ALASKA STAT. § 47.17.020(d) (1971); ARIZ. REV. STAT. ANN. § 8-201.01; ARK. CODE ANN. §§ 9-30-103(5)(B), 12-18-618; CAL. WELF. & INST. CODE §§ 16509.1 (West 1982), 18950.5 (West 1978); COLO. REV. STAT. § 18-6-401 (1975) (exempting children in life threatening situations); CONN. GEN. STAT. §§ 17a-104 (1958), 46b-120(8) (1949); DEL. CODE ANN. tit. 16, § 913 (1971); D.C. CODE § 16-2301(9)(B) (1963); FLA. STAT. § 39.01(a)(f) (1951); GA. CODE ANN. §§ 19-7-5(b) (1965), 49-5-40(a) (1975), 49-5-180(5) (2015); IDAHO CODE § 16-1602(28)(a) (1976); 325 ILL. COMP. STAT. §§ 5/3 (1975), 5/4; LA. CHILD. CODE ANN. art. 603(18) (1988), 1003(10); MINN. STAT. § 626.556(2)(g)(5) (1975); MISS. CODE § 43-21-105(l)(i) (West 1972 & Supp. 1988); MO. REV. STAT. §§ 210.115(4), 211.031, 211.181(4); MONT. CODE ANN. § 41-3-102(4)(b); N.H. REV. STAT. ANN. § 169-C:3(XIX)(c); N.J. STAT. ANN. § 9:6-8.21(1)(c); N.M. STAT. ANN. § 32A-4-2(E)(5) (1993); N.D. CENT. CODE § 50-25.1-05.1(2); OKLA. STAT. tit. 10A, §§ 1-1-105(20), 1-1-105(47); 40 R.I. GEN. LAWS ANN. § 40-11-15; VT. STAT. ANN. tit. 33, § 4912(3)(B) (1981); VA. CODE ANN. § 16.1-228(2); WASH. REV. CODE ANN. § 26.44.020(18) (Supp. 1990); WIS. STAT. § 48.981(3)(c)(4); WYO. STAT. ANN. § 14-3-202(a)(vii) (1978); ME. REV. STAT. ANN. tit. 22, § 4010 (repealed 1976).

116. *See* ARIZ. REV. STAT. ANN. § 8-201.13(b).

117. *See* ARIZ. REV. STAT. ANN. § 8-201.01; COLO. REV. STAT. § 18-6-401 (exempting children in life threatening situations); MISS. CODE §§ 43-21-105(l)(i), 97-5-39; VA. CODE ANN. § 63.2-100 (2002); WASH. REV. CODE ANN. § 26.44.020(18).

treatment,[118] failure to report,[119] maltreatment,[120] negligence,[121] nonsupport,[122] and temporary or permanent termination proceedings.[123]

Rosato distinguishes the text of religious healing exemptions.[124] Most reference "prayer," "spiritual means,"[125] and "bona fide religious denominations."[126] Some prohibit prosecutions "for the sole reason" or "solely because" a child received religious healing.[127] Others consider religious healing "an adequate substitute for medical care,"[128] "health care,"[129] or "other remedial care."[130] Many states refer to a parent's legitimate religious practice.[131] Christian Scientists are the sole beneficiary of some exemptions.[132]

Idaho has the strongest of religious healing exemptions. The Idaho Code prohibits prosecution against parents who choose to treat a minor child or

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118. *See* ALASKA STAT. § 47.10.085 (1972); CAL. WELF. & INST. CODE §§ 300(b)(1), 300(c), 300.5 (West 1984 & Supp. 1990); CONN. GEN. STAT. § 46a-11b(f) (1958); IND. CODE § 31-34-1-14 (1997) (exempting situations where life or health is in serious danger); IOWA CODE §§ 232.68(d), 256B.8; KY. REV. STAT. ANN. § 610.310(2) (West 1988); NEV. REV. STAT. §§ 432B.020(2), 128.013(2), 200.5085 (1985); N.J. STAT. ANN. § 9:6-1.1 (excluding situations involving communicable diseases and sanitary matters); 23 PA. CONS. STAT. AND CONS. STAT. ANN. § 6303(b)(3); S.C. CODE ANN. §§ 63-7-20(4)c, 63-7-950 (1976); WASH. REV. CODE § 26.44.020(18).

119. *See* DEL. CODE ANN. tit. 16, § 913; *see also* LA. CHILD. CODE ANN. art. 603(17) (imposing special rules on priests, rabbis, deacons, ministers, and religious healing practitioners); OKLA. STAT. tit. 10A, § 1-2-101(E) (1965); VA. CODE ANN. § 63.2-100; WASH. REV. CODE § 26.44.020(18).

120. *See* CONN. GEN. STAT. §§ 17a-104, 46B-120(8); LA. CHILD. CODE ANN. art. 603(18).

121. *See* FLA. STAT. § 984.03(37) (1997); KY. REV. STAT. ANN. § 600.020(1)(a)8; MICH. COMP. LAWS § 722.634(14) (1975); NEV. REV. STAT. § 128.106(1)(3) (1981); 40 R.I. GEN. LAWS ANN. § 40-11-15 (West 1976); UTAH CODE ANN. § 78A-6-508(3) (West 2008); KAN. STAT. ANN. § 38-1502(cc)(3) (repealed 2006).

122. *See* COLO. REV. STAT. § 14-6-101 (1981).

123. *See* ARIZ. REV. STAT. ANN. § 8-531.01 (1989); CAL. WELF. & INST. CODE § 16509 (West 1982); DEL. CODE ANN. tit. 13, § 1103(c) (1951); UTAH CODE ANN. § 78A-6-508(3).

124. *See* Rosato, *supra* note 21, at 55–57.

125. *See id.*

126. *See id.*

127. *See id.*

128. *See id.*

129. *See id.*

130. *See id.*

131. *See id.*

132. *Id.* Reference to a specific religious denomination or faith may run counter to *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, which disfavors laws that discriminate among religions. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993). The court in *Church of the Lukumi Babalu Aye, Inc.* asked whether the City of Hialeah's prohibition against the slaughter of animals violated the Free Exercise Clause. *Id.* at 523–24. The Court struck down the prohibitions because they were motivated by religious discrimination against members of the Church of the Lukimi Babalu Aye. *Id.* at 525–47. Specifically, the record was replete with evidence that members of the Hialeah city council expressed discriminatory animus against members of the church. *Id.* at 526–28, 533–42. Finally, the Court found that the purpose of the prohibition, preventing cruelty to animals, was insufficiently justified. *Id.* at 546–47. The prohibition authorized the slaughter of animals for all other religious and nonreligious purposes except for those related to members of the church. *Id.* at 542–45. For example, the prohibitions contained exceptions for kosher slaughtering and slaughtering for nonreligious purposes such as hunting and fumigation. *Id.* at 543–45.

dependent's medical condition through "prayer" or "spiritual means" alone.[133] Idaho's exemption applies when considering whether to order emergency medical treatment for a child.[134] Idaho's exemption also applies against criminal nonsupport,[135] neglect,[136] criminal injury to a child,[137] and involuntary manslaughter.[138] Idaho's exemption also prohibits civil actions for child endangerment and neglect.[139]

Religious healing in Idaho has its costs. Idaho began estimating the child mortality rate among the state's religious healing community in 2013.[140] Researchers formed their estimate in part by examining graves at a cemetery used exclusively by religious healers where over 25% of the graves belong to children.[141] Idaho Vital Statistics reported a 3.37% child death rate from 2002 to 2011.[142] The child mortality rate at this cemetery for the same period was around 31%—almost ten-times the statewide rate.[143]

Former Idaho Supreme Court Chief Justice Jim Jones, who recently described himself as "unshackled,"[144] implored the state legislature to repeal Idaho's "faith-healing" exemption.[145] According to Jones, if an adult decides "to forego medical intervention for themselves for religious reasons that is their prerogative."[146] When it comes to minors, however, Jones argued that Idaho "has an interest in safeguarding the health and safety of minors who cannot speak for themselves."[147] Moreover, Idaho has "numerous protections for children without religious exemptions—marital age, child labor, ability to contract, and the like."[148] Jones concluded that a child's "right to have basic life-saving healthcare" should trump any right to parental control or religious exercise.[149]

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133. *See generally* IDAHO CODE §§ 16-1602(28), 16-1627(3), 18-401(2), 18-1501(4), 18-4006(2) (1976).

134. *See* IDAHO CODE § 16-1627(3) (1976).

135. *See* IDAHO CODE § 18-401(2) (1976).

136. *See* IDAHO CODE § 16-1602(28) (1976).

137. *See* IDAHO CODE § 18-1501(4) (1976).

138. *See* IDAHO CODE § 18-4006(2) (1976).

139. *See* IDAHO CODE § 16-1602(28)(a), 16-1627(3) (1976).

140. Lehr, *supra* note 11; *see also* CHILD DEATHS IN IDAHO 2012, *supra* note 11, at 4, 59–60; CHILD DEATHS IN IDAHO 2013, *supra* note 11, at 6, 77–78.

141. *See* Lehr, *supra* note 11.

142. *See id.*; *see also* CHILD DEATHS IN IDAHO 2012, *supra* note 11, at 4, 59–60; CHILD DEATHS IN IDAHO 2013, *supra* note 11, at 6, 77–78.

143. *See id.*

144. Robert Ehlert, *'Unshackled' Former Idaho Supreme Court Justice Jim Jones Undaunted by His Cancer Diagnosis*, IDAHO STATESMAN, Feb. 24, 2017, http://www.idahostatesman.com/opinion/opn-columns-blogs/robert-ehlert/article134782399.html [https://perma.cc/9K7S-2F3H].

145. Jim Jones, *Does the Right to Life End at Birth for Some Kids?*, SPOKESMAN-REV., Feb. 21, 2017, http://media.spokesman.com/documents/2017/02/Jones-faith-healing-oped.pdf [https://perma.cc/7XMX-9SNH].

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

Jones is not the only Idahoan to raise concerns about statutory exemptions for religious healing parents. One of the primary beneficiaries of Idaho's exemption are members of a church in Canyon County, Idaho.[150] Sheriff Kieran Donahue urged lawmakers to repeal Idaho's religious exemptions[151] due to three religious healing-related deaths in a four month period in Canyon County during the winter of 2016.[152] Jones and Donahue are among the most prominent Idahoans to critique Idaho's religious healing statutes.[153] But others, like recently defeated Canyon County Coroner Vicki DeGues-Morris, urged caution and warn that a repeal may not result in a "change of lifestyle" for religious healers.[154] Instead, DeGues-Morris argued that religious healing communities could "go underground" or report fewer child deaths.[155]

The effects of religious healing are not only observable in Idaho. In 1956, autopsy surgeon Gale Wilson reported on morality rates for one sect of religious healers—Christian Scientists—in King County, Washington.[156] Wilson found that in a twenty-one-year period, mortality rates were substantially higher than for some non-Christian Scientists.[157] In 1991, William F. Simpson found that graduates of a Christian Science college had a higher mortality rate than graduates at the University of Kansas from 1934 to 1983.[158]

In 1998, Seth Asser and Rita Swan revealed a study of 172 cases of child fatalities among religious healing sects from 1975 through 1995.[159] Asser and Swan found that survival rates for 140 children "would have exceeded ninety percent, and

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150. *See* Dan Tilkin, *Oregon Woman Fights Idaho Faith Healing Laws*, KOIN 6 (Jan. 21, 2016), http://koin.com/2016/01/21/oregon-woman-fights-idaho-faith-healing-laws/ [https://perma.cc/B24X-FBHZ].

151. *See* Lehr, *supra* note 11.

152. *See id.*

153. *See* Betsy Russell, *Former Church Member: 'The Way These Kids Die Is Inhumane*, SPOKESMAN-REV., Aug. 4, 2016, http://www.spokesman.com/blogs/boise/2016/aug/04/former-church-member-way-these-kids-die-inhumane [https://perma.cc/ZNV4-7DGC]; *see also* Linda Martin, *Linda Martin Idaho Faith Healing Testimony*, YOUTUBE (Sept. 8, 2016) https://www.youtube.com/watch?v=P9N9Gyrzb80.

154. *See* Russell, *supra* note 153; *see also* Nick Foy & Kyle Pfannenstiel, *Coroner's Primary Reignites Faith Healing Debate*, IDAHO PRESS-TRIB., May 28, 2018, https://www.idahopress.com/news/local/2cscoop/coroner-s-primary-reignites-faith-healing-debate/article_50acec6d-21ba-57fd-935d-60c3b9c1a2a1.html [https://perma.cc/VY49-P2MF].

155. *See* Russell, *supra* note 153.

156. *See* Gale E. Wilson, *Christian Science and Longevity*, 1 J. FORENSIC SCI. 43, 54–55 (1956); *see also* Merrick, *supra* note 53, at 273.

157. *See* Wilson, *supra* note 156, at 54–55.

158. *See* William F. Simpson, *Comparative Mortality of Two College Groups, 1945-1983*, 40 MORBIDITY & MORTALITY WKLY. REP. 579 (1991); *see also* Merrick, *supra* note 53, at 273.

159. Seth M. Asser & Rita Swan, *Child Fatalities from Religion-Motivated Medical Neglect*, 191 PEDIATRICS 625, 626–27 (1998); *see also* Rita Swan, *90 Deaths of Kids Found in Followers of Christ*, 2 CHILD NEWSLETTER (Children's Healthcare Is a Legal Duty, Inc., Sioux City, Iowa), 1998, at 1; Rita Swan, *United Methodist Church Opposes Religious Exemption in Federal Child Abuse Law*, 1 CHILD NEWSLETTER (Children's Healthcare Is a Legal Duty, Inc., Sioux City, Iowa), 2000, at 1; Rita Swan, *Long History of Apathy in St. Louis Area*, 1 CHILD NEWSLETTER (Children's Healthcare Is a Legal Duty, Inc., Sioux City, Iowa), 1993, at 4–6; Swan, *supra* note 77, at 78.

an additional eighteen cases would have had survival rates in excess of fifty percent."[160] Of the fifty-nine children who were newborn, "all but one would have had a good to excellent expected outcome with medical care."[161]

Others have supplemented Asser and Swan's evidence of the harm suffered by children of religious healing parents. Fretwell Wilson discusses how Asser and Swan's study did not include twelve child deaths in Idaho between 1980 and 1998.[162] Merrick discusses how prior to Asser and Swan's study, an Oregon newspaper reported the deaths of seventy-eight children in the state between 1955 and 1998.[163] Massie reports that between 1984 and 1994, "at least forty children . . . died as a result of diseases treatable by conventional medical care."[164] Other reports detail that from 1975 to 1999, at least 165 children died because their parents religiously objected to treatment by means of traditional or conventional medicine.[165]

Merrick reported only fifty-five religious healing prosecutions between 1982 and 2003.[166] In the past, state courts have proven inconsistent when ruling on the constitutionality of a religious healing exemption. The Arizona Supreme Court in 1982 in *Matter of Appeal in Cochise County Juvenile Action No. 5666-J*[167] held the exercise of the exemption did not constitute abuse or neglect.[168] The Ohio Court of Appeals struck down exemptions in 1986 in *In re Willmann*.[169] The Wisconsin Supreme Court ruled in 2013 that exemptions did not apply to life-threatening illnesses in *State v. Neumann*.[170] The Indiana Supreme Court in 1986 in *Hall v. State*[171] and the Pennsylvania Supreme Court in 2000 in *Commonwealth v. Nixon*[172] held the exemption did not apply to the charged crime, which in both cases involved serious felonies. The California Supreme Court upheld a manslaughter conviction in 1988 in *Walker v. Superior Court*,[173] but the federal district court later granted habeas relief on due process grounds.[174] Other state courts overturned convictions

160. Asser & Swan, *supra* note 159, at 626–27.

161. *Id.*

162. Wilson, *supra* note 26, at 1383.

163. Merrick, *supra* note 53, at 274.

164. Massie, *supra* note 53, at 746.

165. Hartsell, *supra* note 76, at 502.

166. Merrick, *supra* note 53, at 281.

167. Matter of Appeal in Cochise Cty. Juvenile Action No. 5666-J, 650 P.2d 459 (Ariz. 1982).

168. *See id.*

169. *See* In re Willmann, 24 Ohio App. 3d 191, 199 (1986) (holding that religious faith does not permit parents to expose child to ill health or death); *see also* State v. Miskimens, 490 N.E.2d 931, 939 (Ohio Ct. Com. Pl. 1984).

170. State v. Neumann, 832 N.W.2d 560 (Wis. 2013).

171. Hall v. State, 493 N.E.2d 433, 435–36 (Ind. 1986).

172. Commonwealth v. Nixon, 761 A.2d 1151, 1152, 1155–57 (Penn. 2000) (rejecting arguments that the minor was mature and chose on her own to refuse medical care).

173. Walker v. Superior Court, 47 Cal. 3d 112, 118–20, 141 (1988).

174. *See* Walker v. Keldgord, No. CIV S-93-0616 LKK JFM P (E.D. Cal. 1996) (holding defendant entitled to a writ of habeas corpus on the grounds that defendant was inadequately notified of his criminal conduct). *But see In re* Eric B., 189 Cal. App. 3d 996, 1006–09 (1987) (holding that periodic medical review of a child violated neither the First Amendment nor substantive due process);

because the exemption misinformed criminal defendants of their defenses.[175] These courts include the Minnesota Supreme Court in 1991 in *Minnesota v. McKown*[176] and the Florida Supreme Court in 1992 in *Hermanson v. State*.[177] The Supreme Judicial Court of Massachusetts in *Commonwealth v. Twitchell* held the exemption applied to manslaughter in 1993, but the court also reversed the convictions because the parents in that case relied on a state attorney general's opinion to the contrary.[178]

Religious healing parents have recently come under increased scrutiny. In June 2017, Sarah and Travis Mitchell became the fifth couple from the Followers of Christ Church in Oregon to face charges after relying on prayer alone to heal a child.[179] Five months earlier, Pennsylvania prosecutors charged Jonathan and Grace Foster, a religious healing couple who refused to provide medical care to a child (Jonathan's father, a pastor in the Faith Tabernacle Congregation, was charged several months later in relation to the child's death).[180] A Michigan judge jailed Rebecca Bredow in October 2017 for refusing a court order to vaccinate her child—the mother's ex-husband who shares joint custody was in favor of vaccination.[181]

Proponents of religious healing exemptions often point to substantive due process rights to care, custody, and control of minor children and dependents. These proponents also question state authority to intrude on the privacy rights of parents or guardians, which includes the right to rear a child according to one's religious beliefs. Dwyer, opposes leading scholars on religious healing exemptions,

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In re Phillip B., 92 Cal. App. 3d 796, 800–03 (1979) (holding that a court order to treat an ill child did not violate the parents' rights under the First Amendment or substantive due process).

175. *See generally* Lybarger v. People, 807 P.2d 570 (Colo. 1991) (finding elements of criminal offense unmet); People v. Lybarger, 700 P.2d 901 (Colo. 1985). For a thorough analysis of the fair notice argument, see Rosato, *supra* note 21.

176. State v. McKown, 475 N.W.2d 63, 67–68 (Minn. 1991).

177. Hermanson v. State, 604 So. 2d 775, 782 (Fla. 1992); *see also* J.V. v. State, 516 So. 2d 1133, 1133–35 (Fla. Dist. Ct. App. 1987) (holding that authorization of treatment was proper and that refusal to grant permission for medical treatment did not constitute abandonment, abuse, or neglect).

178. *See* Commonwealth v. Twitchell, 617 N.E.2d 609, 618–20 (Mass. 1993); *see also* Custody of a Minor, 393 N.E.2d 836, 843–46 (Mass. 1979) (holding that rejection of parental preference for "metabolic treatment" to treat an ill child violated neither the First Amendment nor substantive due process).

179. *See Court Docs Reveal Details About Death of Followers of Christ Infant*, KGW 8 (June 8, 2017), http://www.kgw.com/news/local/clackamas-county/infant-death-investigation-in-clackamas-county/421286810 [https://perma.cc/YAG4-98TW]; Dan Tilkin, *Parents with Faith-Healing Ties Charged with Murder*, KOIN 6 (June 5, 2017), http://koin.com/2017/06/05/parents-with-faith-healing-ties-charged-with-murder [https://perma.cc/2XM3-LGQU].

180. *See Prosecutor: Pair Charged in Girl's Death Cited Faith Healing*, FOX 29 (Feb. 1, 2017), http://www.fox29.com/news/local-news/mom-dad-charged-after-daughters-untreated-pneumonia-leads-to-death [https://perma.cc/RQD5-B7WS]; Mark Scolforo, *Pastor to Face Trial in Granddaughter's Faith Healing Death*, WITF (June 28, 2017), http://www.witf.org/news/2017/06/pastor-to-face-trial-in-granddaughters-faith-healing-death.php [https://perma.cc/KM2B-4NZE].

181. *See* Kristine Phillips, *A Mother Refused to Follow a Court Order to Vaccinate Her Son. Now She's Going to Jail.*, WASH. POST, Oct. 4, 2017, https://www.washingtonpost.com/news/to-your-health/wp/2017/10/04/a-mother-refused-to-follow-a-court-order-to-vaccinate-her-son-now-shes-going-to-jail/?utm_term=.5d10a688f544; Maggie Fox, *Detroit Mom Jailed for Refusing Court Order to Vaccinate Child*, TODAY (Oct. 5 2017), https://www.today.com/health/detroit-mom-jailed-refusing-court-order-vaccinate-child-t117126 [https://perma.cc/Z9C2-Q59P].

and counters that parents are not traditional "right-holders" when it comes to children.[182] Instead, parents are "fiduciaries occupying a caretaking role as a matter of legal privilege."[183] Other opponents argue that exemptions undermine a state's legitimate interest in the wellbeing of its most vulnerable citizens—minor children. Those who find exemptions untenable also have difficulty understanding why a state would allow a parent or guardian to refuse lifesaving medical treatment for a child in need. Next, this Article explores substantive due process rights to religious childrearing, which reveals one-half of the jurisprudential gap that allows for the existence of exemptions.

II. SUBSTANTIVE DUE PROCESS AND RELIGIOUS CHILDREARING

This Article now examines whether substantive due process rights to parental care, custody, and control of children and dependents requires recognition of religious healing exemptions. Substantive due process jurisprudence demonstrates the "play within the joint"[184] between "the private realm of family life" and the exercise of police powers.[185] This jurisprudence also demonstrates that infliction of physical and psychological harm has traditionally provided a baseline for the termination or interruption of parental rights.

Sole reliance on substantive due process to support religious healing exemptions is misguided. While *Meyer v. Nebraska*[186] and *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*[187] establish the parental rights to the care, custody, and control of minor children and dependents, *Prince v. Massachusetts*[188] limits parental autonomy to direct a physically or psychologically harmful religious training. *Wisconsin v. Yoder*[189] affirms substantive due process as the source of the right to childrearing, but also preserves the state's ability to intervene when a parent's religious practice potentially harms children. Neither *Meyer*, *Pierce*, *Prince*, nor *Yoder* involved medical decisions on behalf of a minor child or dependent. Only *Prince* involved religious exercises that could cause harm.

Meyer represents one of the earliest adoptions of constitutionalized parental autonomy under substantive due process. Robert Meyer objected when Nebraska limited foreign language instruction for public and private school students in kindergarten through seventh grade.[190] Nebraska did not prohibit teaching ancient

182. *See* Dwyer, *supra* note 2, at 163; Dwyer, *supra* note 75, at 1446 ("To be sure, 'the child is not the mere creature of the State,' but the child is also not the mere creature of the parent, nor of the religious community to which the parent belongs. Rather, the child is his or her own person. A child may lack a fully formed independent character, but is nonetheless an individual who deserves the same respect accorded adults." (citation omitted)).

183. Dwyer, *supra* note 2, at 164.

184. Locke v. Davey, 540 U.S. 712, 718–19 (2004).

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

186. Meyer v. Nebraska, 262 U.S. 390 (1923).

187. Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510 (1925).

188. *Prince*, 321 U.S. at 158.

189. Wisconsin v. Yoder, 406 U.S. 205 (1972).

190. *See Meyer*, 262 U.S. at 396–97.

or dead languages, such as Latin, Greek, and Hebrew.[191] Nebraska did prohibit teaching German, French, Spanish, Italian, and any other "alien speech."[192] Meyer violated the law when he taught German to a ten-year-old student.[193] Meyer faced a thirty-day jail sentence and a $25 to $100 fine.[194]

The *Meyer* Court did not question Nebraska's constitutional police power to ensure the health and safety of children.[195] This included the ability to "compel attendance" at school,[196] and in the right circumstances, the ability to require English only instruction in schools.[197] *Meyer* instead turned on whether Nebraska properly exercised its power. Nebraska articulated a legitimate purpose that included fostering American ideals, but it was also clear that Nebraska sought to establish English as "the mother tongue" for all children.[198] Pointing to the atrocities of World War I, *Meyer* acknowledged the allure of establishing a "homogeneous people with American ideals."[199] However, Nebraska's attempt to do so violated both the "letter and spirit" of the U.S. Constitution.[200] Knowledge of foreign languages did not threaten the health, morals, or understanding of citizenship.[201] Nor could Nebraska demonstrate an emergency that rendered knowledge of a foreign language a danger to national security.[202]

While Nebraska had a "desirable end," it used a "prohibited means" to achieve that end.[203] *Meyer* included religious worship and childrearing within the zone of constitutionalized protection for family autonomy.[204] *Meyer* established parental control of minor children and dependents derivative of a parent's "natural" duties.[205] Nebraska only banned modern languages, and left "complete freedom" to teach ancient or dead languages.[206] *Meyer* pointed to the lack of choice among foreign languages as an intrusion on the right to dictate a child's education.[207] *Meyer* declared that the U.S. Constitution protects "those who speak other languages as well as to those born with English on the tongue."[208] *Meyer* observed how

191. *See id.* at 400–01.
192. *Id.* at 401.
193. *See id.* at 396–97, 401.
194. *See id.* at 396–97.
195. *See id.* at 402.
196. *Id.*
197. *See id.*
198. *Id.* at 398.
199. *Id.* at 402.
200. *Id.*
201. *See id.* at 401–03.
202. *See id.* at 403.
203. *Id.* at 401.
204. *Id.* at 399.
205. *Id.* at 400.
206. *Id.* at 403.
207. *See id.*
208. *Id.* at 401.

"proficiency in a foreign language seldom comes to one not instructed at an early age."[209]

Incidentally, *Meyer* reflects a short-lived struggle between 1923 and 1925 to identify the constitutional source of parental autonomy. In this context, *Meyer* provides one side of the then emerging theories of substantive due process and equal protection. *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary* provides the other. *Pierce* questioned whether Oregon could compel public school attendance for children who were between the ages of eight and sixteen.[210] Oregon's "manifest purpose" was to increase public school attendance.[211] The Court immediately recognized that enforcement of Oregon's law diminished the profitability and value of private schools, especially those of the military academy and orphanage that brought the challenge.[212]

Pierce firmly established substantive due process as the protectant of parental autonomy. *Pierce* recognized that children are not "mere creature[s] of the state." While states have general police powers to establish or impose educational standards,[213] states lack the power to impose a standardized education.[214] Parents, not states, have the right and duty to prepare children for adulthood.[215] Oregon intruded on the "liberty of parents and guardians to direct the upbringing and education of children under their control."[216]

Pierce, like *Meyer*, limited the state's ability to intrude on a parent's right to make educational choices. Much like Nebraska in *Meyer* failed to demonstrate that the mere knowledge of German, or any other foreign language harmed children, Oregon in *Pierce* failed to show that a private school education was inherently harmful to children. In both cases, neither foreign language ability nor a private school education justified Nebraska and Oregon's means, respectively.

Despite constitutionalized parental rights, *Prince v. Massachusetts* demonstrates that states have *some* power to intrude on a parent's ability to direct a minor child or dependent's religious education. At first blush, *Prince* presents "another episode in the conflict between Jehovah's Witnesses and state authority."[217] Sarah Prince and her nine-year-old niece often distributed religious periodicals on the streets of Brockton in exchange for a suggested five-cent donation.[218] The solicitations implicated a Massachusetts labor law that applied to boys under twelve and girls under eighteen.[219] Both Prince and her niece, who was in Prince's legal custody,

209. *Id.* at 403.
210. *See* Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 530 (1925).
211. *Id.* at 531.
212. *See id.* at 531–34.
213. *See id.* at 534.
214. *See id.* at 535.
215. *See id.*
216. *Id.* at 534–35.
217. Prince v. Massachusetts, 321 U.S. 158, 159 (1944).
218. *See id.* at 161.
219. *See id.* at 160–61.

were ordained ministers in their church and described religious duty as their motivation.[220]

Prince squarely lies at the intersection of a parent's religious freedom under the First Amendment and "parental right[s] as secured by the due process clause."[221] *Prince* recognized three competing interests.[222] First, the parent's right to teach the tenets and the practices of a chosen faith.[223] Second, the child's right to observe and "preach the gospel."[224] Third, the state's interest in protecting the child's welfare.[225] On the latter, *Prince* acknowledged the state's duty to safeguard children from abuses and to give children the opportunity to grow into free, independent, and well developed citizens.[226]

Prince did not examine religious childrearing in a vacuum, but delicately balanced those rights with state authority.[227] *Prince* established "that the custody, care and nurture of the child reside first in the parents."[228] *Prince* mandated respect for this "private realm of family life."[229] On the other hand, *Prince* gives reason to question whether an absolute right exists to make religiously motivated medical decisions for minor children and dependents.[230] *Prince* declined to place religious childrearing beyond the reach of state interference when such education puts a child's health and safety at risk.[231] *Prince* hinges on whether Massachusetts sufficiently justified its child labor laws.[232] *Prince* identifies "the crippling effects of child employment" as an appropriate evil to justify the exercise of police power[233] against claims of parental autonomy.[234]

Prince established "psychological or physical injury" as the baseline to distinguish between religious training that was appropriate for children and that which was inappropriate for children.[235] *Prince* prothesized that even "[t]he zealous though lawful exercise" of religious liberty "may and at times does create situations . . . wholly inappropriate for children, especially of tender years, to face."[236] *Prince* pointed out how religious training that is "permissible for adults . . . may not be so for children."[237] *Prince* explained:

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220. *See id.* at 161–64.
221. *Id.* at 164.
222. *See id.*
223. *Id.*
224. *Id.*
225. *Id.* at 165.
226. *Id.*
227. *See id.*
228. *Id.* at 166.
229. *Id.*
230. *See id.*
231. *See id.* at 166–67.
232. *See id.* at 167.
233. *Id.* at 168.
234. *See id.* at 169.
235. *Id.* at 169–70.
236. *Id.*
237. *Id.* at 169.

> The state's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities and matters of employment. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies.[238]

Monopoli theorizes that *Prince* draws a clear line between a parent's right to inculcate children with the parent's religious beliefs and state statutes that protect the physical safety of children.[239] "While the state must yield in the former case, the parent's free exercise must yield in the latter."[240] Merrick describes this tension as the intersection of "divine love" and "the best interest of the child."[241]

Wisconsin v. Yoder[242] affirms the *Prince* psychological or physical harm baseline as the trigger for state authority to protect children.[243] *Yoder* involved Wisconsin's requirement that all children attend school until age sixteen.[244] Members of the Amish religion objected and refused to send their children to any school after eighth grade.[245] Wisconsin charged, convicted, and fined several Amish parents who were in violation of the law.[246] At trial, uncontradicted expert testimony established that in Amish communities, a "life aloof from the world was not merely preferred, but essential to the Amish faith."[247] The Wisconsin Circuit Court affirmed the convictions.[248] The Wisconsin Supreme Court, however, found an infringement of the parent's free exercise rights.[249]

Yoder offers a nuanced reading of the balance between parental rights to religious childrearing and state power to burden that right. Citing *Pierce*, *Yoder* recognizes that states have "a high responsibility" to "educate its citizens."[250] *Yoder* also recognizes that states can "impose reasonable regulations for the control and duration of education."[251] However, *Yoder* explained that:

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

238. *Id.* at 168; *see also id.* at 170 ("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.").
239. *See* Monopoli, *supra* note 25, at 327.
240. *Id.*
241. Merrick, *supra* note 53, at 269.
242. Wisconsin v. Yoder, 406 U.S. 205 (1972).
243. *See id.* at 233–34.
244. *Id.* at 207.
245. *Id.*
246. *Id.* at 208.
247. *Id.* at 209; *see also id.* at 209–13.
248. *Id.* at 213.
249. *See id.*
250. *Id.*
251. *Id.*

> interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.[252]

Yoder further explained that state authority to regulate should sometimes "yield to the right of parents to provide education in a privately-operated system."[253]

Yoder acknowledged how *Prince* cautioned against an absolute right to religious training and indoctrination of children that was free from state intervention.[254] Thus, *Yoder* focused on Wisconsin's interest to promote good citizenship by providing education.[255] Wisconsin argued its interest in compulsory education was "so compelling that even the established religious practices of the Amish must give way."[256] The Court rejected this argument and found that Wisconsin failed to demonstrate a sufficient relationship between its law (compelling public or private school education until age sixteen) and its interest (promoting good citizenship).[257] "[A]n additional one or two years of formal high school for Amish children in place of their long-established program of informal vocational education would do little to serve [Wisconsin's] interests."[258]

Yoder supports recognition of parental autonomy to religious indoctrination of minor children and dependents, but that recognition is qualified. At that time, compulsory education beyond eighth grade was a "relatively recent development" in U.S. history.[259] Moreover, the uncontradicted expert testimony at trial greatly influenced the Court's reasoning.[260] Wisconsin also failed to show whether the lack of public or private school education beyond age sixteen caused members of the Amish community to be anti-education, unproductive, or prone to criminal behavior.[261]

Yoder recognized that in certain situations, a parent's right to childrearing—religious or otherwise—could be subject to state regulation. *Yoder* also retained the *Prince* physical/psychological harm baseline.[262] *Yoder* and *Prince* are distinguishable by the legislation involved. Religious healing exemptions are more analogous to *Prince*, which involved conduct that could legitimately harm a child.[263] The types of harms that religious healing present to children are well documented.[264]

Any reading of *Yoder* to support a parental right to *unfettered* religious childrearing fails to appreciate the delicate "balance between the parents' religious

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252. *Id.* at 214; *see also id.* at 215–19.
253. *Id.* at 213.
254. *See id.*
255. *See id.* at 221.
256. *Id.*
257. *See id.* at 221–29.
258. *Id.* at 222.
259. *Id.* at 226.
260. *See id.* at 222.
261. *See id.* at 222–25.
262. *See id.* at 230.
263. *See id.* at 229–30.
264. *Id.* at 230.

beliefs and the physical and psychological needs of the child."[265] To the extent that proponents can rely on *Yoder*, such reliance cannot occur in vacuity. In Idaho, the child mortality rate among at least one religious healing community averages ten-times the statewide average.[266] In one county alone, unsuccessful religious healing allegedly resulted in three child deaths in a four-month period.[267] Asser and Swan, Fretwell Wilson, Massie, and Merrick have reported other child deaths from curable diseases, illnesses, and injuries that may have resulted after unsuccessful religious healing.[268]

Yoder, *Prince*, *Pierce*, and *Meyer* reveal one-half of the jurisprudential gap that allows for the existence of religious healing exemptions, as none of these cases discuss parental autonomy to make medical decisions on behalf of a minor child or dependent. Because of this gap, exemptions can explicitly fail to address nonconsenting parents, who often "share" substantive due process rights to a child. Instead, exemptions assume a homogenous household of two parents, both of whom are in agreement with the decision to forgo medical care. Many parents have children outside of wedlock.[269] Exemptions are silent on whether unmarried or married parents have to agree to forgo medical attention. In states with an exemption, religious healing parents can potentially ignore or disregard the rights of a nonconsenting parents with primary custody and control of the child.

The number of nonconsenting parents trapped in the substantive due process jurisprudential gap is unknown. The failure of exemptions to account for rights of nonconsenting parents is arguably fatal when one considers *Stanley v. Illinois*,[270] which extended substantive due process rights to unmarried parents.[271] Joan and Peter Stanley lived together intermittently for eighteen years, during which time they had three children.[272] When Joan died, Illinois instituted dependency proceedings.[273] Without declaring Stanley unfit, Illinois declared the children wards of the state.[274] Illinois took custody of the children and placed them with court-appointed guardians.[275] Stanley questioned whether Illinois must show cause before

265. Sana Loue, *Parentally Mandated Religious Healing for Children: A Therapeutic Justice Approach*, 27 J.L. & RELIGION 397, 407 (2012).

266. Lehr, *supra* note 11; *see also* CHILD DEATHS IN IDAHO 2012, *supra* note 11, at 4, 59–60; CHILD DEATHS IN IDAHO 2013, *supra* note 11, at 6, 77–78.

267. Russell, *supra* note 153; *see also* Martin, *supra* note 153.

268. *See* Asser & Swan, *supra* note 159, at 626–27; Massie, *supra* note 53, at 746; Merrick, *supra* note 53, at 274; Wilson, *supra* note 26, at 1383.

269. *See Unmarried Childbearing*, CENTERS FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/nchs/fastats/unmarried-childbearing.htm [https://perma.cc/W6PA-R8Z6] (last updated Mar. 31, 2017).

270. Stanley v. Illinois, 405 U.S. 645 (1972).

271. *See id.* at 658; *see also* Josh Gupta-Kagan, Stanley v. Illinois*'s Untold Story*, 24 WM. & MARY BILL RTS. J. 773, 787 (2016).

272. *Stanley*, 405 U.S. at 645.

273. *Id.*

274. *See id.* at 646–47.

275. *See id.*

denying custody to unwed fathers when the mothers of their children die.[276] Although the Court did not find an equal protection violation based on gender, Illinois' presumption of unfitness applied only to unwed *fathers*.[277] That presumption proved fatal to the extent that it failed to take into account the substantive due process rights of unwed fathers.[278] *Stanley* serves as a viable option for a nonconsenting parent to challenge religious healing exemptions. Parental rights—even constitutionally protected rights—are rarely unfettered and the rights of one parent rarely trump the rights of another. In this respect, *Stanley*'s extension of substantive due process protections to both married and *unmarried* parents should cause religious healing states to rethink their failure to address the rights of nonconsenting parents. *Stanley* found that familial bonds create no distinction between rights of wed or unwed parents.[279] Both categories constitute a warm, enduring, and important family unit.[280] Professor Josh Gupta-Kagan offers a detailed recount of how four members of the 5–2 *Stanley* Court switched their vote from the 1971 conference to the 1972 decision, thereby perhaps changing the outcome of the case.[281] The Justices' movement reveals a narrative about perils of creating classifications of parental rights.[282] Four years prior to *Stanley*, the Court struck down a statute that denied children wrongful death damages based on the marital status of their parents.[283] Incidentally, no equal protection claim based on a gender classification had ever been successful before *Reed v. Reed*,[284] which was argued the same day as *Stanley*.[285]

Putting aside the failure of religious healing states to account for the rights of nonconsenting parents, proponents of religious healing exemptions also invoke the First Amendment's Free Exercise Clause. Next, this Article discusses religious exemption jurisprudence, which demonstrates the limits of free exercise rights as they pertain to neutral and generally applicable criminal laws. This jurisprudence also demonstrates the other half of the jurisprudential gap that allows for the existence of religious healing exemptions.

III. RELIGIOUS EXEMPTIONS AND THE FREE EXERCISE CLAUSE

Professor James DeLise describes the conflict between the free exercise of religious belief and the duty to comply with neutral laws of general applicability as "a conflict that has deep roots in American history, dating back to colonial and pre-

276. *See id.* at 657–58.
277. *See id.* 653–56.
278. *See id.* at 653–58.
279. *See id.* at 651–52.
280. *See id.*
281. *See* Gupta-Kagan, *supra* note 271, at 792–810.
282. *See id.* at 787–90.
283. *See* Levy v. Louisiana, 391 U.S. 68 (1968).
284. Reed v. Reed, 404 U.S. 71 (1971).
285. *See* Gupta-Kagan, *supra* note 271, at 787–88.

constitutional periods."[286] With DeLise's words in mind, this Article now examines whether the First Amendment's Free Exercise Clause requires recognition of religious healing exemptions.[287] This Part discusses *Reynolds v. United States*,[288] *Sherbert v. Verner*,[289] *United States v. Seeger*,[290] and *Employment Division, Department of Human Resources of Oregon v. Smith*,[291] which best exemplify the "ever-changing"[292] nature of this jurisprudence. These cases demonstrate that exemptions are not required in all cases, but only those where a law places a sufficient-enough burden on religious practice. None of these cases concern exemptions for religious healing parents.

Reynolds v. United States ranks as one of the oldest cases on the issue of religious exemptions under the Free Exercise Clause. *Reynolds* involved the 1878 criminal prosecution of George Reynolds[293] for violating a Utah statute that provided, in part:

> Every person having a husband or wife living, who marries another, whether married or single, in a Territory, or other place over which the United States has exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than $500, and by imprisonment for a term of not more than five years.[294]

Reynolds pleaded not guilty to bigamy.[295] At trial, the prosecution offered evidence that Reynolds married Amelia Jane Schofield while still married to Mary Ann Tuddenham.[296] Reynolds's primary defense was that male members of his church were required to have more than one wife.[297] Upon offering proof of his religious duty,[298] Reynolds argued the court should direct the jury to enter a verdict of not guilty.[299]

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286. DeLise, *supra* note 75, at 120.

287. *See* U.S. CONST. amend. I.

288. Reynolds v. United States, 98 U.S. 145 (1878).

289. Sherbert v. Verner, 374 U.S. 398 (1963).

290. United States v. Seeger, 380 U.S. 163 (1965).

291. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

292. Mark Strasser, *Free Exercise and Substantial Burdens Under Federal Law*, 94 NEB. L. REV. 633, 634 (2016).

293. *Reynolds*, 98 U.S. at 146.

294. *Id.*

295. *Id.* at 148.

296. *Id.*

297. *Id.* at 161. Reynolds was "a member of the Church of Jesus Christ of Latter-Day Saints" and "a believer" that "it was the duty of male members of said church, circumstances permitting, to practice polygamy." *Id.* Reynolds described the duty to practice polygamy as being of "divine origin" revealed from "the Almighty God" to Joseph Smith, the founder of the Mormon Church. *Id.* According to Mormon doctrine, the failure to practice polygamy "would be punished" by "damnation in the life to come." *Id.*

298. *See id.* Reynolds allegedly received permission to enter into a polygamous marriage from Daniel Wells, who had authority to perform marriages and in fact performed the marriage between Reynolds and Schofield. *Id.*

299. *See id.* at 161–62.

The Court rejected religious belief as a per se justification for criminality,[300] but also recognized that the First Amendment forbids Congress from prohibiting the free exercise of religion.[301] *Reynolds* acknowledged the historical underpinnings of the Free Exercise Clause, including early colonial attempts to prevent specific religious practices and later colonial attempts to constitutionalize freedom of religious belief and practice.[302] DeLise hypothesizes that, although the Framers of the U.S. Constitution "did not expressly address" First Amendment exemptions in their debates at the 1787 Constitutional Convention, there is no substantial proof that they considered exemptions antithetical to constitutional principles.[303] Professor Mark Strasser points out that when *Reynolds* was decided, all states prohibited polygamy.[304] At that time, the western legal tradition, as well as the tradition of most U.S. states, considered polygamy an odious practice.[305] Ultimately, the Court held that it was within the legitimate scope of government power to determine whether to allow polygamy because marriage was a civil contract regulated by law.[306]

Reynolds is perhaps most notable for defining the line between the Establishment and Free Exercise Clauses: "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[307] In rejecting an absolute right to religious practice, *Reynolds* recognized that citizens should not become a law unto themselves.[308] The Court went further, reasoning that a religious exemption to monogamous marriage would "make the professed doctrines of religious belief superior to the law of the land."[309]

Reynolds touched upon the subject of religious healing exemptions, which at the time were nonexistent in most states. The Court also discussed *Regina v. Wagstaffe*,[310] an 1868 English criminal case involving the prosecution of parents who failed to provide medical care for a sick child. *Reynolds* reflected upon *Wagstaffe* in terms of positive and negative acts.[311] For example, if the child had starved to death because his or her parents refused to provide food, then the *Wagstaffe* parents would have acted positively and been deemed guilty of manslaughter.[312] "[W]hen an offense consists of a positive act which is knowingly done, it would be dangerous to hold that the offender might escape punishment because he religiously believed

300. *See id.* at 162–68.
301. *Id.* at 162.
302. *See id.* at 162–64.
303. DeLise, *supra* note 75, at 121.
304. *See* Strasser, *supra* note 292, at 635.
305. *See Reynolds*, 98 U.S. at 164–65.
306. *Id.* at 165–66.
307. *Id.* at 166.
308. *Id.* at 167.
309. *Id.*
310. Regina v. Wagstaff, 10 Cox's Crim. Cases 531 (1868) (U.K.).
311. *See Reynolds*, 98 U.S. at 167.
312. *See id.*

the law which he had broken ought never to have been made."[313] Arguably, *Reynolds* remains ambiguous on whether the failure to provide care to a sick child constitutes a negative or positive act. Two of many interpretations of the opinion are plausible. First, the *Reynolds* Court believed the *Wagstaffe* jury viewed the parents' failure to provide care as a negative. Second, the *Reynolds* Court itself viewed the *Wagstaffe* parents' failure as a negative.

Strasser theorizes that *Reynolds* demonstrates an original distaste for religious exemptions.[314] Nevertheless, *Reynolds* offers very little guidance on whether the Free Exercise Clause requires an exemption for religious healing parents; neither do subsequent decisions. In *Braunfeld v. Brown*,[315] the Court rejected a challenge to Pennsylvania's Sunday closing laws.[316] The plaintiffs, who were Orthodox Jews, maintained Sunday closing laws economically disadvantaged Saturday Sabbatarians who were already required to close their stores from sundown Friday to sundown Saturday.[317] The Court distinguished between the absolute right to religious belief and the qualified right to religious practice.[318] Incidental burdens on religious practice are tolerable as long as the law does not target or discriminate against religion.[319] *Gallagher v. Crown Kosher Super Market, Inc.*[320] also involved a Jewish individual's challenge to a Sunday closing law.[321] The Court quickly disposed of the free exercise claims in two paragraphs on the theory that *Braunfeld* controlled.[322]

By 1963, *Sherbert v. Verner*[323] became one of few cases to recognize a religious exemption. Adell Sherbert was a Seventh-day Adventist who was discharged because she would not work on Saturday.[324] The South Carolina Employment Compensation Act provided that claimants must be able and available to accept "suitable work when offered."[325] The South Carolina Employment Security Commission found that Sherbert lacked good cause when she refused to accept "suitable work when offered."[326] Sherbert argued South Carolina's unemployment compensation law violated the Free Exercise Clause.[327] The South Carolina

313. *Id.*
314. *See* Strasser, *supra* note 292, at 636.
315. Braunfeld v. Brown, 366 U.S. 599 (1961).
316. *Id.* at 600.
317. *Id.* at 601.
318. *See id.* at 603 (citing *Reynolds*, 98 U.S. at 166).
319. *See id.* at 605–08. The *Braunfeld* Court explained that, because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference, . . . we cannot afford the luxury of deeming presumptively invalid . . . every regulation of conduct" that burdens religious practice. *Id.* at 606.
320. Gallagher v. Crown Kosher Super Mkt. of Mass., Inc., 366 U.S. 617 (1961).
321. *Id.* at 618–19; *see also* Strasser, *supra* note 292, at 641 (citing *Gallagher*, 366 U.S. at 630–31).
322. *See Gallagher*, 366 U.S. at 630–31.
323. Sherbert v. Verner, 374 U.S. 398 (1963).
324. *Id.* at 398–99.
325. *Id.* at 400–01.
326. *Id.* at 401.
327. *Id.*

Supreme Court disagreed[328] and held the law did not prevent Sherbert from exercising her "right and freedom to observe religious beliefs in accordance with the dictates of her conscious."[329]

Sherbert ended the fight to gain recognition of a Saturday Sabbath in accordance with religious belief, which began two years earlier in *Braunfeld*[330] and *Gallagher*.[331] *Sherbert* affirmed the qualified nature of the Free Establishment Clause. Religious practice is not "totally free" from regulation and the government can restrict "certain overt acts promoted by religious beliefs or principles."[332] The question of whether government regulation impermissibly burdened Sherbert's religious belief hinged on two questions: first, whether the failure to grant an exemption for unemployment benefits imposed a burden on Sherbert's free exercise of religion; second, whether such burden can be justified by a "compelling state interest in the regulation of a subject within [South Carolina's] constitutional power to regulate."[333]

DeLise describes *Sherbert* as the first free exercise case to grant "a constitutional right of exemption from neutral laws of general applicability."[334] The *Sherbert* Court found a clear imposition on religious practice.[335] *Sherbert* also makes it clear that freedom of religious practice involves a "highly sensitive constitutional area."[336] "[N]o showing of merely a rational relationship to some colorable state interest would suffice[,]"[337] regardless of whether unemployment compensation benefits constituted a right or a privilege.[338] Because administrative burdens did not underlie South Carolina's refusal to grant an exemption,[339] *Sherbert* could safely turn away from *Braunfeld* and *Gallagher*[340] by distinguishing the magnitude of the administrative burdens in the latter cases as insurmountable.[341]

Sherbert recognizes the government's obligation to remain neutral in the face of religious differences.[342] Perhaps in awareness of previous failures to provide an exemption in accordance to Jewish beliefs in *Braunfeld* and *Gallagher*, the *Sherbert* Court not-so-subtly denies fostering the "establishment of a Seventh-day Adventist religion in South Carolina."[343] *Sherbert* declared the neutrality requirement prohibited states from excluding "Catholics, Lutherans, Mohammedans, Baptists,

328. *Id.*
329. *Id.*
330. Braunfeld v. Brown, 366 U.S. 599, 605–08 (1961).
331. Gallagher v. Crown Kosher Super Mkt. of Mass., Inc., 366 U.S. 617, 618–19 (1961).
332. *Sherbert*, 374 U.S. at 403.
333. *Id.*
334. DeLise, *supra* note 75, at 122.
335. *See Sherbert*, 374 U.S. at 404–06.
336. *Id.* at 406.
337. *Id.*
338. *Id.*
339. *Id.* at 409.
340. *See id.* at 408–09.
341. *See id.*
342. *See id.*
343. *Id.* at 409.

Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation."[344] Sherbert's religious practice did not infringe on any other person's constitutional rights.[345] Nor did Sherbert's beliefs make her an unproductive member of society.[346] Thus, South Carolina could not apply its eligibility provisions in a way that forced "a worker to abandon religious convictions respecting the day of rest."[347]

A trio of conscientious objector cases that began two years after *Sherbert* clarifies the meaning of "religion" for purposes of the First Amendment. [348] After his student classifications expired, Daniel Seeger refused to submit to an induction in the armed forces on the ground that he was "conscientiously opposed to participation in war in any form by reason of his 'religious' belief."[349] Seeger argued for an exemption as a religious objector under section 6(j) of the Universal Military Training and Services Act.[350] Seeger did not specify which sect of religion justified his belief.[351] Seeger did confess to a "'skepticism or disbelief in the existence of God,'" but argued that his uncertainty did "not necessarily mean lack of faith in anything."[352] Seeger preferred to leave to question his belief in a "Supreme Being."[353] However, Seeger did profess a "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed," and cited Plato, Aristotle, and Spinoza as inspiration.[354] Military officials and the district court deemed Seeger ineligible for an exemption because his belief was not "in relation to a Supreme Being."[355] The Southern District of New York convicted Seeger, but the Second Circuit found a due process violation and reversed.[356]

The *Seeger* Court also reviewed two other denials of religious exemptions from military service. The Second Circuit previously overturned Arno Jakobson's conviction.[357] Military officials originally classified Jakobson as a student[358] and denied an exemption when his student classification expired.[359] Unlike Seeger,

344. *Id.* at 410.
345. *Id.* at 409.
346. *See id.* at 410.
347. *Id.*
348. United States v. Seeger, 380 U.S. 163 (1965).
349. *Id.* at 166.
350. *Id.*
351. *See id.*
352. *Id.*
353. *Id.*
354. *Id.* at 166–67.
355. *Id.* at 167.
356. *See id.*
357. *See id.*
358. *Id.*
359. *Id.*

Jakobson based his eligibility on religion.[360] Jakobson confessed "his 'most important religious law' was that 'no man ought ever to willfully sacrifice another man's life as a means to any other end.'"[361] Military officials found Jakobson's belief to be in accord with a personal moral code, not religion.[362] Military officials also refused to classify Forest Britt Peter's belief as religious.[363] Peter believed in "some power of manifest nature which helps man in the ordering of his life in harmony with its demands."[364] Peter cited democratic American culture, western religion, and philosophical traditions as inspiration.[365] Peter hedged on whether he believed in a "Supreme Being" and instead argued that participation in war violated his moral code against taking human life.[366] Peter argued this belief was superior to his obligation to the government.[367]

Seeger extends First Amendment protections to beliefs that do not seem entirely "religious." *Seeger* also demonstrates the Court's struggle to define "religion" for purposes of the First Amendment. After examining the background and previous interpretations of section 6(j), the Court found itself at a crossroad on what statutory definition of "religious belief" Congress intended to adopt.[368] *Seeger* ultimately adopted a statutory construction that embraced an "ever-broadening understanding of modern religious thought."[369] The government must give "great weight" to an objector's claim that a particular belief is an essential part of faith.[370] Moreover, the government cannot question the validity of any belief.[371]

Describing religious belief as "intensely personal,"[372] *Seeger* established a two-part test for whether a particular belief is "religious enough" for purposes of the First Amendment.[373] First, the belief must be sincere and meaningful.[374] Second, the belief must occupy "a place parallel to that filled by the God."[375] This was all

360. *See id.* at 167–68. Jakobson "explained that his religious and social thinking had developed after much meditation and thought. He had concluded that man must be 'partly spiritual' and, therefore, 'partly akin to the Supreme Reality' . . . ." *Id.*

361. *Id.* at 168.

362. *Id.*

363. *Id.* at 169.

364. *Id.* This belief was derived from Reverend John Haynes Holmes's definition of religion. *See id.*

365. *See id.*

366. *Id.*

367. *See id.*

368. *Id.* at 169–79.

369. *Id.* at 180.

370. *Id.* at 184.

371. *Id. See also* United States v. Ballard, 322 U.S. 78, 86 (1944) ("Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others."). Local boards and courts in this sense are not free to reject beliefs because they consider them "incomprehensible." *See id.*

372. *Seeger*, 380 U.S. at 184.

373. *Id.* at 176. A 1940 version of the Universal Military Training and Services Act was the source of *Seeger*'s two-part test to define religion. *See id.*

374. *Id.*

375. *Id.*

the Court found necessary to qualify for an exemption from military service.[376] According to *Seeger*, this construction avoids imputing to "Congress an intent to classify different religious beliefs, exempting some and excluding others."[377] Additionally, it did not appear Congress intended a more restrictive meaning.[378] Ultimately, Seeger, Jakobson, and Peter were entitled to an exemption.[379]

Scholars dispute whether *Seeger* reflects a constitutional interpretation of the term "religion" for purposes of the First Amendment.[380] The second of the trio of religious objector cases, *Welsh v. United States*,[381] interpreted *Seeger* broadly. Elliot Welsh objected to military service for nonreligious reasons.[382] The Court overturned the lower court's denial of a nonreligious exemption,[383] reasoning that the exemption applies to "all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war."[384] As a result, Welsh was entitled to the same exemption as provided in *Seeger*.[385]

The last of the trio of religious objector cases, *Gillette v. United States*,[386] does not answer whether *Seeger* reflects a constitutional interpretation of the term "religion" for purposes of the First Amendment. Having deemed the Vietnam War to be unjust, Guy Gillette refused to participate.[387] The Court rejected Gillette's entitlement to an exemption on the ground that an individual can object to war in general, but not participation in a *particular* war.[388] If nothing else, *Gillette* demonstrates a willingness to construe narrowly the available exemptions for contentious objectors: one can object to participation in all war; but if one is willing to participate, one must do so in every war. What remains unclear is whether *Gillette*'s reasoning rests on the distinction between the absolute right to religious belief and the qualified right to religious practice or whether the *Gillette* Court considered the alleged burden on religious practice as merely incidental.

Many of the post-conscientious objector cases provide little to distinguish legitimate and illegitimate free exercise claims under *Sherbert*. *Thomas v. Review Board*

376. *See id.*
377. *Id.*
378. *See id.* at 177.
379. *See id.* at 185–88.
380. *Compare* Samuel J. Levine, *Rethinking the Supreme Court's Hands-Off Approach to Questions of Religious Practice and Belief*, 25 FORDHAM URB. L.J. 85, 99 (1997) (noting that *Seeger* involves only a statutory interpretation of the term religion), *with* Sherryl E. Michaelson, *Religion and Morality Legislation: A Reexamination of Establishment Clause Analysis*, 59 N.Y.U. L. REV. 301, 353 (1984) (noting that scholars and commentators refer to *Seeger* as more than a statutory interpretation, but also a constitutional interpretation of the term religion).
381. Welsh v. United States, 398 U.S. 333 (1970).
382. *See id.* at 335–37.
383. *Id.* at 344.
384. *See id.* at 344.
385. *Id.* at 335–43.
386. Gillette v. United States, 401 U.S. 437 (1971).
387. *Id.* at 439–41.
388. *See id.* at 443, 447; *see also* Strasser, *supra* note 292, at 641.

of Indiana Employment Security Division[389] granted an exemption to Eddie Thomas, who quit his job producing weapons for conscientious reasons.[390] In *United States v. Lee*,[391] the Court denied an exemption for Amish participation in the social security system.[392] *Tony & Susan Alamo Foundation v. Secretary of Labor*[393] denied an exemption under the Fair Labor Standards Act for an employer who sought to pay employees in food, shelter, clothing, transportation, and medical care instead of wages.[394] In *Bowen v. Roy*,[395] the Court rejected a claim that the assignment of a social security number would hinder spirituality.[396] The Court reasoned the First Amendment did not require the government to further "spiritual development."[397] Finally, both *Texas Monthly, Inc. v. Bullock*[398] and *Jimmy Swaggart Ministries v. Board of Equalization of California*[399] denied claims for an exemption against sales and use taxes.[400]

Employment Division, Department of Human Resources of Oregon v. Smith[401] dramatically changed *Sherbert*'s free exercise landscape by lessening the standard for criminal laws that are neutral and of general applicability. Alfred Smith and Galen Black were members of the Native American Church.[402] Both applied for unemployment compensation benefits after they "were fired from their jobs with a private rehabilitation organization because they ingested peyote for sacramental purposes" at a church ceremony.[403] Oregon prohibited the ingestion of peyote unless prescribed by a medical practitioner.[404] Oregon deemed Smith and Black ineligible for unemployment benefits due to their work-related misconduct.[405]

Smith preserves *Reynolds'* aversion to exemptions for religious practice even though *Smith* involved a law that makes no mention of religion or religious belief.[406] The Oregon Court of Appeals and the Oregon Supreme Court found the misconduct provision inadequately justified and remanded for a determination of the legality of religious use of peyote in Oregon.[407] After finding that Oregon

389. Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707 (1981).
390. *See id.* at 711, 717–19.
391. United States v. Lee, 455 U.S. 252 (1982).
392. *See id.* at 254–61.
393. Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290 (1985).
394. *See id.* at 293, 302–05.
395. Bowen v. Roy, 476 U.S. 693 (1986).
396. *See id.* at 699.
397. *Id.*
398. Tex. Monthly, Inc. v. Bullock, 489 U.S. 1 (1989).
399. Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378 (1990).
400. *See id.* at 384, 391; *Tex. Monthly*, 489 U.S. at 17–20.
401. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2012)).
402. *Id.* at 874.
403. *Id.*
404. *Id.*
405. *See id.*
406. *See id.*
407. *Id.* at 875–76.

"makes no exception for the sacramental use" of peyote, the Oregon Supreme Court again struck down the statute as a violation of the Free Exercise Clause.[408]

Smith makes clear that governments cannot prefer a particular religious belief or practice.[409] *Smith* did not completely abandon, but rather limits *Sherbert* to the employment compensation context.[410] "[T]he government's ability to enforce generally applicable prohibitions of socially harmful conduct . . . 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'"[411] *Smith* does not designate any alternative level of scrutiny, but the Court's abandonment of heightened scrutiny seems to imply the application of a rational basis-like review for criminal laws that are neutral and of general applicability.

Reynolds, *Sherbert*, *Seeger*, and *Smith* demonstrate a free exercise jurisprudential gap that allows for the existence of religious healing exemptions. The free exercise jurisprudential gap also gives reason to doubt the *necessity* for an exemption when a parent's religious practice causes physical or psychological harm to minor children or dependents.[412] *Smith* rejected the view that the First Amendment prohibits forcing individuals "to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires)."[413] *Smith* points to more than a century of free exercise jurisprudence to cast doubt on whether "an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate."[414] Put another way, "[c]onscientious scruples have not . . . relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs."[415]

Religious healing exemptions involve conduct that would otherwise be classified as criminal and thus more analogous to *Smith*, which demoted *Sherbert*'s compelling interest standard for neutral and generally applicable criminal laws. *Smith* also reiterated the defining line between religious belief and practice recognized in *Reynolds*.[416] DeLise points to a major distinction between *Sherbert* and *Smith*—particularly that between exemptions for legal versus illegal behavior.[417] DeLise also discusses how religious healing exemptions implicate another important aspect of free exercise jurisprudence—the inability of the government to favor or disfavor religious practices.

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408. *Id.* at 876 (quoting Smith v. Emp't Div., 763 P.2d 146, 148 (1988)).

409. *See id.* at 877.

410. *Id.* at 883.

411. *Id.* at 885 (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988)).

412. *See id.* at 882–83.

413. *Id.* at 878.

414. *Id.* at 878–79.

415. *Id.* at 879 (quoting Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 594 (1940), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)).

416. *See id.* at 877–78.

417. *See* DeLise, *supra* note 75, at 125.

The free exercise jurisprudential gap also allows for arguably inadequate regulation of religious healing. While many states allow judicial interference in religious healing cases involving a child,[418] states also require courts to take into account the preference for religious healing.[419] In rural states like Idaho, religious healing communities are often located in remote or isolated areas that contain few nonreligious healers.[420] State authorities may be unaware of a child's illness. Even when state officials are aware, circumstances complicate investigations of a religious healing death. In Idaho, the decision to prosecute implicates other stakeholders like Sheriff Donahue in Canyon County, who has described the difficulties he faces when investigating child deaths in religious healing communities.[421] Those difficulties can prevent a determination of whether the exemption applies. Thus, either through negligence or by design, exemptions offer less protection for the lives of children in religious healing homes.

The free exercise jurisprudential gap allows religious healing states to ignore the child's "constitutional rights to the protection of their lives and to their own free exercise values."[422] This gap also blurs the line between a state's infringement on parental rights and a state's constitutional exercise of its *parens patriae* authority to protect children. Vulnerable children are trapped in the free exercise jurisprudential gap in the same way that nonconsenting parents are trapped in the substantive due process jurisprudential gap.

The free exercise jurisprudential gap that allows for religious healing exemptions also exposes an inconsistency in some states' approach to protecting life altogether. Starvation and malnourishment of children are commonly prosecuted.[423] In one Idaho county alone, religious healing is suspected to have caused three child deaths in four months.[424] County prosecutors have filed no charges related to those incidents.[425]

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418. *See* Wilson & Sanders, *supra* note 26.

419. *See id.*

420. *See id.*

421. *See id.*; *see also* Duara, *supra* note 14; Wolf, *supra* note 14.

422. Massie, *supra* note 53, at 770.

423. *See* Marwa Eltagouri, *Parents Charged with Murder for Starving 6-Year-Old as Punishment, Police Say*, WASH. POST, Nov. 7, 2017, https://www.washingtonpost.com/news/true-crime/wp/2017/11/07/parents-charged-with-murder-for-starving-6-year-old-as-punishment-police-say/?utm_term=.3365d8f2458f; Tara Fowler, *Pennsylvania Parents Accused of Starving Their Nine-Year-Old Son to Death Pled Guilty to Murder*, PEOPLE (Oct. 26, 2015), http://people.com/crime/parents-accused-of-starving-their-9-year-old-son-to-death-plead-guilty-to-murder/ [https://perma.cc/9TKU-FF3R]; Taylor Rios, *Parents and Grandmother Allegedly Starved Nine-Year-Old to Death, All Three Charged with Murder in Hawaii*, INQUISITR (Jul. 16, 2017), https://www.inquisitr.com/4372303/parents-and-grandmother-allegedly-starved-9-year-old-to-death-all-three-charged-with-murder-in-hawaii/ [https://perma.cc/K5TB-X3YM]; Ashley Shook, *9-Year-Old Starved to Death*, WWLP.COM (Feb. 23, 2017, 1:49 PM), http://wwlp.com/2017/02/23/9-year-old-starved-to-death [https://web.archive.org/web/20170228011906/http://wwlp.com/2017/02/23/9-year-old-starved-to-death].

424. *See* Russell, *supra* note 19; *see also* Duara, *supra* note 14.

425. *See* Duara, *supra* note 14.

The inconsistency of some states' approach to protecting life extends to state regulations that apply before and after birth. *Planned Parenthood of Southeastern Pennsylvania v. Casey* identified the moment of conception as the start of the state's compelling interest to protect children.[426] In furtherance of their interest to protect life before birth, some religious healing states have imposed a multitude of regulations aimed toward those who seek to terminate a pregnancy—a right that, unlike religious healing, has been deemed constitutionally fundamental.[427] Evasive and often unnecessary medical procedures serve to provide potential parents with information about unborn life. Waiting periods of up to seventy-two hours force potential parents to postpone procedures in order to "reflect" upon the decision to terminate a pregnancy. Avoidance of fetal pain justified attempts to close the window for legal procedures. In *Whole Woman's Health v. Hellersteadt*, the Court recently struck down unduly burdensome credentialing requirements and regulations for facilities that supposedly ensured the health and safety of patients.[428]

The free exercise jurisprudential gap allows states to decline to impose regulations to direct the behavior of religious healing parents while at the same time heavily regulate parents who seek to terminate a pregnancy. Exemptions do not require religious healing parents to consult a doctor or obtain any information about their child's health. Further, no exemption forces a religious healing parent to wait and reflect upon their decision. No exemption imposes a waiting period that delays the exercise of the choice to pursue religious healing. Nor do exemptions regulate religious healing practitioners and their facilities.

An analysis of the disparity between religious healing parents and parents who terminate a pregnancy may cause discomfort, but such discomfort may be a natural result of jurisprudential gaps. In many religious healing states, the unborn receives more protection than some who are born because exemptions provide a broader scope of parental autonomy than both substantive due process and free exercise jurisprudence require. Vulnerable children and nonconsenting parents remain trapped in jurisprudential gaps either through negligence or by design. As a result, in some states' religious belief may ultimately trigger the state's exercise of its own authority.

CONCLUSION

Cruzan v. Director, Missouri Department of Health recognizes that adults and emancipated minors have the right to refuse medical treatment.[429] The question remains whether parents have the right to exercise that choice on behalf of their minor children and dependents. This Article brings together free exercise jurisprudence and parental rights jurisprudence and places both in the context of religious healing exemptions. In doing so, this Article demonstrates how religious

426. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).
427. *See* Roe v. Wade, 410 U.S. 113 (1973).
428. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).
429. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990).

healing lies at intersection of substantive due process and the Free Exercise Clause. This understanding of the interplay between free exercise and substantive due process jurisprudence is necessary to any thoughtful consideration of religious healing exemptions. This Article also examines the jurisprudential gaps between both bodies of case law and reveals how nonconsenting parents and vulnerable children remain trapped in those gaps.