C. MEDICAL TREATMENT

Many people have visceral apprehensions about, and ideological aversions to, various conventional forms of medical treatment or the medical profession in general or its view of human illness. Some of these apprehensions and aversions are derived from or expressed through religion, bringing them within the scope of the religion clauses of the First Amendment. Typical of religious misgivings about physical medicine are the teachings of Mary Baker Eddy, founder of Christian Science. She taught, and her followers believe, that the modern preoccupation with sickness and death—even for the ostensible purpose of cure and prevention— is Error, in the sense that it debilitates and distracts the person from the fulfillment of health and life.

In what follows, some of the cases involve objections to vaccination or inoculation to immunize against contagious diseases, some, blood transfusions thought to be necessary to save life in various conditions, and some, more generalized objections to other therapies. Some of the earlier cases do not claim a religious basis (perhaps because the religion clauses were not applicable to state and local actions at that time), but they form the basis of later law and are thus essential to examine in their chronological sequence.

1. General

a. *People v. Pierson* (1903). One of the earliest cases of this kind was decided by the New York Court of Appeals in 1903. J. Luther Pierson and his wife lived in Valhalla, N.Y.; they adopted a baby girl, who at 16 months of age contracted whooping cough, which hung on for several weeks and then developed into pneumonia, from which she died on February 23, 1901. The parents did not call a physician to treat her, even though they recognized the symptoms toward the end to indicate a dangerous condition. Their reason was a belief in Divine healing that was taught by the Christian Catholic Church of Chicago to which they belonged. The father testified that "he did not believe in physicians, and his religious faith led him to believe that the child would get well by prayer. He believed in disease, but believed that religion was a cure of disease."

Pierson was convicted of the misdemeanor of failing to provide medical care for a dependent minor, but his conviction was reversed by the Appellate Division. The Court of Appeals reversed the intermediate court and reinstated the conviction, upholding the charge to the jury that "if at the time he refused to call a physician, he knew the child to be dangerously ill, his belief constitutes no defense to the charge made. In other words, no man can be permitted to set up his religious belief as a defense to the commission of an act which is in plain violation of the law of the state."

In evaluating the defendant's claims, the court, in an opinion by Justice Albert Haight, reviewed the struggle between Christianity and medical science:

> After the adoption of Christianity by Rome, and the conversion of the greater part of Europe, there commenced a growth of legends of miracles connected with the lives of great men who became benefactors of humanity. Some of these have been canonized by the church, and are to-day looked upon by a large portion of the Christian world as saints who had miraculous power. The great majority of miracles recorded had reference to the healing of the sick through Divine intervention, and so extensively was this belief rooted in the minds of the people that for a thousand years or more it was considered dishonorable to practice physic or surgery. At the Lateran Council of the Church, held at the beginning of the thirteenth century, physicians were forbidden, under pain of expulsion from the church, to undertake medical treatment without calling in a priest; and as late as 250 years thereafter Pope Pius V renewed the command of Pope Innocent by enforcing the penalties. The curing by miracles, or by interposition of Divine power, continued throughout Christian Europe during the entire period of the Middle Ages, and was the mode of treating sickness recognized by the church. This power to heal was not confined to the Catholics alone, but was also in later years invoked by Protestants and by rulers. We are told that Henry VIII, Queen Elizabeth, the Stuarts, James I and Charles I, all possessed the power to cure epilepsy, scrofula, and other diseases known as the "king's evil"; and there is incontrovertible evidence that Charles II, the most thorough debauchee who ever sat on the English throne, possessed this remarkable gift in a marked degree, and that for the purpose of effecting cures he touched nearly a hundred thousand persons.
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> With the commencement of the eighteenth century a number of important discoveries were made in medicine and surgery, which effected a great change in public sentiment, and these have been followed by numerous discoveries of specifics in drugs and compounds. These discoveries have resulted in the establishment of schools for experiments and colleges throughout the civilized world for the special education of those who have chosen the practice of medicine for their profession. These schools and colleges have gone a long way in establishing medicine as a science, and such it has come to be recognized in the law of our land.... [T]he practice...of engaging physicians has continued to increase, until it has come to be regarded as a duty devolving upon persons having the care of others to call upon medical assistance in case of serious illness....[1]

Thus the court recorded its understanding of the change in professional attendings upon the ill. No longer was it obligatory to call a priest, but now it had become obligatory to call a medical practitioner, and a state-licensed one at that. The church-state issue, however, was not the shift of public patronage to the "doctor" and away from the clergy, but what should be viewed as legally obligatory provision of healthcare in cases of serious illness in which the persons involved were actuated by religious beliefs that did not entertain high confidence in the propriety or efficacy

1. *People v. Pierson*, 68 N.E. 243 (1903).

of conventional medical ministrations. This was not just a pragmatic consideration. Medical science may have its successes—and its failures—but so does faithhealing. And in many instances, the religious conviction did not turn on the recovery of physical well-being or the avoidance of death but in obedience to the divine will, whether one lived a little longer or not. Of course, one is freer to impose that view upon oneself than on one's minor children. To that issue the court turned, basing its consideration on the protections of religious practice in the New York Constitution (since the religion clauses of the federal First Amendment were not then considered applicable to the states).

> The remaining question...is [whether the conviction violates the state constitution] which provides that "the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind.... but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of this state." The peace and safety of the state involve the protection of the lives and health of its children as well as the obedience of its laws. Full and free enjoyment of religious profession and worship is guarantied, but acts which are not worship are not. A person cannot, under the guise of religious belief, practice polygamy, and still be protected from our statutes constituting the crime of bigamy. He cannot, under the belief or profession of belief that he should be relieved from the care of children, be excused from punishment for slaying those that have been born to him. Children, when born into the world, are utterly helpless, having neither the power to care for, protect, or maintain themselves.... But the law of nature, as well as the common law, devolves upon the parents the duty of caring for their young in sickness and in health, and of doing whatever may be necessary for their care, maintenance, and preservation, including medical attendance, if necessary; and an omission to do this is a public wrong, which the state, under its police powers, may prevent....
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> We are aware that there are people who believe that the Divine power may be invoked to heal the sick, and that faith is all that is required.... But sitting as a court of law for the purpose of construing and determining the meaning of statutes, we have nothing to do with these variances in religious beliefs, and have no power to determine which is correct. We place no limitations upon the power of the mind over the body, the power of faith to dispel disease, or the power of the Supreme Being to heal the sick. We merely declare the law as given us by the legislature. We have considered the legal proposition raised by the record, and have found no error on the part of the trial court that called for a reversal.[2]

Five justices agreed (and the seventh justice was not voting). Justice E. M. Cullen wrote:

> I concur in the opinion of Judge Haight. The state, as parens patriae, is authorized to legislate for the protection of children. As to an adult (except

2. Ibid.

> possibly in the case of a contagious disease which would affect the health of others), I think there is no power to prescribe what medical treatment he shall receive, and that he is entitled to follow his own election, whether that election be dictated by religious belief or other consideration.

Thus he raised three issues that will recur in the ensuing cases: (1) the choice by *adults* of medical care, (2) the danger of contagious disease, and (3) the nonreligious basis of some objections.

With reference to objections to medical treatment in general, for religious reasons, another case will be mentioned here before proceeding to the more specific question of vaccination and immunization. Other general cases will be mentioned at the end.

b. *Mitchell v. Davis* (1947). In 1947, an appellate court in Texas upheld the award of custody of a minor child to the juvenile officer of Dallas County because of neglect, consisting in the refusal of a widow to obtain medical care for her twelve-year-old son who was suffering from increasing disability attributed to arthritis or other complications following rheumatic fever. The mother objected to "orthodox medical treatment" in favor of "home remedies and prayer" because of "religious belief in the fact of Divine Healing and her absolute faith in the power of religion to overcome all physical ailments and disease."

> It is well settled that "opposition to medical treatment because of religious belief does not constitute a defense to a prosecution for breach of a statutory duty to furnish a child with such treatment. Conscientious obedience to what the individual may consider a higher power or authority must yield to the law of the land where duties of this character are involved, and since wicked intent is not an essential element of the crime, peculiarities of belief as to the proper form of treatment, however honestly entertained, are not necessarily a lawful excuse."[3]

This dismissive treatment was normal in the case law with respect to conscientious objection to medical treatment until a much later period, as will be seen below.

2. Vaccination and Inoculation

A significant body of lower-court case law has developed around the question of a particular form of medical treatment, the vaccination or immunization of persons not at the time suffering illness and often not in the presence of an immediately threatening contagion. This problem usually arose with respect to children denied admittance to public school because of failure to comply with public health requirements of vaccination or immunization.

At the turn of the century, vaccination was widely viewed as an effective and necessary protection against the scourge of smallpox. Since its discovery—or at least its systematic exploration and announcement—by Edward Jenner at the end of the eighteenth century and its increasingly widespread application, the incidence of smallpox had been drastically reduced.

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3. *Mitchell v. Davis*, 205 S.W.2d 812 (1947), quoting 39 Am.Jur.Sec. 115, p. 781. Quotations in the paragraph preceding this excerpt are the court's characterizations.

a. *Viemeister v. White* (1904). The New York Court of Appeals, in the year after *Pierson*, confronted a similar medical-care case involving vaccination. Edmund C. Viemeister sought a court order requiring the Board of Education of Queens County to admit his ten-year- old son to public school without his having been vaccinated as required by the public health law of the state. The writ was denied in the lower courts, and the state's highest court also denied it, using language that was soon to be quoted by the U.S. Supreme Court in the case treated next below.

The Viemeisters did not offer any religious beliefs as reason for the objection to vaccination, but relied on secular arguments to the effect that "vaccination does not tend to prevent smallpox, but tends to bring about other diseases, and that it does much harm, with no good."[4]

b. *Jacobson v. Massachusetts* (1905). In 1902, the Board of Health of Cambridge, Massachusetts, required all citizens to be vaccinated or revaccinated against smallpox. One citizen failed to do so and was brought up on a criminal complaint. The defendant, Jacobson, pleaded not guilty and made a series of offers of proof to the effect that vaccination was ineffective, unnecessary and a threat to health, and that "he had suffered seriously from previous vaccination, thus indicating that his system was sensitive to the poison of vaccination virus." There was no indication that he based his objection on conscience or religious belief, which was not surprising, since the religion clauses of the federal First Amendment were not then viewed as applicable to the states. This was, therefore, not a "church-state" case, but has been cited as justification for subsequent cases that are, so it deserves at least passing attention to understand those that follow.

At the time the case arose, thirty-four states had no compulsory vaccination laws, while eleven did, and thirteen excluded unvaccinated children from public schools. Jacobson's counsel observed that "The States which make no provision for vaccination are not any more afflicted with smallpox than those which compel vaccination."

The trial court ruled that the facts offered to be proved by Jacobson would be immaterial even if proven, and the jury found him guilty. His conviction was confirmed by the Supreme Judicial Court of Massachusetts. The U.S. Supreme Court ruled in an opinion delivered by Justice John Marshall Harlan (the elder).

> The authority of the State to enact this statute is to be referred to what is commonly called the police power—a power which the State did not surrender when becoming a member of the Union under the Constitution.... According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and public safety....
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> We come, then, to inquire whether any right given, or secured by the Constitution, is invaded by the statute.... The defendant insists that his liberty is invaded when the State subjects him to fine or imprisonment for neglecting or refusing to submit to vaccination; that a compulsory

4. *Viemeister v. White*, 71 N.E. 97 (1904).

> vaccination law is unreasonable, arbitrary and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best; and that the execution of such a law against one who objects to vaccination...is nothing short of an assault upon his person. But the liberty secured by the Constitution...does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members....
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> It is to be observed that when the regulation in question was adopted, smallpox...was prevalent to some extent in the city of Cambridge and the disease was increasing.... [T]he court would usurp the functions of another branch of government if it adjudged, as matter of law, that the mode adopted...to protect the people at large, was arbitrary and not justified by the necessities of the case.
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> [Defendant's] offers [of proof] in the main seem to have had no purpose except to state the general theory of those of the medical profession who attach little or no value to vaccination as a means of preventing the spread of smallpox or who think that vaccination causes other diseases of the body. What everybody knows the court must know, and therefore the state court judicially knew, as this court knows, that an opposite theory accords with the common belief and is maintained by high medical authority. We must assume that when the statute in question was passed, the legislature of Massachusetts was not unaware of these opposing theories, and was compelled, of necessity, to choose between them. It was not compelled to commit a matter involving the public health and safety to the final decision of a court or jury. It is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease. That was for the legislative department to determine.... The state legislature proceeded upon the theory which recognized vaccination as at least an effective if not the best known way in which to meet and suppress the evils of a smallpox epidemic that imperilled an entire population....
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> Whatever may be thought of the expediency of this statute, it cannot be affirmed to be...in palpable conflict with the constitution. Nor...can anyone confidently assert that the means prescribed by the State to that end has no real or substantial relation to the protection of the public health and the public safety. Such an assertion would not be consistent with the experience of this and other countries whose authorities have dealt with the disease of smallpox.

(The court attached a footnote over two pages long reporting the extent of the use of vaccination and the effectiveness attributed to it. Then it quoted at length from an opinion, just issued, of the highest court of New York on the same question.)

> "It must be conceded that some laymen, both learned and unlearned, and some physicians of great skill and repute, do not believe that

> vaccination is a preventive of smallpox. The common belief, however, is that it has a decided tendency to prevent the spread of this fearful disease and to render it less dangerous to those who contract it. While not accepted by all, it is accepted by the mass of the people, as well as by most members of the medical profession....
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> "The fact that the belief is not universal is not controlling, for there is scarcely any belief that is accepted by everyone. The possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive; for the legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases. In a free country, where government is by the people, through their chosen representatives, practical legislation admits of no other standard of action; for what the people believe is for the common welfare must be accepted as tending to promote the common welfare, whether it does in fact or not.... [W]e take judicial notice of the fact that this is the common belief of the people of the State, and with this fact as a foundation we hold that the statute in question is a health law, enacted in a reasonable and proper exercise of the police power."[5]
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> We are not prepared to hold that a minority, residing or remaining in any city or town where smallpox is prevalent, and enjoying the general protection afforded by an organized local government, may thus defy the will of its constituted authorities....
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> The judgment of the court below must be affirmed.[6]

Justices David Brewer and Rufus Peckham dissented but offered no written opinions.

c. *Zucht v. King* (1922). Scarcely two decades later, the same issue came before the U.S. Supreme Court from Texas, where an ordinance of the city of San Antonio provided that no child could attend school without having been vaccinated. One Rosalyn Zucht was excluded from public and from a private school for that reason, and suit was brought on her behalf to compel her admission to school. The case reached the Supreme Court on the limited ground that the statute in question was invalid. The court ruled in an opinion delivered by Justice Brandeis.

> Long before this suit was instituted, *Jacobson v. Massachusetts*...had settled that it is within the police power of a State to provide for compulsory vaccination.... [T]hese ordinances confer not arbitrary power, but only that broad discretion required for the protection of the public health.[7]

Again, there was no claim of conscience or violation of Free Exercise adduced, and, in fact, the Supreme Court has not addressed itself as yet to any such claim with respect to vaccination or other form of required immunization, though lower courts have.

• *Sadlock v. Carlstadt*, 58 A.2d 218 (1948) (vaccination can be required as a

5. Quoting *Viemeister v White*, *supra*.

6. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

7. *Zucht, by her Next Friend v. King*, 260 U.S. 174 (1922).

condition of attending school, cf. *Jacobson* and *Zucht*, and claims of personal liberty and religious freedom do not nullify the police power to protect the general welfare).

• *Mountain Lakes v. Maas*, 152 A.2d 394 (1959) (Christian Science objection to required immunization cannot prevail against the considered judgment of the school board; objector was not the parent or guardian of the children in question anyway, only a foster mother).

• *Cude v. Arkansas*, 377 S.W.2d 816 (1964) (refusal to have children vaccinated was adequate grounds for giving state agency custody of them for purposes of vaccination; parents' refusal to take them back again justified placing them in foster homes). One judge dissented on the ground that the only penalty for the "crime" at issue—truancy—was a fine of ten dollars:

> This penalty has been administered against appellants not because they have refused to comply with the compulsory attendance law but because they have refused to comply with an administrative regulation which resulted in the school authorities prohibiting their children's attendance.... I have found no way to escape the conclusion that the...court...[is] enlarging the penalty for failure to comply with the compulsory attendance law to an extent never dreamed of by the proper law making body. In the absence of legislation to the contrary, I as a judge am not willing now or ever to say as a matter of law that the failure to comply with this one simple regulation of school administrative authorities constitutes such neglect of children so as to warrant the state administering the cruel and unusual punishment of depriving such children of their natural parents and depriving the natural parents of their children....
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> In my view, one of the foreseeable spectres is the unfettered interference by the State Welfare Department in areas where it has no legal standing whatsoever. In its apparent zeal to protect the immuned from the unimmuned I believe the majority has given meaning to the word *neglect* which no amount of rationalization can justify. This is the door that has been left open. History reveals that once a door is open to an administrative agency that door is not easily closed. Whose children under what pretext will be taken next? Will they be kept forever?

• *In re Elwell*, 284 N.Y.Supp.2d 924 (1967) (objection by Methodist chiropractor to immunization of his children did not qualify for statutory exemption because parents were not "bona fide members of a recognized religious organization whose teachings are contrary to the practices herein required").

• *McCartney v. Austin*, 293 N.Y.S.2d 188 (1968) (objection by a Roman Catholic to compulsory innoculation against polio of his son and to the statutory exemption quoted in preceding case that represented a preference of some religious bodies over others both rejected).

d. *Maier v. Besser* (1972). Another case involving the same New York statute reached a somewhat more congenial conclusion and represented the first break in the judicial "stonewall" against religious objections to immunizations. William Maier claimed exemption from the immunization requirement for his three school-age

children. He averred that "the religious beliefs of himself and his children...`are basically similar to those held by Christian Scientists,'" but admitted that he and they were not members of that church. "He maintains that it is an unconstitutional infringement upon his rights to force them to join an organized religious body in order to practice their religious beliefs without governmental interference." The court cited the precedents—*Jacobson, Zucht, Sadlock, Maas, Viemeister, Elwell* and others—for the principle that the state could require immunizations without exempting religious objectors.

> Nonetheless, the Legislature saw fit not to force immunization and vaccination upon persons where it was contrary to their sincerely followed religious beliefs.... It was obviously not the intent of the Legislature to force individuals to join a religious organization in order to practice their religious tenets freely, but rather to prevent individuals from avoiding this health requirement enacted for the general welfare of society, merely because they oppose such medical procedures on the basis of personal moral scruples or by reason of unsupported personal fears.
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> Clearly, the child of a parent who is a bona fide Christian Scientist may be enrolled and received into school under the statutory exemption. To deny the exemption to a child whose parent conscientiously and honestly believes and practices the teachings and tenets of the Christian Science faith, notwithstanding lack of formal membership in the Church, would require a holding that the exemption provision of the statute is unconstitutional. This, the court is reluctant to do....
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> There does not appear to be any rational basis or legitimate purpose in requiring a person to be a registered member of an organized church as opposed to one who can prove that he genuinely practices and lives his religious tenets in order to qualify for this religious exemption.... In fact, the latter could be more sincerely a proponent of a religious faith than the former. Mere church membership or attendance does not guarantee the everyday practice of such religious beliefs. Thus, if the Legislature desires to exempt for religious grounds a certain class of persons, it must do so on a logical and nondisciminatory basis....
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> This court holds that if plaintiff can prove at the trial [on remand] that he has a genuine and sincere religious belief which he actively practices and follows and which is in reality substantially similar to the Christian Science faith, as he alleges, he will qualify for the exemption.[8]

Where 99 percent of the population does not object to immunization, allowing 1 percent—or 5 percent—to be excused from that requirement is not going to precipitate an epidemic *when everyone else is immune*. Inoculations and vaccinations are invasions of one's body, and some (few) people may feel too great a visceral repugnance to be passive or acquiescent about it, and the state can surely achieve its basic objective without coercing them. Of course, if there is a genuine danger of

8. *Maier v. Besser*, 341 NYS 2d 411 (1972).

uncontrolled contagion, the state's responsibility to protect public health and safety must prevail. But the courts should scrutinize the state's claims to determine if the danger is genuine rather than suppositious.[9]

3. Blood Transfusions

Another gross invasion of the body is the transfusion of blood, which most people accepted with equanimity or even enthusiasm (at least until pollution of blood supplies with the HIV virus that causes AIDS became a problem), but a few people find intensely objectionable. The only religious group making this a major theological issue was Jehovah's Witnesses, which considered transfusing blood to be forbidden by the precepts of Old Testament and New. Blood figured prominently in the Judeo-Christian tradition and represented the soul or life of man or animal. Neither Israelites nor resident aliens were to eat [animal] blood under any circumstances (Leviticus 17:10), since it was sacred and was to be spilled only by the priest in ritual sacrifice.

> The blood...is identified with the life. The eating of raw flesh and the drinking of the blood of the victim is common enough in primitive religious practice. Underlying it would seem to be the idea that the man who eats takes unto himself the life, the power, the virtue of the animal slain. Every such practice was forbidden to Israel. The blood or the life might only be used as the means whereby man came into touch with God. When the life of the victim, with which by desire and prayer the offerer has identified himself, is dashed against the altar and thus brought into contact with the Lord, "at-one-ment" between worshipper and deity is both symbolized and effected. It is interesting that one of the few "food laws" which were to be imposed upon Gentile Christians [in the New Testament] according to the Council of Jerusalem was that they abstain from "blood"....[10]

The command against "eating" blood was understood by Jehovah's Witnesses to include any kind of incorporation or ingestion of blood, and therefore they applied this blood taboo to transfusions. This abnegation has caused extensive turmoil in medical circles whenever "sound medical practice" determined that blood transfusion was "indicated" or "required" and the patient was a Jehovah's Witness who refused to accede to the wisdom of the physician. Forthwith a court would be besought to order the patient to permit the transfusion in order to save the patient's life, whether the patient wanted to be saved at that price or not. Or, where a patient was unconscious or incompetent, or where a minor child, infant, or fetus was in jeopardy, the court would be asked to override the religious objections of the spouse or parent(s). This sort of action generated a rash of case law, only a limited and representative selection of which can be treated here.

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9. Further discussion of church-state aspects of healthcare can be found at IID2.

10. *The Interpreter's Bible* (New York: Abingdon Press, 1953), II, pp. 90-91, citing Acts 19:20, 29, 21:25.

a. *Wallace v. Labrenz* (1952). One of the earliest hospital cases to figure in the citations arose in Illinois and was decided by the supreme court of that state in 1952. A baby eight days old was afflicted with Rh blood condition, in which antibodies in the blood destroy the red blood corpuscles. The only known remedy was to replace the child's entire blood supply by transfusion. This the parents refused to permit because of their religious beliefs.

"Rhoda Labrenz, the mother, testified that `we believe it would be breaking God's commandment..., also destroying the baby's life for the future, not only this life, in case the baby should die and breaks the commandment, not only destroys our chances but also the baby's chances for future life. We feel it is more important than this life."[11]

The court appointed the chief probation officer as guardian of the baby, and he gave consent for the transfusion, after which the child recovered. The parents sought a writ of error against the court that had temporarily taken the child from them, contending that the child was not "neglected," as required by the statute, and that if the statue allowed such transfer of custody it deprived the parents of freedom to practice their religion.

> [T]he parents' objection [is based on] their belief that blood transfusions are forbidden by the Scriptures. Because the governing principles are well settled, this argument requires no extensive discussion. Concededly, freedom of religion and the right of parents to the care and training of their children are to be accorded the highest possible respect in our basic scheme.... But "neither rights of religion or rights of parenthood are beyond limitation." *Prince v. Massachusetts*[12]

The opinion did not identify the religion of the parents, but references to the magazine, *Awake*, a publication of the Watchtower Bible and Tract Society, indicated that they were probably Jehovah's Witnesses. The mother's testimony made vivid the plight of parents who believe that they are protecting, not just the present health or well-being of the child, but its immortal soul and its hope of eternal life. Other cases demonstrated how other Jehovah's Witnesses dealt with the question of obeying the commandments of Jehovah.

• *Morrison v. Missouri*, 252 S.W.2d 97 (1952) (parent's religious objection to blood transfusion deemed necessary to save the life of an infant with Rh blood defect did not prevent the state from taking custody of the infant and performing the transfusion, since parent, who might refuse transfusion in his own case, "may not prevent *another* person, a citizen of our country, from receiving medical attention necessary to preserve her life").

• *Hoener v. Bertinato*, 171 A.2d 141 (1961) (court orders transfusion administered to objecting mother in order to save the life of her as-yet-unborn child, whose older sibling had died of Rh negative blood condition).

• *New Jersey v. Perricone*, 181 A.2d 751 (1962) (court orders transfusion to save

11. *People ex rel. Wallace v. Labrenz*, 104 N.E.2d 769 (1952).

12. Ibid., quoting *Prince*, 321 U.S. 158 (1944), discussed at IIA2l.

the life of a "blue baby"—one with a heart defect preventing circulation of oxygen to the extremities—but the child died anyway; court order upheld on appeal).

b. *In re Clark* (1962). A case came to the juvenile court in Toledo, Ohio, involving a three-year-old boy who had suffered second and third degree burns over 40 percent of his body and who was said by the attending physicians to be in need of a blood transfusion, which was refused by the parents, who were Jehovah's Witnesses. The juvenile court issued an order authorizing the hospital to administer the transfusion. The parents moved to vacate the order, and the court appointed counsel to represent the child's interests, since it felt they might not be adequately represented by the parents. The surgeon having custody postponed giving a transfusion for nearly a week out of consideration for the parents' wishes, but then felt he could wait no longer. The transfusion was administered, and the child's condition improved.

In their motion to vacate the judgment, the parents claimed that the statute violated their right to due process of law. This stimulated a disquisition that suggested a certain potential disdain for parents on the part of some juvenile court judges.

> The complaint that the parents were deprived of "due process" can only mean that they were deprived of life, liberty or property without due process. This imports an unpleasant consideration, to say the least.
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> There was no syllable of suggestion, much less evidence, that they were deprived of their life or of their liberty. This leaves only their property. What the parents were deprived of was their *claimed* right to deny their child certain treatment which medical science deemed necessary. Would this be a property right? Do the parents *own* their child's body? Is he their *chattel*?
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> It is true that parents exercise a dominion over their child so mighty and yet so minute as to be sometimes frightening. For example, they determine whether and whom the child may marry...; whether or where he goes to school or college; which, if any, religious faith he may espouse; where he shall live; whether and where he may work, find his recreation, and so on; even whether he wears his rubbers, his pink tie, or she has her hair bobbed. Parents may, within bounds, deprive their child of his liberty and his property.

Judge Alexander seemed to be getting a bit carried away. Not even back in 1962 were parents having much success determining whether—or whom—their children could marry, or what religious faith they could pursue, or what work or recreation. Of course, the degree of "dominion" depended on the age of the child, but the age of the child in this case was *three years old*. The judge seemed to find the dominion of parents over three-year-old children "frightening." He must have been reading some of the headier literature of the juvenile court movement.

> But there are well-defined limitations upon this appalling power of parent over child. In a very recent book edited by juvenile judges [*sic*] for juvenile judges [*sic*] (Procedures and Evidence in Juvenile Court), the preface by Milton G. Rector of the National Council on Crime and Delinquency begins with the phrase: "As early as its first decade, the

twentieth century was popularly dubbed, `the century of the child.'" The rise of the juvenile court movement, the development of the U.S. Children's Bureau, the decennial White House Conferences on Children, are among the dozens of evidences that spring to mind in support of this thesis. The New York State Children's Bill of Rights lists eleven natural and moral rights with which every child is endowed, and which no person would willingly deny.

No longer can parents virtually exercise the power of life or death over their children.... They may not abuse their child or contribute to his dependency, neglect, or delinquency.... And while they may, under certain circumstances, deprive him of his liberty or his property, under no circumstances, with or without due process, with or without religious sanction, may they deprive him of his *life*!

The evidence was undisputed that blood transfusion was necessary[,] and the best available medical opinion held that to deprive the child of it would have been to risk his life. We hold the parents had no right to subject their child to such a risk....

* * *

The Biblical passages relied on to require vacation of the Court's emergency order were as follows: Genesis 9:3,4; Leviticus 3:17, 17:14; Deuteronomy 12:23; Acts 15:28, 29. To a layman unversed in the seemingly esoteric art of theological interpretation of the 17th century English version of ancient Hebrew and Greek Scriptures, these passages are, to say the least, somewhat obscure. They have to do with blood and the eating or taking thereof. Blood transfusion as administered by modern medicine was unknown to the authors of these cryptic dicta. Had its beneficient effects been known to them, it is not unlikely some exception would have been made in its favor—especially by St. Luke who is said to have been a physician.

But in our humble civil court we must confine ourselves to the civil law of the State. Religious doctrines and dogmas, be they obviously sound or curiously dubious, may not control. The parents in this case have a perfect right to worship as they please. They enjoy complete freedom of religion....

But this right of theirs ends where somebody else's right begins. Their child is a human being in his own right, with a soul and body of his own. He has rights of his own—the right to live and to grow up without disfigurement.

The child is a citizen of the State. While he "belongs" to his parents, he belongs also to the State. Their rights in him entail many duties. Likewise the fact that the child belongs to the State imposes upon the State many duties. Chief among them is the duty to protect his right to live and to grow up with a sound mind in a sound body, and to brook no interference with that right by any person or organization.

When a religious doctrine espoused by the parents threatens to defeat or curtail such a right of their child, the State's duty to step in and preserve the child's right is immediately operative.

> To put it another way, when a child's right to live and his parents' religious belief collide, the former is paramount, and the religious doctrine must give way.[13]

This lower court decision is quoted at some length to suggest the almost messianic conviction of some judges that court and state know what is best for the child, that the parents and their wishes are to be viewed with suspicion, and that special counsel should be appointed by the court to protect the child from the parents' suspect interests. One might not wish the outcome to be otherwise but still wish that the court might have credited the parents with a sincere wish to do what was truly right for the child.

It is not an easy matter for ordinary, average laypersons to take on the mighty institutions of "modern medical science" *and* the law. It takes enormous resolution to resist the procedures and expectations of the modern hospital and its staff. Anyone who has tried to prevail upon the lowliest nurse's aide to depart from routine—let alone a head nurse—can appreciate what is involved in challenging the wisdom of the doctor, who hardly listens to the head nurse, not to mention a mere patient. And when this is done in obedience to something as "unscientific" and quixotic as religious conviction is thought by some to be, the task is indeed an uphill one.

The religious believer, trying to be faithful to the principles of the faith, trying to do the will of God in a situation already difficult and anxious, in which the earthly, and eternal, life of a loved one is at stake, may spend many a sleepless, anguished hour trying to muster the nerve to go through a harrowing ordeal that will involve blame, misunderstanding, obloquy, not to mention time and money. Of course, Jehovah's Witnesses and other sect groups have a zealousness—some would say fanaticism—that helps to steel them for such encounters, and their fellow believers lend them moral and other support and prayer, but still it cannot be a welcome confrontation.

Then comes the reaction of the doctor, who does not take kindly to being balked in the accepted medical procedures by anything as frivolous and benighted as religious objections. Quickly the full panoply of "modern scientific medicine" is mobilized to counteract the resistance of "medieval superstitions." The superintendent of the hospital goes into court seeking an injunction or a custody order to enforce the hospital's "responsibility" for the "saving" of the patient. So to the weight of the medical institution is added that of the legal institution, both towering over the relatively unlearned believers—a daunting prospect indeed. For every case that makes its imprint in a court of record, there must be many others in which the believers capitulate at an earlier stage, or never are able to bring themselves to make a stand at all.

This is not to say that their beliefs on blood transfusion (or vaccination, or the other secular issues that have sharp religious implications) are "right," but that they are entitled to respect. Such respect indeed is shown in most of the court opinions reported here, with the possible exception of the one just discussed. Judges give the

13. *In re Clark*, 185 N.E.2d 128 (1962).

objectors their "day in court" to explain their objections, and dutifully record them, but there may well be involuntary indications of impatience or noncomprehension in gesture or facial expression on the part of even the most careful and considerate judges that do not show in the record but make the path more painful for those trying to be true to their faith. At best, great institutions of medicine and law are not very hospitable to uncredentialed ordinary laypersons who insist on throwing monkey wrenches into the works for reasons that may seem visionary and perverse.

c. ***Application of Georgetown College (I)*** **(1964).** One of the more dramatic of these confrontations, often cited in subsequent cases despite its ambiguity, arose under the portentous title of "Application of the President and Directors of Georgetown College, Inc." to the United States Court of Appeals for the District of Columbia Circuit, represented by Edward Bennett Williams, Esq., at the time one of the legal luminaries of the Washington scene. The application was first presented to Judge Edward A. Tamm of the federal district court for the District of Columbia, who for reasons that do not appear, refused to act on it. The cause then came on to be heard in chambers at 4:00 PM by Judge J. Skelly Wright of the Circuit Court of Appeals, one of the more conscientious and capable judges on the federal bench. The application represented that one Mrs. Jesse E. Jones was then a patient at Georgetown University Hospital, that she was "in extremis" and that the physician in attendance, the chief resident, considered transfusions of blood necessary to save her life, and that consent could not be obtained from the patient or her husband; therefore, the court was asked to authorize the hospital to administer the transfusion.

Mrs. Jones had lost two-thirds of her blood supply when brought to the hospital because of a ruptured ulcer. Judge Wright stated in his subsequent opinion what then ensued.

> I called the hospital by telephone and spoke with Dr. Westura, Chief Medical Resident, who confirmed the representations made by counsel. I thereupon proceeded with counsel to this hospital, where I spoke to Mr. Jones, the husband of the patient. He advised me that, on religious grounds, he would not approve a blood transfusion for his wife.... I advised him to obtain counsel immediately. He thereupon went to the telephone and returned in 10 or 15 minutes to advise that he had taken the matter up with his church and that he had decided that he did not want counsel.
>
> I asked permission of Mr. Jones to see his wife. This he readily granted. Prior to going into the patient's room, I again conferred with Dr. Westura and several other doctors assigned to the case. All confirmed that the patient would die without blood and that there was a better than 50 percent chance of saving her life with it. I then went inside the patient's room. Her appearance confirmed the urgency which had been represented to me. I tried to communicate with her, advising her again as to what the doctor had said. The only audible reply I could hear was "Against my will." It was obvious that the woman was not in a mental condition to make a decision. I was reluctant to press her because of the seriousness of her condition and because I felt that to suggest repeatedly the imminence of death without blood might place a strain on her religious convictions. I

> asked her whether she would oppose the blood transfusion if the court allowed it. She indicated, as best I could make out, that it would not then be her responsibility.
>
> I returned to the doctors' room where some 10 or 12 doctors were congregated, along with the husband and counsel for the hospital. The President of Georgetown University, Father Bunn, appeared and pleaded with Mr. Jones to authorize the hospital to save his wife's life with a blood transfusion. Mr. Jones replied that the Scriptures say that we should not drink blood, and consequently his religion prohibited blood transfusions. The doctors explained that a blood transfusion is totally different [from drinking blood and] physically goes into a different part and through a different process in the body. Mr. Jones was unmoved. I thereupon signed the order allowing the hospital to administer such transfusions as the doctors should determine were necessary to save her life.[14]

The order was signed at 5:20 PM The transfusion was administered, followed by several others. The patient recovered and filed a motion in the Circuit Court seeking a rehearing *en banc*[15] of the order granting authorization for the transfusions. The response of the entire court will be treated below. But first it is necessary to review the opinion written by Judge Wright in justification of his action, which was indeed rather unusual. A circuit court judge rarely acts alone and rarely sees a party at first instance, let alone goes to the "scene of the crime" and takes direct action there. Normally a circuit judge acts only in a "panel" with two other judges to review cases already heard and actions already taken by district judges in the courts below. So it must have been a heady and dramatic adventure for Judge Wright to get off the appellate bench and go out "where the action was." He certainly tried to get a direct, first-hand knowledge of the matter and the views of those most directly affected, but one may wonder whether even a circuit-court judge is more than a layman in the sickroom of a critically ill woman, where he was understandably uncertain how best to communicate with her or how to ascertain her wishes.

In subsequent reflection, Judge Wright made extensive efforts to justify his actions. He explained that a true "case or controversy" existed in this instance, which was therefore "justiciable" within the norms set by the Supreme Court.

> Judicial abdication would create a legal vacuum to be filled only by the notions, and remedies, of the private parties themselves. And if the courts are to act in this area, damage suits *post facto* are a poor substitute for timely declaratory or injunctive relief. Thus if Mrs. Jones had brought an action to restrain the hospital from administering the transfusions, a justiciable controversy would certainly have been presented. The fact that it was the hospital which sought judicial declaration of its rights does not make the controversy less justiciable. Moreover, while the question presented is of utmost importance to those concerned, it is of such infrequent occurrence as to be unlikely to attract the attention of the legislature. Courts sit to decide such questions.

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14. *Application of the President and Directors of Georgetown College*, 331 F.2d 1000 (1963).
15. Meaning by the entire bench of nine circuit court judges.

He asserted that appellate courts are entitled to issue any and all writs and need not defer that responsibility to lower courts, especially in order to preserve the *status quo* for fuller adjudication, and "the power of a single judge to issue such emergency temporary writs cannot be disputed." He continued in a somewhat defensive tone:

> This opinion is being written solely in connection with the emergency order authorizing the blood transfusions "to save her life." It should be made clear that no attempt is being made here to determine the merits of the underlying controversy.... Because of the demonstrated imminence of death from loss of blood, signing the order was necessary to maintain the *status quo* and prevent the issue respecting the rights of the parties in the premises from becoming moot before full consideration was possible....
>
> Before proceeding with this inquiry, it may be useful to state what this case does not involve. This case does not involve a person who, for religious or other reasons, has refused to seek medical attention. It does not involve a disputed medical judgment or a dangerous or crippling operation. Nor does it involve the delicate question of saving the newborn in preference to the mother. Mrs. Jones sought medical attention and placed on the hospital the legal responsibility for her proper care. In its dilemma, not of its own making, the hospital sought judicial direction.

One catches here a glimpse of the recurrent theme of the victimized hospital that must defend itself against unreasonable patients who throw themselves upon its responsibility and then refuse to cooperate with the treatment it deems necessary. One gets the implication that if they were going to prove balky at that stage, they should not have imposed themselves upon the hospital in the first place. Of course, the Joneses had no certain idea of what the medical problem was or what would be required to treat it. They just knew that something was terribly wrong with Mrs. Jones, and she needed medical help, of which there are many forms, only one of which—transfusions of blood—would be unacceptable to them for religious reasons. So it was not with "malice aforethought" that they set out to "entrap" the hospital in an untenable dilemma.

On the other hand, the hospital was understandably anxious to avoid legal liability for medical "neglect" if it let her die without a transfusion or for "assault" if it gave her a transfusion against her will. It should be possible for it to obtain a legal determination of that question without imputing something like entrapment to the anxious, bewildered but determined patient and family.

> It has been firmly established that the courts can order compulsory medical treatment for any serious illness or injury,[16] and that adults, sick or well, can be required to submit to compulsory treatment or prophylaxis, at least for contagious diseases.[17] And there are no religious exemptions from these orders.[18]

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16. Citing *Labrenz, Morrison v. Missouri, Mitchell v. Davis, supra.*

17. Citing *Jacobson v. Mass., supra.*

18. Citing *Labrenz, Prince v. Mass., supra,* and *Hamilton v. Regents*, 293 U.S. 245 (1934), discussed at § A5d above.

* * *

Of course, there is here no sick child. However, the sick child cases may provide persuasive analogies because Mrs. Jones was in extremis and hardly compos mentis at the time in question; she was as little able competently to decide for herself as any child would be.... And if...a parent has no power to forbid the saving of his child's life, a fortiori the husband of the patient here had no right to order the doctors to treat his wife in a way so that she would die.

The child cases point up another consideration. The patient, 25-years old, was the mother of a seven-month old child. The state, as parens patriae, will not allow a parent to abandon a child, and so it should not allow this most ultimate of voluntary abandonments. The patient had a responsibility to the community to care for her infant. Thus the people had an interest in preserving the life of this mother.

Apart from the child cases, a second range of factors may be considered. It is suggested that an individual's liberty to control himself and his life extends even to the liberty to end his life. Thus, "in those states where attempted suicide has been made lawful by statute (or the lack of one), the refusal of necesary medical aid [to one's self], whether equal to or less than attempted suicide, must be conceded to be lawful." Cawley, Criminal Liability in Faith Healing.[19] And, conversely, it would follow that where attempted suicide is illegal by the common law or by statute, a person may not be allowed to refuse necessary medical assistance when death is likely to ensue without it....

If self-homicide is a crime, there is no exception to the law's command for those who believe the crime to be divinely ordained. The Mormon cases in the Supreme Court establish that there is no religious exception to criminal laws, and state obiter[20] the very example that a religiously-inspired suicide attempt would be within the law's authority to prevent.... But whether attempted suicide is a crime is in doubt in some jurisdictions, including the District of Columbia.

The Gordian knot of this suicide question may be cut by the simple fact that Mrs. Jones did not want to die. Her voluntary presence in the hospital as a patient seeking medical help testified to this. Death, to Mrs. Jones, was not a religiously commanded goal, but an unwanted side-effect of a religious scruple.... Mrs. Jones wanted to live.

A third set of considerations involved the position of the doctors and the hospital. Mrs. Jones was their responsibility to treat. The hospital doctors had the choice of administering the proper treatment or letting Mrs. Jones die in the hospital bed, thus exposing themselves, and the hospital, to the risk of civil and criminal liability in either case.[21] It is not certain that Mrs.

19. 39 *Minn. L. Rev.* 48, 68 (1954).

20. From *obiter dicta*, portions of a judicial opinion that are not necessary to the judgment reached and thus do not constitute precedent for later decisions.

21. A footnote at this point explained: "Whether or not a waiver signed by a patient *in extremis* would protect the hospital from civil liability, it could not be relied on to prevent criminal prosecution. Death resulting from failure to extend proper medical care, where there is a duty of care, is manslaughter in the District of Columbia." (n. 18).

> Jones had any authority to put the hospital and its doctors to this impossible choice. The normal principle that an adult patient directs her doctors is based on notions of commercial contract which may have less relevance to life-or-death emergencies. It is not clear just where a patient would derive her authority to command her doctor to treat her under limitations which would produce death. The patient's counsel suggests that this authority is part of constitutionally protected liberty. But neither the principle that life and liberty are inalienable rights, nor the principle of liberty of religion, provides an easy answer to the question whether the state can prevent martyrdom. Moreover, Mrs. Jones had no wish to be a martyr. And her religion merely prevented her consent to a transfusion. If the law undertook the responsibility of authorizing the transfusion without her consent, no problem would be raised with respect to her religious practice. Thus, the effect of the order was to preserve for Mrs. Jones the life she wanted without sacrifice of her religious principles.
>
> The final and compelling reason for granting the emergency writ was that a life hung in the balance. There was not time for research and reflection. Death could have mooted the cause in a matter of minutes, if action were not taken to preserve the status quo. To refuse to act, only to find later that the law required action, was a risk I was unwilling to accept. I determined to act on the side of life.[22]

This was one of the more thoughtful and perceptive analyses of the issues raised by religious objections to blood transfusions, and has been often quoted in subsequent cases, especially the final paragraph, but it still left something to be desired. It expressed marvellous solicitude for the hospital and the doctors beset by the responsiblity of dealing with intransigent and possibly litigious patients, but not comparable sensitivity to the plight of the Joneses.

This was one of the first instances in which a court undertook to impose a blood transfusion on a conscious and conscientiously objecting *adult*. Yet the court evinced little diffidence in deciding what is best for the Joneses. The justifications offered were seven:

1. Mrs. Jones was as incompetent as a child, and so the court had to decide for her;
2. Besides, she was the mother of a seven-month-old child, which the state could not allow her to "abandon";
3. It may be a crime to attempt suicide, and there is no religious exemption;
4. Mrs. Jones did not wish to die, but was put in the way of death as "an unwanted side-effect of a religious scruple";
5. The patient did not have "authority" to put the doctors in the position of having to "treat her under limitations that would produce death";
6. If the court ordered the transfusion, Mrs. Jones was relieved of responsibility and thus was obliged neither to die nor to violate her religious principles;
7. In any event, the court's order was necessary merely to preserve the *status quo* for further consideration.

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22. *Application of Georgetown College, supra.*

Though eloquently stated, these reasons are not all as persuasive as Judge Wright seemed to think them. Mrs. Jones was not a child, her objection to blood transfusions had been expressed previously, and she did not repudiate them when the judge questioned her. It was not necessarily "obvious" that "the woman was not in a mental condition to make a decision," and she had already made this one. It is certainly possible that she felt under some duress to conform to her husband's convictions and did not fully share them herself, but she gave no indication of such defection during the time that the judge questioned her (properly) not in the presence of her husband.

The argument that the state could not allow her to "abandon" her infant of seven months is a bit strained in its effort to analogize this case to the "sick child cases," because it was not evident that the child would be abandoned or become a public charge, since the father was still living, and other family members or the Jehovah's Witnesses community could probably be relied on to take care of the child even if the mother died, so predicating the state's obligation on that speculative possibility seemed disingenuous.

Mrs. Jones certainly didn't want to die, but that did not mean that she wanted to live at the price of violating a religious conviction that may have been as important to her as life itself. Many people, particularly very religious people, do not consider death to be the ultimate horror that some doctors and some judges seem to think it. The question for them is not "life or death" but "life at what price?" and the doctor and the judge cannot properly undertake to answer that question for anyone but themselves.

The patient did not need any kind of "authority" to require the doctor to permit her to make that decision for herself. Since 1964 it has become more apparent in case law that a patient must give "informed consent" to a course of medical treatment. It is the *doctor* who requires this—or some other—authority to undertake the treatment, not the patient to justify resisting it. So the judge only had the crucial issue upside down. The burden was on the doctor to obtain consent, not on the patient to require the doctor to desist, which is precisely why the august president and all the directors of Georgetown College were in court in the first place.

The judge thought that a happy solution was available in which the court order relieved the patient of responsibility for what she believed to be forbidden without her having to become a martyr to prove it. Perhaps that is an ideal solution for some, but it has an element of sophistry about it. It apparently did not resolve the Joneses' problem entirely either, for although Mrs. Jones recovered, she asked the full D.C. Circuit to reverse Judge Wright, so she evidently was not satisfied that all had worked out well in the end. If one believes that taking the blood of another person or creature into one's body is wrong and evil and loathsome to God, one is not necessarily reassured by a court's taking the matter out of one's control and imposing the hated treatment upon one.

d. ***Application of Georgetown College (II)*** **(1964).** Not all of Judge Wright's colleagues on the bench of the D.C. Circuit were enthused about his action. Mrs. Jones' motion for rehearing was considered *en banc* by Chief Judge David L. Bazelon and Circuit Judges Wilbur K. Miller, Charles Fahy, George T. Washington, John A.

Danaher, Walter M. Bastian, Warren Burger, James S. Wright and Carl E. McGowan. This time she was represented by counsel. After argument the court issued a *per curiam* order *en banc*[23] that the petition for rehearing was denied. But four judges filed opinions or comments indicating disagreement, so the order was apparently adopted by a 5-4 vote.

Judge Washington concurred in a separate opinion, commenting that in his view the matter was over. "Mrs. Jones has left the hospital, and the order of September 17th has expired by its own terms." Therefore, there was no longer a live issue to be decided, so he voted against a rehearing, but not on the merits of the blood transfusion. Judge Danaher indicated that he would dismiss for lack of a case or controversy.

Judge Miller dissented, joined by Judges Bastian and Burger. His dissent was entirely on procedure, not on the merits. He thought an individual appellate judge should not have taken it upon himself to act in the premises.

Another dissent was filed by Judge Burger, joined by Judges Bastian and Miller, which spoke more to the merits.

> I believe we should dismiss the petition for rehearing en banc for want of a justiciable controversy, as Judge Danaher does, rather than merely deny it.
>
> This episode presents on the one hand an example of a grave dilemma which confronts those who engage in the healing arts and on the other hand some very basic and fundamental issues on the nature and scope of judicial power. We can sympathize with the one but we cannot safely or appropriately temporize with the other; we have an obligation to deal with the basic question whether any judically cognizable issue is presented when a legally competent adult refuses, on grounds of conscience, to consent to a medical treatment essential to preserve life....
>
> "The touchstone to justiciability is injury to a legally protected right...."24 The threshold issue, therefore, is whether the hospital had a right which it was entitled to require the court to enforce....
>
> We can assume first that a hospital, like a doctor, has certain responsibilities and duties toward a person who, by choice or emergency, comes under its care. No affirmative act of the patient is suggested as invading or threatening any right of the hospital. So we must decide whether an "invasion" of legal right can be spelled out of a relationship between the patient's refusal to accept a standard medical treatment thought necessary to preserve life and the possible consequences to the hospital if, relying on her refusal of consent, it fails to give a transfusion and death or injury follows. The possible economic impact, apart from the moral implications inherent in its responsibilities, perhaps presents an arguable basis for the hospital's claim of protected economic right. It stood in an unenviable "Good Samaritan" posture when the patient categorically refused to consent to a blood transfusion called for by a medical

23. The Latin phrases mean the order was issued on behalf of the entire "bench" of the Circuit, but was "by the court" as a whole rather than being signed by one or more judges.

24. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1950).

emergency. The choice between violating the patient's convictions of conscience and accepting her decision was hardly an easy one.

However, since it is not disputed that the patient and her husband volunteered to sign a waiver to relieve the hospital of any liability for the consequences of failure to effect the transfusion, any claim to a protected right in the economic damage sphere would appear unsupported.

Can a legally protected right arise out of some other duty-rights of the hospital toward a patient, such as a moral obligation to preserve life at all costs?

For me it is difficult to construct an actionable or legally protected right out of this relationship. The affirmative enforcement of a right growing out of a possible moral duty of the hospital toward a patient does not seem to meet the standards of justiciability especially when the only remedy is judicial compulsion touching the sensitive area of conscience and religious belief....

* * *

Mr. Justice Brandeis, whose views have inspired much of the "right to be let alone" philosophy, said in Olmstead v. United States[25] ...:

> "The makers of our Constitution sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man."

Nothing in this utterance suggests that Justice Brandeis thought an individual possessed these rights only as to sensible beliefs, valid thoughts, reasonable emotions, or well-founded sensations. I suggest he intended to include a great many foolish, unreasonable and even absurd ideas which do not conform, such as refusing medical treatment even at great risk.

* * *

Confronted by a unique episode such as this, it seems to me we must inquire where an assumption of jurisdiction over such matters could lead us. Physicians, surgeons and hospitals—and others as well—are often confronted with seemingly irreconcilable demands and conflicting pressures. Philosophers and theologians have pondered these problems and different religious groups have evolved different solutions; the solutions and doctrines of one group are sometimes not acceptable to other groups or sects. Various examples readily come to mind: a crisis in childbirth may require someone to decide whether the life of the mother or the child shall be sacrificed.... May the physicians or hospital require the courts to decide? A patient may be in a critical condition requiring, in the minds of experts, a certain medical or surgical procedure. If the patient has objections to that treatment based on religious conviction, or if he rejects the medical opinion, are the courts empowered to decide for him?

* * *

It is at the periphery of the boundaries of power where the guidelines

25. 277 U.S. 438 (1928), dissenting.

> are less clear that an appealing claim presents difficult choices, but this is precisely the area in which restraint is called for in light of the absolute nature of our powers and the finality which often, as here, attends our acts.... [We] should...reconcile ourselves to the idea that there are [human problems that] judges are powerless to solve; and this is as it should be. Some matters of essentially private concern and others of enormous public concern, are beyond the reach of judges.[26]

Despite this chiding by the conservative wing of the D.C. Circuit, the majority (of five) did not repudiate Judge Wright's adventure or his activist disposition of the issue presented to him, so it is properly cited by those who think it casts light on the problem. The U.S. Supreme Court denied *certiorari* in this case June 15, 1964. The author of the last dissent quoted, Warren E. Burger, was confirmed as chief justice of the United States on June 9, 1969, but did not have occasion to consider a blood-transfusion case while on the bench of the Supreme Court.

• *Raleigh-Fitkin Hospital v. Anderson*, 201 A.2d 537 (1964) (pregnant mother could be required to submit to blood transfusion despite religious objections in order to save life of fetus).

e. *In re Brooks* (1965). A result quite different from the New York and New Jersey decisions was reached by the Supreme Court of Illinois in the case of an older woman who was not pregnant. She and her husband and two adult children were also Jehovah's Witnesses. She was hospitalized for treatment of a peptic ulcer in McNeal General Hospital in Chicago. During the two years prior to her hospitalization, she had repeatedly informed her physician of her religious objection to blood transfusions, and had supplied him with a copy of "Blood, Medicine and the Law of God," published by the Watchtower Bible and Tract Society, which explained the "reasons" for the Jehovah's Witnesses' opposition, from which the Illinois court quoted at some length. Furthermore,

> Mrs. Brooks and her husband had signed a document releasing Dr. Demange and the hospital from all civil liability that might result from the failure to administer blood transfusions to Mrs. Brooks. The patient was assured that there would thereafter be no further effort to persuade her to accept blood.
>
> Notwithstanding these assurances, however, Dr. Demange, together with several assistant State's attorneys and the attorney for the public guardian of Cook County, Illinois, appeared before the probate division of the circuit court with a petition by the public guardian requesting appointment of that officer as conservator of the person of Bernice Brooks and further requesting an order authorizing such conservator to consent to the administration of whole blood to the patient. No notice of this proceeding was given to any member of the Brooks family. Thereafter, the conservator of the person was appointed, consented to the administration of a blood transfusion, it was accomplished and apparently successfully

26. *Application of Georgetown College (II), supra*, Burger dissent.

> so, although appellants now argue that much distress resulted from transfusions due to a "circulatory overload."[27]

The state contended that the case was now moot, but the court declined to dismiss it, quoting its reasoning in *Labrenz*, "that the present case falls within that highly sensitive area in which governmental action comes into contact with the religious beliefs of individual citizens." The state, after having acted in complicity with the doctor in this high-handed and arrogant *ex parte* disregard of the patient's well-known wishes, now sought to pass it off by saying, "It's all over now." It was not "all over." Mrs. Brooks and her family had appealed to the Supreme Court of Illinois to have the conservatorship orders (characterizing her as incompetent) expunged and the petitions therefor dismissed, although they did not seek damages, as they well might have.

> It is argued by appellants that the absence of notice in any form to Mrs. Brooks or her husband, who were readily available at the hospital, constituted a denial of due process vitiating the entire proceedings; that insufficient proof was presented to establish the patient's incompetency (the doctor testified Mrs. Brooks was "semi-disoriented" and not "fully capable" but also stated "I think she would consent to surgery. It is the fact this is a transfusion of blood she objects to"); and that acceptance of medical treatment previously refused because of religious and medical reasons (blood transfusions are not entirely free from hazard) cannot be judicially compelled under the circumstances here present.
>
> While, under the particular circumstances here, some merit is to be found in all of these contentions, we believe we should predicate our decision upon the fundamental issue posed by these facts, i.e.; when approaching death has so weakened the mental and physical faculties of a theretofore competent adult without minor children that she may properly be said to be incompetent, may she be judicially compelled to accept treatment of a nature which will probably preserve her life, but which is forbidden by her religious convictions, and which she has previously steadfastly refused to accept, knowing death would result from such refusal? So far as we have been advised or are aware, there is no reported decision in which this question has been squarely presented and decided.
>
> * * *
>
> Appellees argue that society has an overriding interest in protecting the lives of its citizens which justifies the action here taken....
>
> * * *
>
> It seems to be clearly established that the First Amendment...protects the absolute right of every individual to freedom in his religious belief and the exercise thereof, subject only to the qualification that the exercise thereof may properly be limited by governmental action where such exercise endangers, clearly and presently, the public health, welfare or morals....
>
> Applying the constitutional guarantees and the interpretation thereof

27. *In re Estate of Bernice Brooks*, 205 N.E.2d 435 (1965).

> heretofore enunciated to the facts before us we find a competent adult who has steadfastly maintained her belief that acceptance of a blood transfusion is a violation of the law of God. Knowing full well the hazards involved, she has firmly opposed acceptance of such transfusions, notifying the doctor and hospital of her convictions and desires, and executing documents releasing both the doctor and the hospital from any civil liability which might be thought to result from a failure on the part of either to administer such transfusion. No minor children are involved. No overt or affirmative act of appellants offers any clear and present danger to society—we have only a governmental agency compelling conduct offensive to appellant's religious principles. Even though we may consider appellant's beliefs unwise, foolish or ridiculous, in the absence of an overriding danger to society we may not permit interference therewith in the form of a conservatorship established in the waning hours of her life for the sole purpose of compelling her to accept medical treatment forbidden by her religious principles, and previously refused by her with full knowledge of the probably consequences. In the final analysis, what has happened here involves a judicial attempt to decide what course of action is best for a particular individual, notwithstanding that individual's contrary views based upon religious convictions. Such action cannot be constitutionally countenanced.
>
> * * *
>
> While the action of the circuit court herein was unquestionably well-meaning, and justified in the absence of decision to the contrary, we have no recourse but to hold that it has interfered with basic constitutional rights.[28]

Thus the Supreme Court of Illinois repudiated the action of the doctor, the state's attorneys and the lower court in remarkably restrained language, considering the high-handed overriding of the patient's previously and clearly expressed decision on the very question at issue. What more could a person do to try to protect their religious integrity?

• *U.S. v. George*, 239 F.Supp. 752 (1965) (adult male Jehovah's Witness refused blood transfusion at Veterans Hospital, but said he would not resist a court order since it would then be on the court's conscience, not his own, so the court ordered the transfusion).

f. *Jehovah's Witnesses v. King County Hospital (I)* (1967). The Jehovah's Witnesses of Washington State decided to make a broad-front counterattack on the hospitals and medical practitioners of the state who, they felt, had been systematically disregarding their religious rights. So they instituted a lawsuit on behalf of a wide range of plaintiffs, children and adults, against a wide range of defendants, including judges, court employees, hospitals and hospital personnel and physicians, both individually and as classes, and asked for the convening of a three-judge federal court to consider the claim of unconstitutionality of a state juvenile-court law under which the defendant judges had authorized defendant

28. Ibid.

doctors and hospitals to take the plaintiffs' children "from the protection of their parents by having [them] declared wards of the court simply because plaintiffs in the exercise of their judgment disagree with the opinions of the defendant physicians and decline to accept blood transfusion for their children." Plaintiffs also asked the court to rule on the same issue as applied to several adult plaintiffs who had been given transfusions against their will under court order.

After a great deal of jurisdictional positioning, in which a number of plaintiffs and defendants were dismissed for various reasons, the federal court at length came to the merits, in an opinion delivered by Judge William J. Lindberg. He rehearsed the complaint to the effect that plaintiffs charged the state court judges with violating their federally guaranteed constitutional rights by acting "under color of state law" in ordering their children to be given blood transfusions contrary to the plaintiffs' religious beliefs. Ten cases remained before the court in which that was alleged to have happened. The court reviewed the plaintiffs' contention that the state juvenile court law and the state judges' application of it violated the plaintiffs' religious freedom to bring up their children in accord with their beliefs.

> Substantially the same argument was advanced by Jehovah's Witnesses in Prince v. Commonwealth of Massachusetts, ...involving an appeal from convictions for violating Massachusetts' child labor laws. Contrary to those state laws, the aunt and custodian of a nine-year old girl permitted and encouraged the girl to sell Bible tracts on the public streets....
>
> The Supreme Court affirmed the judgment, holding that the family is not beyond regulation in the public interest, as against a claim of religious liberty....
>
> It appears to us that the holding of *Prince* is applicable here and that our special three-judge court is bound by that decision. Thus, whatever merit there be in plaintiffs' argument that a more thorough consideration of philosophic principles calls for a contrary conclusion, we are not in a position to decide contrary to *Prince*. It need only be added that our case, as was also true of *Prince*, does not involve any of the rights of parents to train and indoctrinate their children in religious matters.
>
> It is true that in *Prince*, the court made it clear that it did not intend that opinion to lay the foundation for every state intervention in the indoctrination or participation of children in religion which may be done in the name of their health and welfare.... But we think it does lay the foundation, binding upon us, for the particular state intervention in the name of health and welfare which is here under review. As stated in *Prince*...: "The right to practice religion freely does not include liberty to expose… the child…to ill health or death."

However, the court added, if *Prince* was not controlling—as plaintiffs contended because the Supreme Court explicitly limited the *Prince* holding to the facts in that case and had never spoken on the blood transfusion issue—then the three-judge federal court in this instance should abstain from deciding the constitutionality of a state statute until the state courts had an opportunity to interpret the statute. For

one thing, the application of the statute turned on the phrase "gross and wilful neglect."

> Although a blood transfusion might be necessary for the well-being of the child, refusal to consent to a blood transfusion, coupled with willingness to consent to substitutes, if any, may not constitute "gross and wilful" neglect. Use of the language "grossly and wilfully" in the statute would thus appear to make the application of the statute to plaintiffs in the blood transfusion cases uncertain.

Therefore, the court concluded, *Prince* suggested that the statute was constitutional. But if *Prince* did not control, the matter should be left to the state courts to construe the state statute before federal courts should try to determine whether the state statute, as construed by the state courts, violated the federal constitution. So, after whittling the case down to a reduced number of parties and rejecting all claims not based on the Juvenile Court Act, the federal court said the matter was controlled by *Prince*, adverse to the plaintiffs, or it should be taken through the state courts (or "Go Back to Go"). Thus, after the expenditure of huge effort and expense, the plaintiffs were left with nothing whatever to show for their efforts, not even a finding with respect to forced transfusion of *adults*. They appealed to the U.S. Supreme Court.

g. *Jehovah's Witnesses v. King County Hospital (II)* (1968). Many people are under the impression that the U.S. Supreme Court has never ruled on the question of refusal of consent to blood transfusions for religious reasons. That is not the case. The Supreme Court accepted the appeal from the three-judge district court in the Washington State case and issued a brief *per curiam* holding:

> The judgment is affirmed. *Prince v. Massachusetts*.
> Mr. Justice Douglas and Mr. Justice Harlan would note probable jurisdiction and set the case for oral argument.[29]

Thus the Supreme Court has held that a state may impose blood transfusions on *minor children* when thought to be necessary by prevailing medical opinion despite the religious objections of parents, on the strength of *dicta* in the *Prince* opinion. The Supreme Court has not ruled on the matter of blood transfusions for *adults* over their objections based on religious convictions.

h. *In re Sampson* (1970). A family court in Ulster County, New York, was confronted with a difficult decision in 1970 with respect to a young man of fifteen who was a victim of neurofibromastosis or Von Recklinghausen's disease, which caused a massive deformity of the right side of his face and neck. "The outward manifestation of the disease," said the court, "is a large fold or flap of an overgrowth of facial tissue which causes the whole cheek, the corner of his mouth and right ear to droop down giving him an appearance which can only be described as grotesque and repulsive." The boy's mother was willing to consent to surgery to correct this deformity, but would not consent to blood transfusions necessary for the operation

29. *Jehovah's Witnesses v. King County Hospital*, 390 U.S. 598 (1968).

because of her religious convictions as a Jehovah's Witness.

Judge Hugh R. Elwyn, after extensive study of the case, found himself able to reach a decision. He was clearly appalled by the boy's condition.

> [T]he massive deformity of the entire right side of his face and neck is patently so gross and so disfiguring that it must inevitably exert a most negative effect upon his personality development, his opportunity for education and later employment and upon every phase of his relationship with his peers and others.... Although Kevin was found to be not psychotic, a psychologist found him to be "a boy (who) is extremely dependent and (who) sees himself as an inadequate personality." The staff psychiatrist reports that "Kevin demonstrates inferiority feeling and low self concept. Such inadequate personality is often noted in cases of mental retardation, facial disfigurement and emotional deprivation"....
>
> [U]nless some constructive steps are taken to alleviate his condition, his chances for a normal, useful life are virtually nil.
>
> The unanimous recommendation of all those who have dealt with the many problems posed by Kevin's affliction—educators, psychologists, psychiatrists, physicians and surgeons[—]is that steps be taken to correct the condition by surgery. It is conceded, however, by the surgeons that, insofar as his health and his life is concerned, this is not a necessary operation. The disease poses no immediate threat to his life nor has it as yet seriously affected his general health. Moreover, the surgery will not cure him of the disease. In fact, for the condition from which he suffers there is no known cure.[30]

The needed surgery was conceded by the surgeons to be risky. "It's a massive surgery of six to eight hours duration with great blood loss," testified one of the surgeons. It would be dangerous even with blood transfusions, and "[w]ithout the mother's permission to administer blood transfusions the risk becomes wholly unacceptable."

The court recorded the religious basis of the mother's objections, which are familiar from cases discussed above. It also noted the prudential misgivings of the Witnesses.

> In addition to the adverse reaction in a patient to be anticipated from the mismatching of incompatible blood types or the ofttime fatal consequences of a circulatory overload or an air embolism caused by inept procedures, the Court finds considerable support for the Witnesses' fear that the current widespread practice of using blood from commercial blood banks poses a serious threat to the patient's health through the transmission of such diseases as syphilis, malaria, hepatitis and a variety of allergic conditions.[31]

The court cited all of the cases discussed above except *King County* and concluded "in every reported case that research has revealed in which the issue has been presented the courts have unequivocally upheld the power of the state to authorize

30. *In the Matter of Kevin Sampson*, 317 N.Y.S.2d 641 (1970).

31. Ibid., citing several recent news items in the margin.

the administration of a blood transfusion over the religious objections of the parent where the blood transfusion was shown to be necessary for the preservation of a minor's life or the success of needed surgery."

In the light of the cited authorities, the court held that the mother's religious objections "must give way before the state's paramount duty to insure [the son's] right to live and grow up without disfigurement." The court noted that the boy's disability was not life-threatening (as had been the severe burns of the three-year old child in the *Clark* decision[32] quoted at great length), that there was no "emergency," and that, in fact, one of the doctors had urged waiting until the boy was twenty-one and could decide for himself (because of the risk, even with a blood transfusion, and because the boy would have a greater volume of his own blood as he grew older). Nevertheless, the court saw its way clear to follow in the steps of the Ohio family court judge in *Clark*.

> I therefore conclude that this court's authority to deal with the abused, neglected or physically handicapped child is not limited to "drastic situations" or to those which constitute a "present emergency," but that the Court has a "wide discretion" to order medical or surgical care and treatment for an infant even over parental objection, if in the Court's judgment the health, safety or welfare of the child requires it.
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> * * *
>
> From the surgeon's point of view the fact that the surgical risk may decrease as the boy grows older is certainly a most persuasive reason for postponing the surgery. However, to postpone the surgery merely to allow the boy to come of age so that he may make the decision himself... totally ignores the developmental and psychological factors stemming from his deformity which the Court deems to be of the utmost importance in any consideration of the boy's future welfare....
>
> This Court cannot evade the responsibility for decision now by the simple expedient of foisting upon this boy the responsibility for making a decision at some later day, which by the time it is made, if at all, will be too late to undo the irreparable damage he will have suffered in the interim. This Court plainly has a duty to perform and though the responsibility for decision is awesome, the burden cannot be shared by transferring even a small part of it to another.

Before taking the final leap, the court quoted from decisions in two cases involving surgery on a minor, in which neither blood transfusions nor religious objections were at issue. It quoted at length from Judge Stanley H. Fuld of the New York Court of Appeals writing *in dissent* in a case *denying* authority for surgery, *Matter of Seiferth* (1955). Although the state's highest court had decided *against* the course contemplated by Judge Elwyn, he thought that the subsequent enactment of the Family Court Act conferred on family court judges "wide discretion and grave responsibilities" not present in 1955, thus in effect overruling *Seiferth*. Judge Fuld's

32. *In re Clark*, 185 N.E.2d 128 (1962), discussed at § b above.

dissent was quoted for more than a page to the encouragement of judges to shoulder the responsibility of making difficult decisions.

> "It would, of course, be preferable if the boy were to accede to the operation [to correct a cleft palate and "hair lip" [*sic*]].... However, there is no assurance that he will, either next year, in five years or six, give his consent....
>
> "[T]he court... has a duty to perform..., and it should not seek to avoid that duty by foisting upon the boy the ultimate decision to be made. Neither by statute nor decision is the child's consent necessary or material, and we should not permit his refusal to agree, his failure to cooperate, to ruin his life and any chance for a normal, happy existence; normalcy and happiness, difficult of attainment under the most propitious conditions, will unquestionably be impossible if the disfigurement is not remedied.
>
> * * *
>
> "What these parents are doing, by their failure to provide for an operation, however well-intentioned, is far worse than beating the child or denying him food or clothing.
>
> * * *
>
> "The welfare and interests of a child are at stake. A court should not place upon his shoulders one of the most momentous and far-reaching decisions of his life...."[33]

Obviously Judge Fuld's *dissent* called to the inclinations of Judge Elwyn over the heads of the majority in *Seiferth*, though he was candid enough to admit that "the views expressed by the dissenting Judges in *Seiferth* have not been universally accepted." In the margin he confided that in *In re Hudson*

> [t]he Supreme Court of Washington reversed an order of a Juvenile Court which had ordered surgery for the amputation of a child's left arm with this rebuke to judicial authority: "However, the mere fact that the court is convinced of the necessity of subjecting a minor child to a surgical operation will not sustain a court order which deprives a parent of the responsibility and right to decide respecting the welfare of the child. No court has authority to take a minor child, over objection of its parents who have not been deprived as unfit and unsuitable persons to have custody and control of the child, and subject it to a surgical operation."[34]

and

> I am keenly aware of the moral dilemma posed by the choice between an abdication of this court's responsibility for this boy's health and general welfare and the seeming assumption by the court of a power many would regard as the exclusive prerogative of God alone. In re Hudson...the Washington Supreme Court by a 5-4 decision chose the first horn of the dilemma rather than arrogate to itself such divine powers. In eschewing

33. Ibid., quoting *Matter of Seiferth*, 309 N.E.2d 820 (1955), Fuld dissent.

34. Ibid. n. 11, quoting *In re Hudson*, 126 P.2d 765 (1942), a case that involved nonreligious objections to an amputation, where blood transfusion was not at issue.

> such powers the court said: "Implicit in their (the family's) position is their opinion that it would be preferable that the child die instead of going through life handicapped by the enlarged, deformed left arm. That may be to some today the humane, and in the future it may be the generally accepted, view. However, we have not advanced or retrograded to the stage where, in the name of mercy, we may lawfully decide that one shall be deprived of life rather than continue to exist crippled or burdened with some abnormality. That right of decision is a prerogative of the Creator."[35]

But, putting such passivist musings aside, the court resolved to do its duty—as it saw it— however difficult.

> Nevertheless, a decision must be made, and so, after much deliberation, I am persuaded that if this court is to meet its responsibilities to this boy it can neither shift the responsibility for the ultimate decision onto his shoulders nor can it permit his mother's religious beliefs to stand in the way of attaining through corrective surgery whatever chance he may have for a normal happy existence....
>
> * * *
>
> For the reasons heretofore expressed the court finds the mother's religious objections to the administration of blood transfusions untenable. It is both illogical and impractical for Mrs. Sampson to consent to surgery for her son and then for religious reasons attempt to limit or circumscribe the surgeons in the employment of their surgical skills.[36]

The court ordered the matter to be supervised by the Ulster County Department of Social Services with directions that surgery be carried out with blood transfusions at the discretion of the County Commissioner of Health (who had brought the action) and the attending surgeons, costs of surgery and hospital care to be borne by Ulster County.

This lower court decision is treated at some length because it articulated the struggle between judicial paternalism and judicial restraint. It is not the purpose of this commentary to portray either of those options as always or obviously preferable. There is much to be said on either side. But one cannot help noting that the court, following the lead of Judges Alexander[37] and Fuld,[38] portrayed the dilemma as one either of heroically biting the judicial bullet or else "foisting" the decision onto the family or the fifteen-year-old (or twenty-one-year-old) boy. There runs through the exposition of all three judges an undercurrent of paternalism—of knowing what is best for the persons who would have to undergo the surgery and live with its results—physical, mental, emotional and spiritual—better than they know for themselves. Although Judge Elwyn gave polite and careful attention to Mrs. Sampson's religious and other objections, he clearly thought them obscurantist and

35. Ibid., n. 12, quoting *Hudson, supra.*
36. *In re Sampson, supra.*
37. In *In re Clark, supra.*
38. In *Matter of Seiferth, supra*, dissenting.

obstructionist when opposed to the technological and superior wisdom of modern medical science.

He was not prepared to consider the possibility that there might be some satisfactions attainable in life for Kevin and his family without surgery, and he was not encouraged in that consideration by the failure of the Ulster County school system or the family to provide much in the way of education for the boy. Instead, he was repelled by Kevin's appearance into the conviction that *anything* would be better than that!

So he disregarded the decision of the majority of the state's highest court[39] in favor of a dissenting judge's clarion call not to go "foisting" upon people responsibility for decisions about the most important matters in their own lives, disregarded the surgeon's advice that the operation was very risky, but would be less so if postponed until the person to be operated on was twenty-one, when he could decide for himself whether he wanted the operation, overrode the mother's "illogical and impractical" opposition based on religious convictions, and ordered an admittedly "dangerous" operation when there was no life-threatening emergency requiring immediate action. This decision was unanimously upheld by the Appellate Division,[40] and the Court of Appeals affirmed *per curiam*.[41]

• *Kennedy Hospital v. Heston*, 279 A.2d 670 (1971) (adult patient subjected to blood transfusion by court order despite religious objections, mainly out of consideration for the plight of the hospital and surgeons seeking to follow their professional standards).

• *Holmes v. Silver Cross Hospital*, 340 F.Supp. 125 (1972) (following the precedent of *In re Brooks, supra*, federal district court denied motions to dismiss a suit by Holmes' estate, holding that a state-appointed conservator's ordering of medical treatment for a person in violation of his religious beliefs violates the First Amendment's Free Exercise Clause).

i. *In re Green* (1972). In 1972, the Supreme Court of Pennsylvania had an opportunity to address the blood transfusion issue. A young man named Ricky Ricardo Green in his mid-teens was suffering from curvature of the spine brought on by polio, a condition so severe that he was unable to stand or walk. Physicians advised that a spinal fusion could correct this condition, but because his mother granted permission for the surgery only on condition that no blood transfusion be attempted, the director of the State Hospital for Crippled Children at Elizabethtown, Pennsylvania, brought an action under the Juvenile Court Act to have Ricky declared a "neglected child" and a guardian appointed who would consent to the blood transfusion(s). The family court—unlike the ones in Ohio and New York discussed above[42]— denied permission. The Superior Court on appeal unanimously reversed, but the Pennsylvania State Supreme Court intervened and rendered a significant decision written by Chief Justice Benjamin R. Jones.

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39. *In re Seiferth, supra.*

40. 323 N.Y.S.2d 253 (1971).

41. 328 N.Y.S.2d 686 (1972).

42. See *In re Clark* at § 3b above, and *In re Sampson* at § 3h above.

In our view, the penultimate question presented by this appeal is whether the state may interfere with a parent's control over his or her child in order to enhance the child's physical well-being when the child's life is in no immediate danger and when the state's intrusion conflicts with the parent's religious beliefs. Stated differently, does the State have an interest of sufficient magnitude to warrant the abridgement of a parent's right to freely practice his or her religion when those beliefs preclude medical treatment of a son or daughter whose life is not in immediate danger?

* * *

Our research disclosed only two opinions on point; both are from the New York Court of Appeals but the results differ. In Matter of Seiferth...,[43] the State of New York sought the appointment of a guardian for a "neglected child," a fourteen-year old boy with a cleft palate and harelip. The father's purely personal philosophy, "not classified as a religion," precluded any and all surgery as he believed in mental healing; moreover, the father had "inculcated a distrust and dread of surgery in the boy since childhood...." The trial judge concluded that the operation should not be performed until the boy agreed. After reversal by the Appellate Division,...the Court of Appeals, by a four-to-three vote, reinstated the order of the Children's Court. The primary thrust of the opinion was the child's antagonism to the operation and the need for the boy's cooperation for treatment....

On facts virtually identical to this appeal, the Family Court of Ulster County ordered a blood transfusion in In re Sampson....[44] On appeal, the Appellate Division...unanimously affirmed the order in a memorandum decision.... When the matter reached the Court of Appeals..., that Court affirmed per curiam the opinion of the Family Court but added two observations: (1) the Seiferth opinion turned upon the question of a court's discretion and not the existence of its power to order surgery in a non-fatal case, and (2) religious objections to blood transfusions do not "present a bar at least where the transfusion is necessary to the success of the required surgery."...

With all deference to the New York Court of Appeals, we disagree with its second observation in a non-fatal situation and express no view of the propriety of that statement in a life or death situation. If we were to describe this surgery as "required," like the Court of Appeals, our decision would conflict with the mother's religious beliefs. Aside from religious considerations, one can also question the use of that adjective on medical grounds since an orthopedic surgeon testified that the operation itself was dangerous. Indeed, one can question who, other than the Creator, has the right to term certain surgery as "required." This fatal/non-fatal distinction also steers the courts of this Commonwealth away from a medical and philosophical morass: if spinal surgery can be ordered, what about a hernia or gall bladder operation or a hysterectomy? The problems created by Sampson are endless. We are of the opinion that as between a parent

43. 127 N.E.2d 820 (1955), referred to in § 3h above.

44. See discussion at § 3h above.

> and the state, the state does not have an interest of sufficient magnitude outweighing a parent's religious beliefs when the child's life is not immediately imperiled by his physical condition....
>
> [O]ur inquiry does not end at this point since we believe the wishes of this sixteen-year old boy should be ascertained; the ultimate question, in our view, is whether a parent's religious beliefs are paramount to the possibly adverse decision of the child.... The record before us does not even note whether Ricky is a Jehovah's Witness or plans to become one. We shall, therefore, reserve any decision regarding a possible parent-child conflict and remand the matter for an evidentiary hearing...in order to determine Ricky's wishes.[45]

Three justices dissented in an opinion written by Justice Michael J. Eagen, in which he contended that the (supposed) interests of the crippled young man should be the deciding factor, by which he meant the Superior Court's suppositions about what the true interests of the young man *should* be, viz., that he should be required to have the operation, whether he wanted it or not.

> I also do not agree with the emphasis the majority places on the fact that this is not a life or death situation. The statute with which we are dealing... does not contain any such language.... The statute only speaks in terms of "health," not life or death. If there is a substantial threat to health, then I believe the courts can and should intervene to protect Ricky. By the decision of this Court today, this boy may never enjoy any semblance of a normal life which the vast majority of our society has come to enjoy and cherish.
>
> Lastly, I must take issue with the manner in which the majority finally disposes of the case. I do not believe that sending the case back to allow Ricky to be heard is an adequate solution. We are herein dealing with a young boy who has been crippled most of his life, consequently he has been under the direct control and guidance of his parents for that time. To now presume that he could make an independent decision as to what is best for his welfare and health is not reasonable.... We should not confront him with this dilemma.[46]

Justices Samuel J. Roberts and Thomas W. Pomeroy joined Justice Eagen in this dissent. (The majority consisted of Chief Justice Jones and Justices Henry X. O'Brien, Robert N. C. Nix, Jr., and Louis L. Manderino.)

It is remarkable, and not a little frightening, how many judges, like Justices Eagan, Roberts and Pomeroy, Judge Theodore O. Spaulding for the Superior Court (whom Justice Eagen quoted approvingly for eighteen column inches), and all the New York judges who wrote or upheld *In re Sampson*, were quite willing to arrange matters to "benefit" juveniles like Ricky Green and Kevin Sampson against their parents' wishes and religious convictions and without even "foisting" upon them the necessity to decide whether they believe it will really benefit them—"We should not confront him

45. *Holmes v. Silver Cross Hospital, supra.*

46. Ibid., Eagen dissent.

with this dilemma"! Instead, "we" will decide it for him, whether he likes it or not, so that he may "enjoy…a normal life which the vast majority of our society has come to enjoy and cherish."

It is this mode of thinking that speaks of "required" surgery, meaning it is "required" in the view of certain physicians, social workers, hospital administrators and judges, not necessarily in the view of the persons upon whom the operation is to be performed or their families or faith-communities, who have been sustaining them through these difficulties.It is a relief to hear the (narrow) majority of a major state's highest court reply, "Indeed, one can question who, other than the Creator, has the right to term certain surgery...`required.'" The reference to the Creator will be congenial to many, including this author, but the statement is equally valid without it. "Required" surgery imposed by the state is the opposite of freedom.

j. *In re Osborne* (1972). The dialogue among the courts continued with an opinion by the District of Columbia Court of Appeals. It involved a thirty-four-year-old man who was admitted to Cafritz Memorial Hospital with injuries and internal bleeding caused when a tree fell on him. The hospital became convinced that he needed a blood transfusion, but the patient refused to give his consent, and his wife also refused consent because of their religious beliefs as Jehovah's Witnesses. The hospital petitioned the Superior Court to appoint a guardian to give consent to the transfusion, and Judge Sylvia Bacon held a hearing at their home the night of the accident, as a result of which she denied the petition. The denial was appealed to the Court of Appeals on an emergency basis, and that court directed Judge Bacon to hold another hearing at the bedside of the patient, which she did, asking an able civil liberties attorney, Lawrence Speiser, to be present to represent the patient and his family. After that hearing the three-judge Court of Appeals immediately rendered its judgment and issued its written opinion several weeks later.

> When the petition was brought to Judge Bacon's home the night of the accident, the patient's wife, brother, and grandfather were present. They stated the views of the patient and agreed with them.... The grandfather explained that the patient "wants to live very much.... He wants to live in the Bible's promised new world where life will never end. A few hours here would nowhere compare to everlasting life." His wife stated, "He told me he did not want blood—he did not care if he had to die...."
>
> * * *
>
> Judge Bacon took note of a possible overriding state interest based on the fact that the patient had two young children. It was concluded, however, that the maturity of this lucid patient, his long-standing beliefs and those of his family did not justify state intervention.... [I]t was revealed that a close family relationship existed which went beyond the immediate members, that the children would be well cared for, and that the family business would continue to supply material needs....
>
> We...directed the bedside hearing to dvelop [*sic*] [the patient's views] without the exclusive use of what might be called hearsay statements. We also directed Judge Bacon to ask the patient whether he believed that he would be deprived of the opportunity for "everlasting life" if transfusion were ordered by the court. His response was, "Yes. In other words, it is

> between me and Jehovah; not the courts.... I'm willing to take my chances. My faith is that strong." He also stated, "I wish to live, but with no blood transfusions. Now, get that straight."
>
> Judge Bacon was careful also to determine the extent, if any, of impairment of judgment of capacity for choice resulting from the use of drugs. She was informed that the patient was not then under the influence of any medication having such possible or usual side effects.
>
> * * *
>
> Thus Judge Bacon and this court were faced with a man who did not wish to live if to do so required a blood transfusion, who viewed himself as deprived of life everlasting even if he involuntarily received the transfusion, and who had, through material provision and family and spiritual bonds, provided for the future well-being of his two children. In reaching her decision, Judge Bacon necessarily resolved the two critical questions presented—(1) has the patient validly and knowingly chosen this course for his life, and (2) is there compelling state interest which justifies overriding that decision? Based on this unique record, we have been unable to conclude that judicial intervention respecting the wishes and religious beliefs of the patient was warranted under our law.[47]

The court added in a footnote;

> It would be unnecessary to consider the first question if we were to take the view discussed by Judge Weintraub in John F. Kennedy Memorial Hospital v. Heston..., that the state must have a compelling interest in sustaining life [irrespective of the patient's wishes]. The notion that the individual exists for the good of the state is, of course, quite antithetical to our fundamental thesis that the role of the state is to ensure a maximum of individual freedom of choice and conduct.[48]

Judge J. Walter Yeagley concurred in the court's opinion but added a further thought:

> I would add that the thrust of the opinion in my view, while based on the first amendment, is not...based solely on religious freedom, but also on the broader based freedom of choice whether founded on religious beliefs or otherwise.[49]

In its final footnote the court added:

> 6. We are also advised that the patient has recovered though his chances were very slim and that he has been discharged from the hospital.

k. *Matter of Fosmire v. Nicoleau* (1990). A more recent decision from New York State's highest court represents the maturing of judicial understanding in that state of the kind of question posed in this line of cases. A young woman, Denise Nicoleau,

47. *In the Matter of Charles P. Osborne*, 294 A.2d 372 (1972).
48. Ibid., n. 5.
49. Ibid., Yeagley concurrence.

thirty-six, was admitted to Brookhaven Memorial Medical Center for premature delivery by cesarean section of a healthy baby boy. Following delivery, the mother began to hemorrhage, and her doctor told her that in his opinion she could not survive without a blood transfusion. The patient, a practical nurse, and her husband, a radiologist, were both Jehovah's Witnesses. When she had first consulted her physician months before, she had told him that she would not consent to a blood transfusion because of her religious beliefs, and on the admission form she submitted to the hospital she had consented to normal medical procedures but had specifically and explicitly excluded "the administration of blood, pooled plasma or other derivatives." Both she and her husband reaffirmed this refusal of consent to a blood transfusion when the doctor warned them of the seriousness of her condition. He then notified hospital officials of the situation, and they decided to seek a court order authorizing the transfusion.

Without notifying the patient or her family, the hospital applied to a state Supreme Court justice in Suffolk County, Long Island, for a court order, representing it as necessary to save her life. The judge signed an ex parte order three hours later, and the family was informed shortly before the transfusion was administered six hours after the order was signed. Two days later a second transfusion was given. A month later the patient and her husband applied to the Appellate Division of the state Supreme Court to vacate the order, arguing that her refusal to consent to blood transfusions was motivated not only by her religious beliefs but by her anxiety about the dangers of blood transfusions, such as infection with communicable diseases such as AIDS (acquired immune deficiency syndrome, for which there was no known cure). She contended that the hospital's actions in compelling her to submit to blood transfusions against her will violated her common-law, statutory and constitutional rights to practice her religion free of governmental interference, and that there were no countervailing interests of the state sufficient to outweigh those rights. The Appellate Division agreed with her and vacated the order by a divided court. The hospital appealed to the state's highest court, the Court of Appeals, which issued an opinion written by Chief Judge Sol Wachtler for five of the seven members of the court; the other two concurred separately on narrower grounds.

> To place this issue in focus it is important to emphasize what this case does not involve.
>
> First, the patient is an adult and not a child whose parents have refused to consent to necessary blood transfusions or other lifesaving measures....
>
> Second, we are not dealing with an incompetent patient and thus are not called upon to decide whether the patient, when competent, made and expressed a firm resolve to forego the right to lifesaving treatment under particular circumstances. Here there is no doubt that the patient is a competent adult who made a conscious choice, for personal reasons, to avoid blood transfusions under all circumstances and that she never wavered in that commitment. The only question is whether the hospital and the court were bound to honor her choice so clearly expressed.
>
> * * *

Initially, we note our agreement with the Appellate Division's conclusion that in this case the Supreme Court should not have signed the order ex parte, without giving the patient or her husband notice and an opportunity to be heard. Applications for court-ordered medical treatment affect important rights of the patients and should generally comply with due process requirements of notice and the right to be heard before the order is signed. We recognize that...there may be cases in which the patient's condition is so grave that there is no opportunity for prior notice and a hearing.... In this case, however, the record does not disclose any such exigency.... Apparently three hours elapsed between the time the application was made and the time the order was signed and an additional six hours passed before it was executed. Thus there was ample time to provide notice and an opportunity for a hearing, however informal.

* * *

On the merits we have also concluded that the Supreme Court should not have ordered the blood transfusions in this case. The question as to whether this order violates the patient's constitutional rights to religious freedom or to determine the course of her own medical treatment raises important and sensitive issues. However, they need not be resolved here because in our view the patient had a personal common law and statutory right to decline the transfusions. Although this right is not absolute, and may have to yield to superior State interests under certain circumstances, the hospital has not identified any State interest which would override the patient's rights under these circumstances.

The common law of this State established the right of a competent adult to determine the course of his or her own medical treatment.[50] This right has been adopted and preserved by the Legislature.[51]... [W]e [have] reaffirmed the basic right of a competent adult to refuse treatment even when the treatment may be necessary to preserve the person's life.

We have recently held that this "fundamental common law right is coextensive with the patient's liberty interest protected by the due process clause of our State constitution" and that right could be overcome only by a compelling State interest.[52]

* * *

The hospital notes that most of our cases recognizing this right involved older persons who were suffering from terminal illnesses or conditions in which there was little or no hope of recovery. It argues that the right to decline lifesaving medical treatment should be limited to such conditions; when, in the opinion of the patient's doctors, a particular medical treatment will completely restore the patient's health, the State's interest in preserving life is stronger and should prevail over the patient's wishes.

Actually the cited cases dealt with an extension of the rule, requiring the doctors and hospitals to respect the right even when the patient becomes incompetent if, while competent, the patient had clearly stated a desire to

50. *Schloendorff v. Society of N.Y. Hosp.*, 211 N.Y. 125, 129-30 [n.d.].

51. Public Health Law §§ 2504, 2805d.

52. *Rivers v. Katz*, 67 N.Y.2d 485 [n.d.].

> decline life-sustaining treatment under certain circumstances.... The right of a patient to decline life-sustaining treatment was recognized in these cases, not because the State considered their lives worthless, but because the State valued the right of the individual to decide what type of treatment he or she should receive under particular circumstances.
>
> The hospital's principal argument is that the State has an interest in preserving the life of the patient for the benefit of her child. In other words, a competent adult could never refuse lifesaving treatment if he or she were a parent of a minor child. However, there appears to be disagreement among the courts that recognize the exception as to whether the perceived State's interest is to preserve the family unit intact (the two-parent rule proposed by the hospital in this case) or to simply insure that the child is not left parentless (the one-parent rule adopted by the Appellate Division in this case).
>
> * * *
>
> There is no question that the State has an interest in protecting the welfare of children. However, at common law the patient's right to decide the course of his or her own medical treatment was not conditioned on the patient being without minor children or dependents. Similarly, when the legislature codified the common law rule it imposed no such restriction. And the hospital can point to no law or regulation which requires a parent to submit to medical treatment to preserve the parent's life for the benefit of a minor child or other dependent. If, as the hospital urges, the State has an interest in intervening under these circumstances, it has never expressed it.
>
> * * *
>
> The State's interest in promoting the freedom of its citizens generally applies to parents. The State does not prohibit parents from engaging in dangerous activities because there is a risk that their children will be left orphans.... There is no indication that the State would take a more intrusive role when the risk the parent has assumed involves a very personal choice regarding medical care. On the contrary, the policy of New York, as reflected in the existing law, is to permit all competent adults to make their own personal health care decisions without interference from the State.[53]

The court noted in the margin that the case was technically moot because the patient had already received the transfusion before the Appellate Division vacated the order, but the court decided it anyway "to provide guidance in future cases." It also had the effect of removing any shelter the hospital may have enjoyed from civil liability by virtue of acting under court order.

Judge Richard D. Simons wrote a concurring opinion in which he agreed that "individuals enjoy a common law right to determine what may be done to their bodies but that right may be qualified by some overriding State interest." But he disagreed with the majority's holding that any such overriding state interest must have been explicitly expressed by the state, presumably by statute. He contended

53. *Matter of Fosmire v. Nicoleau*, 75 N.Y.2d 218 (1990).

that more general interests of the state might weigh against the individual's common law right, such as "the State's general interest in preserving life, protecting innocent third parties, preventing suicide and promoting medical ethics."

But for Judge Simons the element of religious objection to transfusions tipped the scale against the state.

> Her religious conviction changes treatment that is routine for others into extraordinary therapy which she cannot accept. The use of her body, without her consent and contrary to her religious beliefs, is to her no less than ravishment.... When this factor is considered, [her] right to relief is manifest.[54]

Judge Stewart F. Hancock was less willing to accord such dispositive weight to the religious objection. For him it was simply another factor to be added to the patient's side of the scale in seeking to balance individual rights against the state's interest.

One wonders what more the patient could have done to make clear her wishes prior to the occasion when they were peremptorily and unilaterally overridden by the hospital and the judge who issued the *ex parte* order. The blatant disregard for her clearly and timely expressed determination *not* to have any blood transfusion ought to have provided grounds for heavy civil damages against the hospital. Perhaps the doctor and the hospital acted as they did to avoid suit, if she had died, for failure to take all indicated measures to save her life. But perhaps it will take some substantial damages on the other side to make them equally cautious not to violate the clearly expressed refusal by a patient of certain unacceptable modes of treatment.

In this decision and its forerunners in New York (cited in the margin of the decision) we see emerging an element missing in the line of cases treated earlier in these pages, viz., a common-law right to refuse medical treatment (at least for oneself). Since the common law is more venerable than statute law, it ought to have put in its appearance earlier in these cases, and a lot of anguish could have been averted, as in *Brooks, George, Sampson, Heston, Holmes,* and the like, *supra*. Unfortunately, the common law is not "common" to all jurisdictions, but is perceived differently from state to state—and often seems to be lost sight of altogether—so it may not offer the same protection everywhere.

The federal Bill of Rights ought to afford greater uniformity of protection for rights of privacy (a "penumbral" right much controverted in some circles), if not of free exercise of religion, but as we have seen, different courts accord different weight even to the "preferred rights" of the First Amendment. There seem always to be some judges, like Judge Hancock, willing to "balance" them away against all sorts of supposed interests of the state, even when not hitherto expressed in constitution or statute.

Chief Judge Wachtler and Judges Judith S. Kaye, Fritz W. Alexander, Vito J. Titone and Joseph W. Bellacosa did their best to nail down the principle that a competent adult has the right to determine the course of his or her own medical treatment—even to the extent of refusing treatment thought necessary to preserve

54. Ibid., Simons concurrence.

the person's life—with the hospital fighting against it every inch of the way! But there lingers the uneasy sense that another day there may be a court dominated by a Judge Hancock and his ilk that will discover interests of the state that will outweigh those of the patient in new fact-situations very similar to this one, and the whole issue will be "up for grabs" again. Perhaps the idea of "settled law" is wishful thinking, but if anything deserves to be settled, and just as this court settled it, it is the teaching of this case.

l. Review of Decisions. Perhaps it will be useful to review in summary form the decisions discussed above.

No.	Title of Case	Date	Juris.	Age	Condition	Outcome
a.	Wallace v. Labrenz	1952	Ill.	Infant	Rh negative	Order granted
•	Morrison v. Missouri	1952	Mo.	Infant	Rh negative	Order granted
•	Hoener v. Bertinato	1961	N.J.	Pregnant Adult	Rh negative	Order granted
•	New Jersey v. Perricone	1962	N.J.	Infant	"blue baby"	Order granted (infant died)
b.	In re Clark	1962	Ohio	3	burns	Order granted
c.	Application of Georgetown College	1964	CADC (1 j.)	Adult w/ child	ulcer ("incomp.")	Order granted
d.	[same] Burger dissent	1964	CADC (banc)	[same]	[same]	Order should not have been granted
•	Fitkin Hospital v. Anderson	1964	N.J.	Pregnant adult	pregnancy	Order granted
e.	In re Brooks	1965	Ill.	Adult (no depend.)	ulcer	Order should not have been granted
•	U.S. v. George	1965	Conn. (fed.)	Adult	ulcer	Order granted
f.	Jehovah's Witnesses v. King County Hospital	1967	Wash.	Infants	various	Injunction denied
g.	[same]	1968	U.S. Sup. Ct.	[same]	[same]	Denial affirmed
h.	In re Sampson	1970	N.Y.	15	non-life-threatening deformity	Order granted

•	Kennedy Hospital v. Heston	1971	N.J.	22	auto accident	Order granted
•	Holmes v. Silver Cross Hospital	1972	Ill.	Adult	accident	Order should not have been granted
i.	In re Green	1972	Pa.	16	non-life-threatening deformity	Order denied
j.	In re Osborne	1972	D.C.	34	accident	Order denied
k.	Fosmire v. Nicoleau	1990	N.Y.	36	caesarean delivery	Order should not have been granted

The upshot of this array of cases seems to be that courts will grant orders for blood transfusions to save life despite religious objections in the case of infants or pregnant women, or (in the controverted *Georgetown* case) when the patient has an infant child. State courts are divided on the propriety of ordering a transfusion for an adult (who is not pregnant and does not have children likely to be dependent upon the state), with New Jersey justifying such an order and Illinois and the District of Columbia rejecting such justification. With respect to operations to correct non-life-threatening deformities of adolescents, New York has ordered blood transfusions for such an operation while Pennsylvania has refused to do so. New York's most recent case bespeaks a clear rejection of the hospital's disregard of an adult's refusal of transfusion. The U.S. Supreme Court has affirmed the refusal of a state court to enjoin the transfusion of infants, but thus far has offered no affirmative guidelines on the question.

This variegated array of cases has shown a remarkable divergence of views among judges asked to decide life-or-death questions involving religious convictions. Some judges seem willing, even eager, to override such convictions in order to save (earthly) life, while others are willing to let competent adults, at least, decide such questions for themselves. Which trend shows greater respect for human life, dignity and freedom? Should one's right to have one's religious convictions respected depend upon whether one is situated in New Jersey or New York, Ohio or Illinois?

4. Medical Treatment: General (continued)

a. *Winters v. Miller* (1971). The broader subject of religious objections to other or more generalized forms of medical treatment was discussed in a case from New York State. A woman named Miriam Winters was subjected to medication (mainly tranquilizers) at Bellevue Hospital in New York City and then at Central Islip State Hospital on Long Island, although she was a Christian Scientist and had stated her objections to medication. She sued Alan D. Miller, M.D., the State Commissioner of Mental Hygiene, in federal district court, and the trial judge, Anthony Travia, granted summary judgment in favor of the state. She was represented by Bruce Ennis of the New York Civil Liberties Union, who took an appeal to the Second Circuit Court of

Appeals. Circuit Judge Joseph Smith wrote an opinion for the court.

> When she was admitted she refused to allow a doctor to take her blood pressure stating to him that she was a Christian Scientist, and the [hospital] records contain several references to this fact indicating that the hospital clearly had notice of her religious beliefs. In spite of this, however, and over her continued objections she was given medication (for the most part rather heavy doses of tranquilizers, both orally and intramuscularly)....
>
> The primary question raised in this appeal is whether [her] constitutional rights were violated when she was given medical treatment over her objections, which were religious in nature, and whether she is therefore entitled to relief under the federal civil rights statutes.
>
> It should be emphasized at the outset that [she] had never been found by any court to be "mentally incompetent," nor, so far as the record shows, were any facts alleged by the medical personnel who attended her which would justify a finding by a court of "mental incompetence." Neither did any court ever find that she was "mentally ill," although the two physicians who examined her [at Bellevue Hospital] did state that in their opinion she was suffering from a "mental illness."
>
> However, the law is quite clear in New York that a finding of "mental illness" even by a judge or jury, and commitment to a hospital, does not raise even a presumption that the patient is "incompetent" or unable adequately to manage his own affairs. Absent a specific finding of incompetence, the mental patient retains the right to sue or defend in his own name, to marry, draft a will, and, in general to manage his own affairs....
>
> It is clear and appellees concede that if we were dealing here with an ordinary patient suffering from a physical ailment, the hospital authorities would have no right to impose compulsory medical treatment against the patient's will and indeed, that to do so would constitute a common law assault and battery. The question then becomes at what point, if at all, does the patient suffering from a mental illness lose the rights he would otherwise enjoy in this regard.
>
> The court below was apparently of the view that *any* patient alleged to be suffering from a mental illness of *any* kind...loses the right to make a decision on whether or not to accept treatment....
>
> Appellant argues, however, that if we concede the right of others to refuse treatment because they are Christian Scientists or hold similar religious views in this regard, then in the present case, where there is clear evidence that appellant's religious views pre-dated by some years any allegations of mental illness and where there was no contention that the current alleged mental illness in any way altered these views, there is no justification for defendants-appellees substituting their own judgment for that of their patient....
>
> [T]here is no evidence in the record that would indicate that in forcing the unwanted medication on Miss Winters the state was in any way protecting the interest of society or even any third party. The appellees rely on the

> fact that the Bellevue authorities found that she was "possibly" harmful to herself and to others.... Appellant, however, is not suggesting in this case that the authorities could not legally retain her in the hospital, but rather only that her First Amendment rights were violated as a result of compulsory medication.
>
> * * *
>
> Finally, the appellees argue that the state was acting as *parens patriae* with respect to Miss Winters and therefore had the responsibility as well as the right to decide what was best for her under the circumstances.
>
> * * *
>
> The basic fallacy of appellee's case thus becomes obvious. While it may be true that the state could validly undertake to treat Miss Winters if it did stand in a *parens patriae* relationship to her and such a relationship may be created if and when a person is found *legally* incompetent, there was never any effort on the part of appellees to secure such a judicial determination of incompetency before proceeding to treat Miss Winters in the way they thought would be "best" for her. As appellant points out, even if there is some way to find the kind of compelling state interest required to override the First amendment, there clearly was not a compelling interest in so summarily forcing her to do so. Regular hearings of the New York Supreme Court are held in Bellevue Hospital every Tuesday morning.... If appellees had respected her wishes for only four days, they could have brought her before the court for judicial resolution of the issue. At this hearing the appellant might have been able to persuade the court that she was not mentally ill. Or the court might have found that other alternatives would suffice. Under our constitution there is no procedural right more fundamental than the right of the citizen, except in extraordinary circumstances, to tell his side of the story to an impartial tribunal.[55]

Having found that Miss Winters had stated a claim on which relief could be granted, the court reversed the dismissal and remanded the case for trial. Judge Leonard P. Moore, however, dissented, asking:

> Does the majority mean...that a person who is deemed to be potentially harmful to others could not, even in an emergency situation, be given appropriate drugs to reduce the likelihood of such anti-social conduct in the absence of an adversary judicial determination of incompetence? In the face of danger to herself and others, must Bellevue's harried medical staff seek out a judge whenever the police present them with a person whose mental condition requires that she receive tranquilizers or other drugs to protect herself and others or do they mean that a person can be given drugs against his stated religious convictions in at least some circumstances where the patient has not been declared legally incompetent by judicial adversary determination?
>
> I disagree in any event with the majority's implicit conclusion that...the treating doctors were not justified in concluding that the medical treatment administered was not in the best interests of the patient and, on

55. *Winters v. Miller*, 446 F.2d 65 (1971).

> the contrary, would hold that this determination, being valid, justified the medical care given Miss Winters.

Here again were two very different estimates of the situation based on the same record, which is not entirely informative about the events that formed the basis of the action [at least as they were reflected in the court's opinion(s)]. For instance, neither the majority nor the dissent explained how Miss Winters posed a threat to herself or others that was thought to justify sedation, although intramuscular injection was ordinarily used in New York State hospitals at that time only when necessary to quiet patients who were violent.

The court's opinions also did not indicate what part Miss Winters' religious objection to medication actually played, even though it was mentioned. The majority stated that she could not be subjected to medical treatment against her will if she was suffering from a *physical* ailment only (whether her objections were religious or not), and in the absence of a judicial finding of "mental incompetence" she could not be subjected to medication for alleged *mental* illness either (whether her objections were religious or not). The dissent contended that the doctors should be able to determine what was best for her without a court hearing (whether her objections were religious or not). Possibly the religious nature of her objections may have created a higher threshold of "compelling state interest" to be met by the state, but the opinions did not explicitly say so.

The state's defense appeared to have been based mainly on unsupported assertions of its supposed prerogatives to act as *parens patriae* on behalf of those it considered to be in need of help (whether they wanted the help offered or not). It claimed to be acting on an "overriding secular interest" in advancing "public health and welfare" so as to protect "the mental health of the state"—a rather abstract and intangible interest that would be very difficult for a court (or anyone else) to evaluate or to weigh against an individual's asserted interests. The majority indicated some skepticism about the hospital's or the physicians' ability to determine what was "best" for an unwilling patient, but was quite confident of a *court*'s ability to do so (whether the patient's objections were religious or not). The dissent had no doubt of the ability of the hospital, the physicians or the court to make such a determination (whether the patient's objections were religious or not). And the trial judge—to whose care the case was probably returned—was anxious that "badly needed beds in mental hospitals" not be occupied by those who refused treatment prescribed by "competent and expert medical practitioners" lest their condition "progressively worsen" and cause the state "a public burden and expense," for to do so would be "a step backward in the history of mental hygiene." This theme was pressed even further by the dissent in the direction of "pity-the-poor-hospital" when it conjured up the prospect of the "harried medical staff" having to "seek out a judge whenever the police present them with a person whose mental condition requires that she receive tranquilizers or other drugs to protect herself and others."

The state might have been better advised to have offered evidence of the woman's behavior that would indicate how she threatened the safety of herself or others in a way that could be allayed only by medical sedation. But the state (so far as the

court's opinions indicated) does not appear to have offered any evidence of such behavior, and so the learned judges (learned in another field) resorted largely to conjecture about the facts without a very extensive understanding of the milieu in which the disputed actions had occurred.

The majority was unrealistic in seeming to suppose that coping with a disturbed patient could always await the next weekly session of the state Supreme Court term held at Bellevue, while the trial judge and the dissent were equally unrealistic in the opposite way, contending that the medical personnel could and should prescribe and apply whatever therapeutic expedients they (unilaterally) thought the situation required. Many things could have been done to maintain the patient in a neutral and tractable state (without medication) until a court hearing could be held, and by that time the patient's stress might have been sufficiently alleviated that an order of civil commitment might not even be needed.

Only then would the court need to weigh whether a compelling state interest in medication had been shown sufficient to overcome the patient's religious objections. That question need not have been reached at the stage represented by the reported opinions, and, indeed, it actually wasn't.

b. *Hall v. Indiana* (1986). Another type of case appeared in the courts of Indiana as a result of deaths occurring in a group called "Faith Assembly" centered in Noble County, northeast Indiana. Some ninety-seven people were said to have died after they or their parents followed the sect's teaching to rely on prayer rather than medical science in cases of illness.[56] Nine parents were convicted of letting their children die without medical care, and the case of one couple, Gary and Margaret Hall, reached the Indiana Supreme Court following their conviction for "reckless homicide" despite a plea of having relied on treatment by prayer. (Their twenty-six-day-old son died of pneumonia in 1984 when their prayers seemingly did not avail.)

> An autopsy revealed that the cause of death was acute bronchial pneumonia, an inflammation of the lungs which prevented Joel from breathing normally. The county coroner, a physician, opined that there would have been a reasonably good chance of stopping the pneumonia and saving Joel's life if medical care had been obtained during the two days prior to his death.
>
> Pursuant to their religious beliefs, the Halls did not seek medical care. The Halls believed that sickness was the devil in a spiritual battle with God and that prayer would heal the sick. [They] testified that regardless of the seriousness of Joel's illness, they would not have taken him to a doctor.
>
> * * *
>
> A conviction for reckless homicide requires the State to prove that the Halls recklessly killed another human being.... A person engages in conduct "recklessly" if he engages in the conduct in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct....

56. *Fort Wayne (Ind.) News-Sentinal*, June 4, 1986, p. 2B.

> Despite the [Halls'] admitted awareness that their son was ill and that his condition progressively deteriorated, they did not seek medical care for him.
>
> The Halls, arguing by analogy to the child neglect statute, maintain that their "reckless" conduct was brought within the realm of acceptable standards of conduct by their exercise of prayer in lieu of medical care. The child neglect statute does permit a caretaker who deprives a dependent of medical care to be exempted from criminal responsibility if the caretaker "in the legitimate practice of his religious belief, provided treatment by spiritual means through prayer, in lieu of medical care, to his dependent...." However, reckless homicide does not have a statutory defense excusing responsibility for a death which resulted from what our legal system has defined to be reckless acts, regardless if these acts were conducted pursuant to religious beliefs or otherwise.... Prayer is not permitted as a defense when a caretaker engages in omissive conduct which results in the child's death.[57]

The decision was unanimous, all five justices agreeing. The "shield" provision for treatment of illness by prayer in the child-neglect statute on which the parents relied was held to be unconnected with the homicide statute—a technicality that would appeal to the legal mind but not to the laypersons who fell afoul of it. That distinction will be encountered again below.

This decision involved a small, little-known religious group that received a great deal of unfavorable notice as a result of these deaths. Similar legal issues were posed by a larger, very well known and highly respectable religious body, the Church of Jesus Christ, Scientist, which likewise eschewed the use of conventional medicine in favor of spiritual treatment by prayer.

c. Christian Science Cases Arising from Death of Child. One of the most sensitive and difficult classes of church-state case law arises from the death of a child from illness claimed to be successfully treatable by medical means not employed because of the religious beliefs of parents that spiritual means would suffice. These cases often involved followers of the teachings of Mary Baker Eddy (1821-1910), founder of the Church of Christ, Scientist, whose textbook, *Science and Health with Key to the Scriptures*, she wrote in 1875.

It was the belief of this religion that illness is a symptom of failure to be in right relationship to God and can be overcome by rectifying that relationship through spiritual means. Adherents maintained that this understanding worked for them; if it did not, they would not persist in it. Church members were not penalized or excluded if they failed to rely on spiritual means in dealing with illness or injury, but they were cautioned not to try to mix the two methods and thus fail to do justice to either. Christian Science taught that disease and suffering are not caused or permitted by God and are alien to the divine creative purpose. Illness was seen as an aspect of human alienation from God that should be actively confronted and overcome by spiritual means. Christian Scientists do not try to ignore illness or suffering as an

57. *Hall v. Indiana*, 493 N.E.2d 433 (Ind. 1986).

"illusion," but try to remedy through deeper understanding the alienation from God that is believed to be its underlying cause.

This approach to health was not an intellectual dogma nor a revivalistic drama performed by a charismatic "healer" before an emotionally involved audience, but a way of life that must be achieved through disciplined spiritual growth. Christian Scientists did not plead for the deliverance of a particular person from a particular illness as a special favor from God to make an *exception* to spiritual laws in that one case by a "miracle" of "faith healing," but rather they sought to bring themselves and a person suffering from "illness" into better alignment with the *operation* of God's spiritual laws that work for health and wholeness. The "science" in Christian *Science* is this working *with* spiritual reality and discovering its pragmatic effectiveness.[58]

The First Church of Christ, Scientist, in Boston maintained a directory of full-time Christian Science practitioners throughout the country, persons who devoted full time to the ministry of healing through prayer and have demonstrated a successful record of healing. Their role was not comparable to that of a medical physician, but consisted entirely of "heartfelt yet disciplined prayer that brings to a case needing healing a deeper understanding of a person's actual spiritual being as a child of God."[59] These professionals were compensated by those who utilized their services. They were classified with clergy in various statutes such as the Internal Revenue Code.[60] Their services were indemnified by most insurance programs in lieu of medical treatment.[61]

The practice of spiritual treatment was recognized in most states as an alternative to medical treatment in statutes defining child abuse or neglect, as will be seen below. But when a child died without medical treatment, the bereaved parents were sometimes prosecuted despite such statutory recognition and despite the fact that children also died under medical treatment. Such prosecutions seemed to proceed from an assumption that the only proper and definitive way to treat human "illness" is by conventional medical science. Such an assumption would require families that believed otherwise to turn from their convictions and experience and to resort to medical intervention in which they did not believe. It is no derogation of the marvels of medical learning to say that there are aspects of human health that are not yet fully understood and may never be by empirical experimentation alone.

Recent insights into psychosomatic medicine, whole-personality healing, mental and emotional influences on the immune system and iatrogenic (physician-caused) illness point to realms of nonmechanistic indeterminacy in human knowledge of human health that have already been recognized in physics.[62] The dean of the

58. Derived from a publication of the Christian Science Board of Directors, *Freedom and Responsibility: Christian Science Healing for Children* (Boston: First Church of Christ, Scientist, 1989), *passim*.

59. Ibid., p. 19, Excerpt from Talbot, Nathan A., "The Position of the Christian Science Church," 309 *New England Journal of Medicine* 1641 (Dec. 29, 1983).

60. E.g., I.R.C. § 1402(e).

61. *Freedom & Responsibility, supra,* pp. 63-64.

62. See Peel, Robert, *Spiritual Healing in a Scientific Age* (San Francisco: Harper & Row, 1987), pp. 22-29 and *passim*.

Harvard Medical School was quoted by Derek Bok, president of Harvard, as saying (only half facetiously) to medical students, "Half of what we have taught you is wrong. Unfortunately, we do not know which half."[63] Another medical writer used a lesser figure.

> [Each] new medical discovery [is] announced with the same assuredness and supported by just as much evidence as had been used [earlier] for precisely the opposite viewpoint....
>
> Unlike other areas in which fads come and go, medical styles are meant to be supported by irrefutable evidence. That assumption is so far off the mark that the term "medical science" is practically an oxymoron. Dr. David Eddy of the Jackson Hole Group has estimated that no more than 15 percent of medical interventions are supported by reliable scientific evidence.[64]

This modesty would seem to be more appropriate to all human endeavors than the arrogance of those who insist that modern medical science must be the sole standard for what is acceptable in dealing with human illness.

In any event, Mary Baker Eddy, founder of Christian Science, advised adherents to comply with the law in such matters as requirements for vaccination or inoculation of children against communicable disease.

> Rather than quarrel over vaccination, I recommend, if the law demand, that an individual submit to this process, that he obey the law, and then appeal to the gospel to save him from bad physical results.... This statement should be so interpreted as to apply, on the basis of Christian Science, to the reporting of a contagious case to the proper authorities when the law so requires.[65]
>
> I say, "Render to Caesar the things that are Caesar's." We cannot force perfection on the world. Were vaccination of any avail, I should tremble for mankind; but, knowing it is not, and that the fear of catching smallpox is more dangerous than any material infection, I say: Where vaccination is compulsory, let your children be vaccinated, and see that your mind is in such a state that by your prayers vaccination will do the children no harm. So long as Christian Scientists obey the laws, I do not suppose their mental reservations will be thought to matter much.[66]

Criminal Cases

(1) *Walker v. Superior Court* (1989). Laurie Grouard Walker, a member of the Church of Christ, Scientist, was charged with involuntary manslaughter and felony child endangerment as a result of the death of her four-year-old daughter, Shauntay,

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63. Bok, Derek, "Needed: A New Way to Train Doctors," President's Report to the Harvard Board of Overseers, 1982-83, *Harvard Magazine* (May-June 1984), p. 41.

64. Nuland, Sherwin B., "Medical Fads" *N.Y. Times*, June 25, 1995, Section 4, p. 16. Dr. Nuland is clinical professor of surgery at the Yale School of Medicine.

65. Eddy, Mary Baker, *The First Church of Christ Scientist and Miscellany* (Boston: First Church of Christ, Scientist, 1941), pp. 219-220.

66. Ibid., pp. 344-5.

of acute purulent meningitis. The child fell ill with flu-like symptoms on February 21, 1984, and developed a stiff neck. The mother relied on the services of an accredited Christian Science practitioner, who prayed for the child and visited her on two occasions. A Christian Science nurse was also engaged, who attended the child on three days. The child nevertheless lost weight, became disoriented and irritable, and died on March 9. During the seventeen days of her illness, she received no medical treatment.

The mother moved for dismissal on the ground that her conduct was protected by law, and if it was not, she did not have fair notice thereof. Her motion was denied, and she appealed. Ultimately, the Supreme Court of California ruled on her contention in an opinion by Justice Stanley Mosk. The core of Mrs. Walker's contention was that the Penal Code of California (in Section 270) provides a complete defense against any prosecution for utilizing spiritual treatment rather than medical treatment for a child's illness. That section of the law was enacted in 1872 and stated: "Every parent of any child who willfully omits, without lawful excuse, to perform any duty imposed upon him by law, to furnish necessary food, clothing, shelter, or *medical attendance* for such child, is guilty of a misdemeanor." In 1925 the legislature amended this section by adding after "medical attendance" the words "*or other remedial care*." In 1976 it added a further amendment to the effect that "If a parent provides a minor with *treatment by spiritual means through prayer alone in accordance with the tenets and practices of a recognized church or religious denomination, by a duly accredited practitioner thereof,* such treatment shall constitute `other remedial care,' as used in this section."[67]

The California Supreme Court dealt first with the question whether Section 270 meant that prayer treatment was an acceptable substitute for medical treatment. The lower court had relied on an earlier case, *People v. Arnold*,[68] that held the phrase "or other remedial care" to stipulate one of a series of multiple necessities, thus "operating in addition to rather than in lieu of the responsibility to furnish medical attendance."[69] The state Supreme Court rejected that construction, holding "[T]his language is sufficiently clear...to conclude that the Legislature intended `other remedial care' to constitute a substitute for `medical attendance.'... We accordingly conclude that section 270 exempts parents who utilize prayer treatment from the statutory requirement to furnish medical care, and overrule *People v. Arnold* to the extent it concludes to the contrary."

A second question was more consequential: whether the provision in Section 270 pertaining to misdemeanor penalties for child neglect barred felony prosecution for manslaughter and child endangerment. The defendant maintained that the 1976 language added to Section 270 by the legislature (at the behest of the Christian Science Church in response to the court's adverse dictum in *Arnold*) was intended as a shield for all use of prayer in lieu of medical care in treatment of the illness of a child. The court analyzed this contention using an obscure rule of statutory

67. Stats. 1976, ch. 673, § 1, p. 1661, emphasis added.
68. 58 Cal Rptr. 115, 426 P.2d 515 (1967).
69. *Walker v. Superior Ct.*, 763 P.26 852, 857 (Cal. 1988).

construction: different statutes should be construed together only if they stand *in pari materia*, viz., if they have the same purpose. Even if they do so, a defense to one is not necessarily a defense to the other. The court concluded that the purpose of Section 270 was to require parents to furnish certain routine necessities for their children so that the public need not assume that obligation.

> While certainly reflecting concern for the general welfare of children, the fiscal objectives of this support provision are so manifestly distinguishable from the specific purposes of the involuntary manslaughter and felony child-endangerment statutes—designed to protect citizens from immediate and grievous bodily harm—that section 270 cannot be read to create express exemptions from prosecution under those separate provisions as a matter of parallel construction. The Legislature has determined that the provision of prayer is sufficient to avert misdemeanor liability for neglecting one's financial responsibility to furnish routine child support. This hardly compels the conclusion that in so doing the Legislature intended to create an unqualified defense to felony manslaughter and child endangerment charges for those parents who continue to furnish prayer alone in the rare instance when a gravely ill child lies dying for want of medical attention....
>
> The historical materials...demonstrate that the members of the Legislature were well aware the legislation left open the possibility of manslaughter and child endangerment prosecutions, but simply declined to extend their amendatory efforts beyond Section 270. A staff analysis prepared for the Assembly Committee on Criminal Justice observed that... "[N]o exception is made under the manslaughter statutes for parental liability should the child die. If treatment by prayer is to be recognized in part, the parents should not be liable for the results of using a permitted mode of healing."...[70]

Similar warnings were provided to members of the state Assembly when the bill came to the floor, but no amendments were offered on this subject. The Senate Committee on Judiciary received a four-page analysis of the legislation, which included a comment printed (unlike any other section of the analysis) entirely in capital letters "Do the provisions of this bill conflict with section[s]...of the Penal Code which make it a crime for any person to willfully cause or permit a minor under his care or custody to suffer any physical harm or injury? [¶] Might a parent be immune from liability for failure to provide for the health of the child because they [*sic*] choose treatment by prayer rather than common medical treatment, but incur liability if the child suffers any harm?" Nevertheless, the Senate committee and the full Senate adopted the legislation without addressing the possible inconsistency pointed out so prominently by the staff analysis. The court concluded:

> "The failure of the Legislature to change the law in a particular respect when the subject is generally before it and changes in other respects are made is indicative of an intent to leave the law as it stands in the aspects

70. Ibid., 860, 861.

> not amended."[71] The plain language, purpose, and legislative history of section 270 thus fail to establish a discernible legislative intent to exempt prayer treatment, as a matter of law, from the reach of the manslaughter and felony child-endangerment statutes.

The court found further evidence of the legislature's intent in this matter in the child dependency provisions of the Welfare and Institutions Code. This section had just been amended and had not yet come into effect, but it indicated the legislature's latest enactment on the issue.

> "Whenever it is alleged that a minor comes within the jurisdiction of the court on the basis of the parent's...willful failure to provide adequate medical treatment or specific decision to provide spiritual treatment through prayer, the court shall give deference to the parent's...medical treatment, nontreatment, or spiritual treatment through prayer alone in accordance with the tenets and practices of a recognized church or religious denomination by an accredited practitioner thereof and shall not assume jurisdiction *unless necessary to protect the minor from suffering serious physical harm or illness*." (Italics added [by the court].)....
>
> The legislative design appears consistent: prayer treatment will be accommodated as an acceptable mode of attending to the needs of a child only insofar as serious physical harm or illness is not at risk. When a child's life is placed in danger, we discern no intent to shield parents from the chastening prospect of felony liability.[72]

The defendant further argued that she did not possess the degree of culpability necessary to convict her under either of the charged offenses, since she did not fall into the criminal negligence required as an element of both. Criminal negligence has been defined in California, the court said, as "aggravated, culpable, gross, or reckless, that is, the conduct of the accused must be such a departure from what would be the conduct of an ordinarily prudent or careful man under the same circumstances as to be incompatible with a proper regard for human life…. [Such negligence] is ordinarily to be determined pursuant to the general principles of negligence, the fundamental of which is knowledge, actual or imputed, that the act of the slayer tended to endanger life."[73]

The court commented on an 1874 case from England cited by the defendant in which the court had dismissed a manslaughter indictment against a parent who had treated an ill child exclusively by prayer, yet the child died.

> [T]he court considered and rejected the proposition that a parent who treated a child by spiritual care "instead of calling in a doctor to apply blisters, leeches, and calomel," was guilty of criminal negligence. Were blisters, leeches and calomel the medical alternative to prayer today, quite likely defendant's reliance on [this case] would more fully resonate with

71. *Cole v. Rush*, 289 P.2d 450 (1955).
72. *Walker, supra,* 865, 866.
73. *People v. Penny*, 285 P.2d 926 (1955).

> this court. Medical science has advanced dramatically, however, and we may fairly presume that the community standard for criminal negligence has changed accordingly.

The defendant also contended that she lacked the *mens rea* or evil intent to be guilty of the crime charged. But the court noted that—unlike some states—California employs an *objective* rather than a *subjective* test of criminal negligence, viz., whether a reasonable person similarly situated would have been aware of the risk involved; if so, the defendant is presumed to have had such an awareness. The court recalled a case involving a self-styled "healer" who deep-massaged a leukemic person, following which the patient died. The court in that case observed that the healer had not harbored any intent to harm the victim, but was instead trying to help him. Nevertheless, the healer was found liable to the charge of criminally negligent involuntary manslaughter.[74] "The relevant inquiry, then, turns not on the defendant's subjective intent to heal her daughter but on the objective reasonableness of her course of conduct," said the *Walker* court.

The court dealt with the defendant's constitutional claims: that her conduct was absolutely protected from criminal liability by the First Amendment. The court analyzed that claim using the compelling state interest test then in effect—a governmentally imposed burden on the practice of religion must be justified by a compelling state interest that can be served in no less burdensome way.[75]

> Defendant does not dispute the gravity of the governmental interest involved in this case, as well she should not. Imposition of felony liability for endangering or killing an ill child by failing to provide medical care furthers an interest of unparalleled significance: the protection of the very lives of California's children.... Balanced against this interest is a religious infringement of significant dimensions. Defendant unquestionably relied on prayer treatment as an article of genuine faith, the restriction of which would seriously impinge on the practice of her religion. We note, however, that resort to medicine does not constitute "sin" for a Christian Scientist, does not subject a church member to stigmatization, does not result in divine retribution, and, according to the Church's amicus curiae brief, is not a matter of church compulsion.
>
> Regardless of the severity of the religious imposition, the governmental interest is plainly adequate to justify its restrictive effect. As the United States Supreme Court stated in Prince v. Massachusetts,[76] "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 legal discretion when they can make that choice for themselves.... The right to practice religion freely does not

74. *People v. Burroughs*, 678 P.2d 894 (1984).

75. That test was dropped by the U.S. Supreme Court in *Oregon v. Smith*, 494 U.S. 892 (1990), discussed at § D2e below, and Congress sought to restore it in the Religious Freedom Restoration Act of 1993.

76. 321 U.S. 158, 170 (1944).

> include liberty to expose the community or child to communicable disease or the latter to ill health or death."...
>
> To survive a First Amendment challenge, however, the policy must also represent the least restrictive alternative available to the state. Defendant and the Church argue that civil dependency proceedings advance the governmental interest in a far less intrusive manner. This is not evident. First, we have already observed the profoundly intrusive nature of such proceedings; it is not clear that parents would prefer to lose custody of their children pursuant to a disruptive and invasive judicial inquiry than to face privately the prospect of criminal liability. Second, child dependency proceedings advance the governmental interest only when the state learns of a child's illness in time to take protective measures, which quite likely will be the exception rather than the rule. Finally, the imposition of criminal liability is reserved for the actual loss or endangerment of a child's life and thus is narrowly tailored to those instances when governmental intrusion is absolutely compelled.... Accordingly, the First Amendment...do[es] not bar defendant's criminal prosecution.

The final issue dealt with by the court was whether the defendant had been denied due process of law by not being given fair notice of potentially criminal conduct. She claimed that the statutes discussed earlier provided no notice of the point at which lawful prayer treatment becomes unlawful, thus requiring her to guess—at peril of criminal punishment—as to the meaning of a penal statute. She asked rhetorically, "Is it lawful for a parent to rely solely on treatment by spiritual means through prayer for the care of his/her ill child during the first few days of sickness but not for the fourth or fifth day?" The court answered this rather reasonable inquiry by quoting Justice Oliver Wendell Holmes:

> "The law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree."[77] The "matter of degree" that persons relying on prayer treatment must estimate rightly is the point at which their course of conduct becomes criminally negligent. In terms of notice, due process requires no more.... [The laws at issue here] thus provided constitutionally sufficient notice to defendant that the provision of prayer alone to her daughter would be accommodated only insofar as the child was not threatened with serious physical harm or illness.[78]

Five justices joined this opinion. Justice Mosk wrote an additional opinion (concurring with his opinion for the court) in which he went beyond the statutory discussion to reach the constitutional question briefed by the parties (but only one other justices joined him in that effort). He concluded that the shield provision in Section 270 violated the Establishment Clause because it protected only Christian Scientists.

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77. *Nash v. United States*, 229 U.S. 373, 377 (1913).

78. *Walker, supra.*

The statute excludes from criminal liability any parent who provides a minor with "treatment by spiritual means through prayer alone in accordance with the tenets and practices of a recognized church or religious denomination, by a duly accredited practitioner thereof." (Italics added [by the court].) The provision thus affords no protection for parents who otherwise treat their children "by spiritual means through prayer alone." Specifically denied the exemption are (1) parents not affiliated with a "recognized" church or religious denomination who nonetheless provide prayer treatment on the basis of personal religious belief or the teachings of an unrecognized sect, and (2) parents who provide prayer treatment in accordance with the tenets of a recognized denomination that does not "accredit" prayer "practitioners."

These excluded believers are not the fanciful product of a strained reading of the statutory language. In People v. Arnold [supra], this court considered a religious exemption claimed under section 270 by a member of "the Church of the First Born," described as "a religious group believing in faith healing." Whether, and on what basis, a court would determine that the Church of the First Born constitutes a "recognized" religion is a serious question not easily answered. Furthermore, while the opinion in Arnold states that members of the group prayed with the defendant for a cure, there is no indication that they were "duly accredited practitioner[s]" of prayer treatment. If not, Mrs. Arnold would have been denied the current statutory exemption even if the Church of the First Born had been "recognized." Indeed, certain well-known denominations decline to term anyone a "healer": "The so-called Pentecostal sects have some members who actively seek and encourage `divine intervention,' but they do not ordinarily perform acts that are thought to `heal' a sick person. In this sense, there are no `healers'; the cure is thought to come directly from God."[79]

Also denied the statutory exemption are parents whose use of prayer treatment stems from personal religious beliefs rather than the tenets of a recognized church or denomination.... The one group of parents squarely protected by the terms of the statute are Christian Scientists, whose denomination sponsored the 1976 amendment to section 270 enacting its religious exemption. It is thus more than fortuity that the word "practitioner," used by Christian Scientists to formally designate their healers, also appears in section 270 to describe the required providers of the exempted treatment....

By sparing the favored from criminal liability while condemning others for failure to cloak identical conduct in the mantle of a sanctioned denomination or procedure, the religious exemption of section 270 operates without neutrality "in matters of religious theory, doctrine and practice" and thus cannot survive in the absence of a compelling state interest in the discriminatory effect.... [T]he only discernible state interest in this exemption is religious accommodation per se. While

79. Comment, "Religious Beliefs and the Criminal Justice System: Some Problems of the Faith Healer," 8 *Loyola L.A.L.Rev.* 396, 413-4 (1975).

> accommodation has been sustained as a legitimate objective when it "reflects nothing more than the government's obligation of neutrality in the face of religious differences,"[80] here the accommodation reflects nothing less than a denominational preference in the face of indistinguishable religious conduct. Manifestly this is not a compelling objective in the constitutional sense.
>
> If the Legislature wishes to exempt from criminal liability those parents who rely on prayer treatment in lieu of medical care, the establishment clause requires as a minimum that the exemption be granted irrespective of denominational affiliation or practice.[81]

Justice Allen E. Broussard wrote separately, concurring that a prosecution could be maintained against the defendant for involuntary manslaughter, but dissenting as to child endangerment.

> [E]ven if the failure to provide necessary medical attendance were punishable under [the Penal Code section on child endangerment], the prayer exemption of section 270 must be read into that section or the exemption is pointless. It is overwhelmingly clear that the Legislature sought to preclude child endangerment liability of persons coming within the religious exemption of section 270, particularly where prayer is successful, and to apply [the endangerment] section... to such persons would defeat the legislative intent rendering the religious exemption meaningless.... [The endangerment section should apply] only when the basis of the child endangerment is active conduct endangering the child, willfully causing or permitting child endangerment. The only active conduct shown by the evidence is that [the defendant] prayed. Prayer is not prohibited by [the child endangerment section].[82]

The Supreme Court of California, per Justice Mosk, had certainly devoted extensive deliberation and analysis to this perplexing and sensitive issue, but some predispositive assumptions were apparent in its conclusions. A touching faith in the sovereign remedy of modern medical science was visible throughout. If it were still a matter of "blisters, leeches and calomel," the court might have been more sympathetic to alternative modes of healing, but "medical science has advanced dramatically," and "the community standard for criminal negligence has changed accordingly." Society may well be grateful for such advances, which have substantially raised the average life expectancy for everyone, but some religious understandings hold that the causes of health and illness lie deeper than science can reach (or at least has thus far reached), and that illness is itself but a symptom of those underlying causes that are scarcely touched by medical science, however "modern."

The court disposed of that quixotic notion by characterizing it as "subjective" and pointing out that—whatever other jurisdictions might do—in California the law relied

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80. *Sherbert v. Verner*, 374 U.S. 398, 409 (1963), discussed at A7c above.

81. *Walker, supra*, Mosk concurrence, joined by Justice Marcus Kaufman.

82. *Walker, supra*, Broussard concurrence in part and dissent in part.

on "objective" criteria—"whether a reasonable person similarly situated would have been aware of the risk involved." Thus the test is shifted to an aggregation of subjective views as hypothesized by the court without locating and interrogating a random sample of "reasonable persons" facing similar circumstances. Even if most of such "reasonable persons" might have chosen medical care, does that invalidate the choices of those who did not? Only if the state is prepared to impose the medical norm as the only acceptable understanding of reality and of human duty and responsibility within it.

The California Supreme Court was in no doubt that that was the case, and perhaps there is some merit in this methodology, since some people (including some religious people) can pursue courses of action that are much more clearly unfounded in common experience and much more clearly hazardous to the public health and safety than those at issue here, and the public must have some basis in the collective will called law for protection of the community. Yet the question remains whether this situation involved conduct so prevalent or so malevolent as to require the invocation of the draconian powers of the criminal law. Other jurisdictions have not thought so, as will be seen.

But the California legislative situation was pertinent to this question. The court was quite correct that the legislature had considered the problem and had failed to address it (as legislatures often do), leaving the seeming inconsistency between the misdemeanor statute and the felony statutes unresolved. Whether the defendant—or anyone else—had "fair notice" that the conduct pursued would prove to be criminal is questionable, and the *in pari materia* analysis and the quotation from Justice Holmes were not persuasive as to what Mrs. Walker would have known to do when her daughter lay ill. She was under the not unreasonable impression that the law of California expressly allowed "treatment by spiritual means through prayer." She did not know that the legislature had been apprised of the possible inconsistency between the misdemeanor and felony sections of the Penal Code and had failed to reconcile them. She did not know that at some indefinite point her efforts to pursue the teachings of her faith despite the perplexity, anxiety and anguish about her child's illness could land her in prison. That is hardly "fair notice" within the understanding of any "reasonable person," and the court's insistence that it was fair notice does not make it so—except in California.

Justice Mosk was not wrong in his concurring opinion on the constitutional issue: that the California "shield" provision for spiritual healing drafted by the Christian Science Church and adopted in several (but not all) instances by the legislature was probably inconsistent with the Establishment Clause as being a benefit for one and only one religious body. The Christian Science Church has been assiduous in obtaining this provision in the laws of most states—as it well might be in pursuing protection for sincere practice of its faith. It has sought to obtain as broad coverage as possible in such legislation, but often must settle for statutes that are narrowly confined to Christian Science practice and unhelpful to more sweeping claims of faith-healing.[83] That narrowly drawn exemption may thus be self-defeating if it

83. See *Hall v. Indiana* at § 4b above.

offends the Establishment Clause, yet a broader exemption might be less likely to commend itself to legislators. It is instructive to see how this provision has fared in other jurisdictions.

The mother in this case was found guilty of involuntary manslaughter by a judge in a one-day trial based on the transcript of the preliminary hearing and stipulated facts. She was sentenced to probation and community service. The California Court of Appeals in an unpublished decision refused to overturn the conviction, and the California Supreme Court denied review.

In another case arising in the same year in California, *People v. Glaser*, Christian Science parents were charged with manslaughter and felony child endangerment in the death of their sixteen-month-old son from meningitis after a twenty-seven-hour illness. The parties consented to a trial without jury limited to oral argument based on the transcript of a preliminary hearing. The court found the parents not guilty on all charges.[84] In a third Califonia case, *California v. Rippberger* (1991), Christian Science parents were convicted of felony child endangerment, and their conviction was upheld on appeal on the basis of *Walker, supra*. Presumably, Christian Scientists in California are now on notice that the shield provision in some California penal statutes does not protect them from prosecution under other penal statutes, and that they refrain at their peril from resorting to medical treatment in illnesses of their children that might prove fatal.

(2) *Massachusetts v. Twitchell* (1993). From Massachusetts came a case with a similar fact-pattern but a very different outcome. David and Ginger Twitchell were Christian Scientists from Christian Science families who were convicted of involuntary manslaughter for the death of their two-and-a-half-year-old son, Robyn, from peritonitis caused by a perforated bowel, a condition that evidence indicated could be corrected by surgery with a high success rate. Robyn was ill for five days in 1986. During that period the Twitchells retained a Christian Science practitioner and nurse and at one point consulted with Nathan Talbot, manager of Committees on Publication for the entire church. He supplied them with a church publication explaining the legal rights and obligations of Christian Scientists in Massachusetts, quoting a statute that recognized remedial treatment by spiritual means alone as satisfying any parental obligation not to neglect a child or to provide a child with requisite physical care, couched in wording very similar to the California statute discussed above.

At trial the defendants sought to introduce in evidence the church publication on which they had relied, but the trial judge, Sandra L. Hamlin, refused to admit it. They were sentenced to ten years' probation on July 6, 1990, subject to the requirements that all their children be given periodic checkups by a pediatrician and that they obtain medical attention for any signs of a child's serious illness. The Twitchells appealed their conviction directly to the state Supreme Judicial Court, which agreed to hear it and ruled on August 11, 1993, more than seven years after Robyn's death and three years after their conviction and sentencing. The opinion of the court was

84. *People v. Glaser*, Case # A753942 (Superior Ct. L.A. Cty., Cal. 1989), *on appeal,* Case # A753942 (Ct. App. 2d App. Dist., Cal. 1990).

presented by Justice Herbert P. Wilkins. Only one justice, Joseph R. Nolan, dissented.

> We shall conclude that parents have a duty to seek medical attention for a child in Robyn's circumstances, the violation of which, if their conduct was wanton or reckless, could support a conviction of involuntary manslaughter and that the spiritual healing provision [pertaining to child neglect or failure to provide physical care] did not bar a prosecution for manslaughter in these circumstances. We further conclude, however, that special circumstances in this case would justify a jury's finding that the Twitchells reasonably believed that they could rely on spiritual treatment without fear of criminal prosecution....
>
> Our definition of involuntary manslaughter derives from the common law.... [Apart from any statute,] there is...a common law duty to provide medical services for a child, the breach of which can be the basis...for the conviction of a parent for involuntary manslaughter.
>
> [What, then, is the impact of the "shield" provision in the neglect statute?] The Commonwealth asks us to eliminate any application of the spiritual treatment provision to this case by holding that...provision... unconstitutional. The argument is based solely on the establishment of religion clause of the First Amendment to the Constitution of the United States and the equal protection clause of the Fourteenth Amendment.... These claims of unconstitutionality place the Commonwealth in the position of challenging the constitutionality of its own duly enacted statute.... The retroactive invalidation of a statute on which a criminal defendant relied in justification of his conduct would present a serious fairness issue. Because we shall conclude that the spiritual treatment provision does not...foreclose a charge of involuntary manslaughter, we need resolve neither these preliminary questions nor the underlying constitutional one.... It is unlikely that the Legislature placed the spiritual treatment provision in [the child-neglect statute] to provide a defense to, or to alter any definition of, common law homicide....
>
> The spiritual treatment provision refers to neglect and lack of proper physical care.... These concepts do not underlie involuntary manslaughter. Wanton or reckless conduct is not a form of negligence. Wanton or reckless conduct does not involve a wilful intention to cause the resulting harm. An involuntary manslaughter verdict does not require proof of wilfulness [citations omitted].... The spiritual treatment provision protects against criminal charges of neglect and of wilful failure to provide proper medical care and says nothing about protection against criminal charges based on wanton or reckless conduct. The fact that at some point in a given case a parent's conduct may lose the protection of the spiritual treatment provision and may become subject to the common law of homicide is not a circumstance that presents a due process of law "fair warning" violation.[85]

85. At this point the court cited with approval the California decision in *Walker* (discussed immediately above) as well as (without approval) *Hermanson* and *McKown* [discussed below at §§ (4) and (3), respectively].

The defendants argue that they were misled by an opinion of the Attorney General that caused them to conclude that they were protected by the spiritual treatment provision.... There is, however, no evidence to support the contention that they relied directly on that opinion or that they knew of [it]. Indeed it does not appear that the defendants made any argument to the trial judge that they relied on an official interpretation of the law.[86]

In May, 1975, the Attorney General [of Massachusetts] gave an opinion on a number of topics to the deputy director of the Office for Children. The relevant portion of that opinion...answers a general question "whether parents who fail to provide medical services to children on the basis of religious beliefs will be subject to prosecution for such failure." A reasonable person not trained in the law might fairly read the Attorney General's comments as being a negative answer to the general question whether in any circumstances such parents may be prosecuted. It is true that the answer comes to focus on negligent failures of parents, and we know that wanton or reckless failures are different. But an answer that says that children may receive needed services "notwithstanding the inability to prosecute parents in such cases" and issues no caveat concerning homicide charges, invites a conclusion that parents who fail to provide medical services to children on the basis of religious beliefs are not subject to prosecution in any circumstances.

Although the Twitchells were not aware of the Attorney General's opinion, they knew of a Christian Science publication called "Legal Rights and Obligations of Christian Scientists in Massachusetts." The defense offered the publication in evidence. The judge held a voir dire on the question whether to admit that portion of the publication which concerned the furnishing of proper physical care to a child and which David Twitchell had read on the Sunday or Monday before Robyn's death. The judge excluded the evidence, and, although the defendants objected at trial, they have not argued to us that the exclusion was error. The relevant portion of the publication, after quoting [the statute], added, repeating precisely but without citation, a portion of the Attorney General's opinion, that this criminal statute "expressly precludes imposition of criminal liability as a negligent parent for failure to provide medical care because of religious beliefs. But this does not prohibit the court from ordering medical treatment for children." There is no mention of potential criminal liability for involuntary manslaughter.

Although we have held that the law of the Commonwealth was not so unclear as to bar the prosecution of the defendants on due process of law principles, the Attorney General's opinion presents an additional element to the fairness assessment. It is obvious that the Christian Science Church's publication on the legal rights and obligations of Christian Scientists in

86. In the margin, the court added: "Defense counsel did not request a jury instruction on this theory of reliance. The Commonwealth makes no objection to the defendant's argument on this ground, however, and the judge's views on the spiritual treatment provision suggest that, if requested, no such instruction would have been given."

> Massachusetts relied on the Attorney General's 1975 opinion. That opinion was arguably misleading because of what it did not say concerning criminal liability for manslaughter. If the Attorney General had issued a caveat concerning manslaughter liability, the publication (which, based on such portions of it as appear in the record, is balanced and fair) would have referred to it in all reasonable likelihood. Nathan Talbot...might well have given the Twitchells different advice.
>
> Although it has long been held that "ignorance of the law is no defence,"[87] there is substantial justification for treating as a defense the belief that conduct is not a violation of law when a defendant has reasonably relied on an official statement of the law, later determined to be wrong, contained in an official interpretation of the public official who is charged by law with the responsibility for the interpretation or enforcement of the law defining the offense.[88]...
>
> The Twitchells were entitled to present such an affirmative defense to the jury. We can hardly fault the judge for not doing so because the defense did not make such an argument or request a jury instruction on that defense. The issue was one that, if presented to them, could well have changed the jury's verdicts. Evidence showed that the defendants were deeply motivated toward helping their child, while at the same time seeking to practice their religion within the limits of what they were advised that the law permitted. The issue of their reliance on advice that had origins in the Attorney General's opinion should have been before the jury. Therefore, the failure to present the affirmative defense to the jury, along with the relevant portion of the church's publication which the judge excluded, created a substantial risk of a miscarriage of justice requiring that we reverse the convictions, even in the absence of a request for jury instruction on the subject. For these reasons, the judgments must be reversed, the verdicts must be set aside, and the cases remanded for a new trial, if the district attorney concludes that such a prosecution is necessary in the interests of justice.[89]

In the margin at the end of its opinion, the court murmured, "The sincerity of [the defendants'] religious beliefs and their attempts to determine what their legal obligations were seem to be unquestionable.... Three years now have passed since the sentencing. The basic principle has been established that [the law] did not provide the Twitchells with protection against a charge of involuntary manslaughter.... If there is a new trial, the judge should exercise great care that the religious beliefs of the Twitchells and other Christian Scientists are not implicitly or explicitly placed on trial. If the prosecution seeks to cross-examine a witness about church doctrine or his or her religious beliefs, on objection the judge should consider carefully the relevance of the evidence sought in relation to any prejudice that may result."

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87. *Commonwealth v. Everson*, 140 Mass. 292, 295 (1885).

88. In the margin the court noted: "There is special merit to such a rule if religious beliefs are involved and if the defendant was attempting to comply with the law while adhering, as far as possible, to his religious beliefs and practices."

89. *Commonwealth v. Twitchell*, 416 Mass. 114 (1993).

One justice dissented on the ground that the church publication had been properly excluded from the trial because it was not competent evidence on the issue of manslaughter.

The prosecution accepted the court's thinly veiled invitation not to retry the case.

The Massachusetts court seems to have followed the lead of the California court in meticulously parsing the distinction between the child-neglect statute and the involuntary manslaughter statute and then holding the defendants culpable for not having fathomed that obscure distinction. The law of Massachusetts, as thus construed, thenceforward provided no protection for parents relying on Christian Science spiritual treatment beyond the indeterminate point at which their ill child might die and the parents be guilty of manslaughter. On the issue of whether the law thus affords "fair notice" of the point at which their conduct becomes criminal, the court simply referred to the not-very-helpful dictum of Justice Holmes cited by the California court that the law often requires people to estimate a "matter of degree" at their peril. That dictum recognized the complexity of human affairs and the difficulty of the law's foreseeing and specifying all possible permutations of motives and circumstances, but it also seems to have abandoned the ideal that the law should apprise reasonable people trying to obey it of what is legal and what is not. That is not "fair notice" in any intelligible meaning of the term.

In reaching its final judgment, the Massachusetts court seemed to recognize that difficulty. Having made the point that parents were not protected from liability in case of any *serious* outcome, the court found that the parents in the instant case had been inadvertently misled by an opinion of the Attorney General relayed to them by a church publication, and thus were not as culpable as the trial court had found them, so were entitled to a new trial if the prosecution wanted to pursue the matter, which it didn't. Meanwhile the Twitchells had moved to Long Island beyond the jurisdiction of the court.

(3) *Minnesota v. McKown* (1990). Ian Lundman, eleven years old, died on May 9, 1989, of diabetes mellitus. He had been occasionally ill in the weeks preceding, but fell seriously ill two or three days before he died. His mother, Kathleen McKown, and his stepfather, William McKown, were Christian Scientists, and they relied on spiritual healing methods throughout Ian's illness.

The Hennepin County Attorney presented testimony by medical physicians to a grand jury in that county to the effect that Ian's illness was treatable through conventional medicine and that his condition could probably have been stabilized up to two hours before he died. The grand jury returned indictments charging the mother and stepfather with second degree manslaughter. The McKowns moved the District Court for dismissal of the indictments, and the court agreed.

> [T]he indictment may stand only if it properly charges, and there is probable cause to believe, that defendants consciously created an unreasonable risk of harm by grossly negligent conduct. This court does not find there is probable cause to believe there was grossly negligent conduct in this case.
>
> [The statute] which defines child neglect in the criminal code...provides:
>
> If a parent...in good faith selects and depends upon spiritual means or

> prayer for treatment or care of disease or remedial care of the child, this treatment or care is "health care" as used in clause (a).
>
> This statute clearly sets forth the applicable standard of care to be used in this case. The State argues that the defendants are under a duty to provide medical treatment in life-threatening situations notwithstanding this statute. This court cannot agree. The manslaughter statute must be read in conjunction with the child neglect statute....
>
> To resolve whether two statutes should be read together, the court must determine if they are "in pari materia." Statutes are said to be "in pari materia" when they relate to the same matter or subject even though one is specific and one general and even though they have not been enacted simultaneously and do not refer to each other expressly....
>
> Both the child neglect statutes and the involuntary manslaughter statute deal with criminal liability as a result of negligent behavior. The child neglect statute specifically addresses the subject of negligent behavior affecting children, while the involuntary manslaughter statute generally addresses the subject of negligent behavior as it affects children and adults. By the plain language of the two statutes it appears that they are "in pari materia."
>
> However, the guiding principal [*sic*] for a court in determining whether the exception of one statute is applicable to another is the natural and reasonable understanding of members of the legislature or persons to be affected by the statute.... The spiritual means exemption was presented to the House Judiciary Committee in the first part of 1983. The intention of the legislature is best stated by Representative Bishop.... It seems to me that a parent who in good faith selects a spiritual means shouldn't be exposed to criminal treatment....
>
> The overall legislative scheme was designed to have the state intervene in the case of an emergency rather than punish the parents either with child neglect or "any criminal sanction."...
>
> [The] State argues that the spiritual means exemption has no application when the child's injuries extend beyond substantial physical harm and result in death. This court can find no basis in the statute or the legislative record for such an interpretation....
>
> The spiritual means exemption was proposed by the Christian Science Church. Their understanding was that they would be allowed to rely on spiritual means for health care without the threat of criminal reprisal once the exemption was passed. The natural and reasonable understanding of members of the legislature and persons to be affected by the spiritual means exemption was that no criminal proceedings would be brought regardless of result as long as they practiced their religion in good faith....
>
> This court finds that the failure to properly instruct the Grand Jury...as to the applicable standard of care requires this court to dismiss the indictment.[90]

The state appealed the dismissal, and the court of appeals disagreed with the

90. *Minnesota v. McKown*, Fourth Judicial District, County of Hennepin, Eugene J. Farrell, J., April 1990, Nos. 89052952, etc.

district court that the two statutes in question were *in pari materia*, but agreed that the trial court was correct to dismiss the indictments as violations of due process.[91] The state appealed to the Supreme Court of Minnesota, which heard the case *en banc* and issued an opinion per Justice Esther Tomljanovich. The state Supreme Court agreed with the court of appeals that the spiritual means exemption did not apply to the manslaughter charge.

> [T]he child neglect and second degree manslaughter statutes are not *in pari materia* and thus, the spiritual treatment and prayer exception of the former cannot be imported into the latter. The child neglect provision applies specifically to individuals with legal responsibility for a child who wilfully neglect that responsibility and thereby cause the child substantial physical or emotional harm. The statute defining second degree manslaughter, however, permits the state to prosecute anyone who causes the death of another by exposing that person to an unreasonable risk of death or great bodily injury. The two statutes are therefore clearly based on separate and distinct purposes. Further, nothing in the language of either provision suggests they are so closely related as to require they be interpreted in light of one another, and neither contains an explicit mandate to construe them together.... Although legislative history may be useful in interpreting an ambiguous statute, this court generally does not consider it when faced with a clearly worded provision.... The language of the exception is not ambiguous; it expressly states that relying on spiritual treatment and prayer does not itself constitute child neglect. Thus we need not consult the exception's legislative history in our interpretation of it.[92]

But the Supreme Court agreed with the two courts below that the indictments violated the constitutional guarantee of due process of law.

> [The McKowns do not contend] that either the manslaughter statute or the child neglect statute is so vaguely worded as to make it unreasonably difficult to discern what conduct each prohibits. Rather, [they] contend the child neglect statute misled them in that it unequivocally stated that they could, in good faith, select and depend upon spiritual means or prayer without further advising them that, should their chosen treatment method fail, they might face criminal charges beyond those provided in the child neglect statute itself.... "[T]he person of ordinary intelligence...should not have to guess at the meaning of penalty provisions, or else those provisions are not sufficiently clear to satisfy due process concerns."[93] This concern that individuals be given unambiguous notice of the boundaries within which they must operate directly contravenes the state's contention that nothing in the spiritual treatment and prayer exception to the child neglect provision reasonably suggests immunity from all prosecution. The exception is broadly worded, stating that a parent may in good faith "select and depend upon" spiritual treatment and prayer, without

91. 461 N.W.2d 720 (1990).
92. *Minnesota v. McKown*, 475 N.W.2d 63 (1991).
93. *U.S. v. Colon-Ortiz*, 866 F.2d 6, 9 (CA1 1989).

> indicating a point at which doing so will expose the parent to criminal liability. The language of the exception therefore does not satisfy the fair notice requirement inherent in the concept of due process.
>
> Furthermore, the indictments...violate the long-established rule that a government may not officially inform an individual that certain conduct is permitted and then prosecute the individual for engaging in that same conduct.... The spiritual treatment and prayer exception to the child neglect statute expressly provided [the McKowns] the right to "depend upon" Christian Science healing methods so long as they did so in good faith. Therefore the state may not now attempt to prosecute them for exercising that right.[94]

Justice M. Jeanne Coyne dissented, joined by Justice John E. Simonett, arguing that the majority had (correctly) held the two statutes not to be *in pari materia*, but then in holding that the one did not give fair notice of the other, had brought back in "the rejected *in pari materia* argument garbed in the cloak of due process."

> Whatever kind of health care is selected, due process does not require notification that selection of and reliance on a course of conduct which appears to comply with the requirements of one statute may not meet the requirements of another.
>
> If, for example, a parent selects conventional health care and engages a physician to treat a child, there is no basis for a prosecution for child neglect because the parent has provided necessary health care. If, however, the parent who selects conventional health care knowingly engages a physician whose license has been suspended or revoked because of habitual neglect of patients caused by drug addiction and if the child should die because of the physician's neglect, I think it highly unlikely that anyone would contend that the absence of a warning in the child neglect statute insulated the parent from a charge of manslaughter.

The four justices of the majority apparently did not wish to go the route of the California Supreme Court, but neither did they wish to give a blanket shield to faith healing, so they chose the middle course of lack of "fair notice," which meant that the McKowns could not be prosecuted, but left the fate of future instances of a child's death under spiritual treatment and prayer undetermined, if not in fact imperiled on the basis that the *McKown* decision meant faith healers should be on notice that they could be prosecuted for a child's death.

The McKowns were subsequently sued for Ian Lundman's death by Ian's natural father, so the entire issue was processed again in the civil courts, with results to be examined below.

(4) *Hermanson v. Florida* (1992). On September 30, 1986, Amy Hermanson, age seven, died of acute juvenile onset diabetes mellitus following an illness of nine days' duration, during which time she lost weight, became lethargic, could not keep food down and exhibited other symptoms of marked illness. Her parents, both Christian Scientists, retained a Christian Science practitioner and a Christian Science

94. *Minnesota v. McKown, supra.*

nurse to care for Amy using the methods of spiritual treatment and prayer favored by Christian Science. Notwithstanding these efforts, Amy died, and subsequently the parents were charged and convicted of child abuse resulting in third-degree murder for failing to provide Amy with conventional medical treatment. They received four-year suspended prison sentences with fifteen years' probation.

The appellate court affirmed the conviction on the ground that the shield provision for use of spiritual treatment and prayer in the child-neglect statute did not protect the defendants against prosecution for murder in the case of death of a child, citing with approval the California case of *Walker v. Superior Court, supra.* That court also rejected the defendants' claim that their use of spiritual treatment and prayer was protected by the guarantee of free exercise of religion in the First Amendment of the U.S. Constitution, pointing out that the recent Supreme Court decision in *Oregon v. Smith*[95] held that the Free Exercise Clause does not relieve individuals of the obligation to comply with a law that does not target religious belief or practice. The court also turned aside the defendants' claim that the statute(s) did not give them fair warning of what was culpable conduct by quoting Justice Holmes' dictum, "The law is full of instances where a man's fate depends on his estimating rightly...some matter of degree."

The Supreme Court of Florida reversed in a unanimous opinion by Justice Ben F. Overton that dealt solely with the issue of due process of law.

> In asserting that they were denied due process, the Hermansons claim that the statutes failed to give them sufficient notice of when their treatment of their child in accordance with their religious beliefs became criminal. They argue that their position is supported by (1) the fact that it took the district court of appeal nine pages to explain how it arrived at its conclusion that the exemption for spiritual treatment was only part of the civil child abuse statute, not the criminal child abuse statute and (2) the trial court's construing the statute differently, holding that they were protected by the [shield] provision to the extent of making it a jury issue.
>
> The United States Supreme Court...stated that confusion in lower courts is evidence of vagueness which violates due process.[96] Furthermore,...we held that due process is lacking where "a man of common intelligence cannot be expected to discern what activity the statute is seeking to proscribe."[97]... The State, in this instance, relies primarily on the decision of the Supreme Court of California in Walker..., particularly the conclusion that "persons relying on prayer treatment must estimate rightly" to avoid criminal prosecution because "due process requires no more."[98] Pennsylvania and Indiana have taken a similar view and rejected similar due process arguments.[99]...

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95. 494 U.S. 872 (1990), discussed at D2e.

96. *U.S. v. Cardiff*, 344 U.S. 174 (1952).

97. *Linville v. State*, 359 So.2d 450, 453-454 (1978).

98. *Walker, supra*, 871-872.

99. Cf. *Pennsylvania v. Barnhart*, 497 A,2d 616 (Pa. Super. Ct. 1985), *Hall v. Indiana*, 493 N.E.2d 433 (Ind. 1986), discussed at § b above.

> We disagree with the view of the Supreme Court of California in Walker that, in considering the application of this type of religious accommodation statute, persons relying on the statute and its allowance for prayer as treatment are granted only the opportunity to guess rightly with regard to their utilization of spiritual treatment. In commenting on this type of situation, one author has stated: "By authorizing conduct in one statute, but declaring that same conduct criminal under another statute, the State has trapped the Hermansons, who had no fair warning that the State would consider their conduct criminal."[100] We agree.
>
> To say that the statutes in question establish a line of demarcation at which a person of common intelligence would know his or her conduct is or is not criminal ignores the fact that, not only did the judges of both the circuit court and the district court of appeal have difficulty understanding the interrelationship of the statutes in question, but as indicated by their questions [of the court], the jurors also had problems understanding what was required.
>
> In this instance, we conclude that the legislature has failed to clearly indicate the point at which a parent's reliance on his or her religious beliefs in the treatment of his or her children becomes criminal conduct. If the legislature desires to provide for religious accommodation while protecting the children of the state, the legislature must clearly indicate when a parent's conduct becomes criminal. As stated by another commentator: "Whatever choices are made...both the policy and the letter of the law should be clear and clearly stated, so that those who believe in healing by prayer rather than medical treatment are aware of the potential liabilities they may incur."[101]... Accordingly, for the reasons expressed, we quash the decision of the district court of appeal and remand this case with directions that the trial court's adjudication of guilt and sentence be vacated and the petitioners discharged.[102]

At last a state's highest court had put the burden where it belonged: on the authors of laws binding the citizenry rather than on the perplexed citizens trying to reconcile their religious duty with their civic obligations. The court rightly pointed out that if learned judges have to labor for numerous pages to explain why a shield for religious practice in one statute doesn't apply to closely related situations governed by another statute, the law is more convoluted than persons of common intelligence should be required to sort out, and quoting Justice Holmes is no consolation to those who, in good faith, may have estimated wrong.

Civil Cases

(5) *Brown v. Laitner* (1989). Matthew Swan died in 1977 at age fifteen months of meningitis after an illness of thirteen days. His mother and father relied on

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100. Clark, Christine A., "Religious Accommodation and Criminal Liability," 17 *Fla.St.U.L.Rev.* 559, 585 (1990).

101. Laughran, Catherine W., "Religious Beliefs and the Criminal Justice System: Some Problems of the Faith Healer," 8 *Loy.L.A.L.Rev.* 396, 431 (1975).

102. *Hermanson v. Florida*, 604 So.2d 775 (1992).

Christian Science treatment, but after he died, they brought suit against the First Church of Christ, Scientist, and two Christian Science practitioners who had provided spiritual treatment through prayer during the child's illness. The suit was entered in Michigan by one Rev. Ralph Brown as "personal representative of the estate of Matthew Swan," charging negligence and misrepresentation. The trial court granted the church's motion to dismiss the action, ruling that the plaintiff could not establish his claims without a constitutionally impermissible inquiry into the sincerity of the defendants' religious beliefs. With respect to the plaintiff's negligence charge, the court ruled that application of the reasonable care standard would require defendants' conduct to be measured by what a reasonably prudent Christian Science practitioner would do under the circumstances.

The Court of Appeals considered whether the state's *parens patriae* interest in children's welfare was sufficiently compelling to permit a common-law action in ordinary negligence when religious conduct proximately causes the injury or death of an infant. The court held that a private negligence action is not part "of the state's exercise of its power for the protection of children," and that the plaintiff's argument was "unprecedented and unwarranted."

> In addressing this issue, the Court of Appeals attempted to balance the right of religious freedom and Matthew Swan's right to life-saving medical treatment. The Court of Appeals found that the public policy of Michigan favors "the untrammeled exercise of good-faith spiritual healing practices." In ascertaining such public policy, the Court relied in part on the construction of the religious exemption set forth in the Medical Practice Act:
>
> > "This act or rules promulgated pursuant thereto do not apply to a person who, in good faith, ministers to the sick or suffering by spiritual means alone, through prayer, in the exercise of religious freedom, if he does not use or prescribe drugs, medicine, or surgery or assume the title of, or hold himself out to be, a physician or surgeon...."
>
> Plaintiff argued that when defendants suggested that Matthew had particular illnesses or diseases, they went beyond permissible spiritual means alone to cure and entered the realm of medical diagnosis, forbidden to unlicensed practitioners.
>
> Defendants argued that plaintiff is barred from asserting a violation of and cause of action under the Medical Practice Act because such a claim was not raised until after [the Supreme] Court's order granting leave to appeal was issued. Although the plaintiff had not alleged a violation of the act, the Court of Appeals [had] broached the question whether defendants were diagnosing or exceeding the boundaries of spiritual healing alone, a question not readily resolved without factual determination by a jury and briefing.... Defendants argued that since the practitioners offered their services as spiritual healers and any alleged diagnoses were made as part of this spiritual activity, their acts were within the exemption of the Medical Practice Act.[103]

103 . *Brown v. Laitner*, 435 N.W.3d 1, 6-7 (1989), opinion of Levin, J., dissenting.

The Supreme Court of Michigan granted leave to appeal limited to whether the religious exemption of the medical malpractice act applied to plaintiff's allegation that the defendants engaged in diagnosis and whether those allegations support a cause of action inferred from violation of an act barring the unauthorized practice of medicine. Extensive briefs were entered in the Supreme Court, and oral argument was heard. Then the court issued a terse and rather uninformative order:

> Upon consideration of the briefs and oral arguments of the parties, the order...which granted leave to appeal is VACATED and leave to appeal is DENIED because the Court is no longer persuaded that the question presented should be reviewed by this Court.

(One justice dissented, from whose rehearsal of events the quotations above were taken.)

This case was one of the first (but not the last) in which a private civil action was undertaken against Christian Science practitioners and their church. Its peculiar posture did not necessarily set broad precedents for later actions. The plaintiff was a clergyman unrelated to the decedent bringing an action as "personal representative" of the decedent's estate. The action—as it reached the Supreme Court—was "inferred" from the provision in the statute governing licensing of medical practitioners that exempted practitioners of spiritual healing from such licensure requirements. The threshold question in such a situation would seem to be whether a spiritual healing practitioner's alleged practice of medicine without a license conferred upon private individuals a cause of action in negligence, misrepresentation or malpractice (which was not pleaded) rather than limiting the remedy to state action enforcing the licensing requirement.

The offending "diagnoses"—as reported in Justice Charles L. Levin's dissent—amounted to no more than speculations that Matthew might be cutting a big double tooth, or that he did not have roseola, or that he did not have a paralysis or rheumatic fever or strep throat. They would seem to have been no more authoritative than one perplexed adult saying to another what they thought the trouble might or might not be, which hardly rises to the level of unlicensed practice of medicine.

In the criminal cases reviewed earlier, the course that some courts seemed to require was that the Christian Scientists must abandon spiritual healing at some point when the child's ailment began to appear very serious and take the child to a (real) doctor. How should the Christian Scientists know when that danger point was reached if they were not to try to form some estimate of the seriousness of the child's condition on the basis of symptoms exhibited and possible diagnoses thereof (all of which Mary Baker Eddy would probably have considered dabbling in error)? Yet that was the very course that Rev. Brown was reduced to arguing violated the Medical Practice Act. No wonder the Supreme Court of Michigan washed their hands of it!

(6) *Lundman v. McKown* (1995). When the Supreme Court of Minnesota turned back the state's efforts to prosecute the parties involved in the death of Ian Lundman, the child's natural father took up the cause in civil court, suing the child's mother (from whom he was divorced) and stepfather, as well as a Christian Science

practitioner, Christian Science nurse, Christian Science nursing home, the Minnesota Christian Science Committee on Publication and the First Church of Christ, Scientist, in Boston, for wrongful death. After a seven-week trial in 1993, the jury found all defendants negligent and awarded compensatory damages of $5,200,000 against them as follows: the mother, 25 percent; the step-father, 10 percent; the practitioner, 10 percent; the nurse, 5 percent; the nursing home, 20 percent; the Committee (an individual named Van Horn), 20 percent; and the Church, 10 percent. The trial court reduced the damages to $1,500,000. The jury also awarded a judgment against the church alone for $9 million in punitive damages!

The Court of Appeals reviewed the case, considering a number of challenges to the actions of the court below, the most remarkable of which was a judgment of nine million dollars against the church itself as punishment for teaching the concept of spiritual healing. That result had enlisted the outraged concern of a number of national religious bodies, among them the National Council of Churches, the National Association of Evangelicals, the Evangelical Lutheran Church in America, the Orthodox Church in America, the Church of Jesus Christ of Latter-day Saints, the Lutheran Church—Missouri Synod, the Church of the Nazarene, and the Roman Catholic Archdiocese of St. Paul and Minneapolis.[104]

The decision was issued by Judge Jack Davies for himself and Judge Edward D. Mulally, a retired district court judge serving by appointment on the Court of Appeals. The third member of the panel, Chief Judge Roger M. Klaphake, concurred in part and dissented in part. [The fact-situation is reported in the criminal case at §(4) above.] The majority stated:

> We first address appellant church's challenge to the award of punitive damages. Punitive damages serve to punish wrongdoers and deter others from similar conduct. [Mr. Lundman] argues that the punitive damages award is a permissible deterrent because it "persuade[s] the First Church not to interfere in the direct care of seriously-ill children."
>
> For three independent reasons we hold that punitive damages may not be imposed. First, there is no evidence that the church directly interfered in Ian's care and insufficient evidence as a matter of law that it interfered by agency through his caregivers. Hence, there is no past conduct by the church of the kind justifying punitive damages. The punitive damages award must be reversed on that ground alone.
>
> Second, even were we to recognize an agency relationship, the punitive award would still fall because it is unconstitutional, as the church and two amici assert. They question the constitutionality of imposing punitive damages on a church to force it to abandon teaching its central tenet. We find the argument compelling.
>
> In closing argument in the action for punitive damages, [Mr.

104. Amicus briefs were entered on the other side by the American Academy of Pediatrics and the American Medical Association (and their Minnesota affiliates), urging affirmance, by the Minnesota Trial Lawyers Association (same), and by the Minnesota Civil Liberties Union, contending that any standard that absolved Christian Scientists of liability would be an unconstitutional establishment of religion.

Lundman's] attorney compared the church's involvement to a weed, arguing:

> I see weeds on the lawn and I can sit there and pick at the surface of weeds all day long, but until you dig underneath and get the root of the weed, the weed will come back again and again and again.

[The attorney] explained why [Lundman] sought punitive damages only from the church:

> [I]t is with the First Church that you go below the surface of these policies. If you want to establish a change, if you want to deter and make a difference, it is against the First Church that [a] punitive damage award will make a difference.

As these statements suggest, the main conduct of the church on which the punitive damages award was based is its espousal and promotion of spiritual treatment as a means of care, and on its concomitant failure to train Christian Science practitioners and nurses to perform or seek medical diagnoses.

The church's espousal of spiritual treatment is, however, entitled to substantial free exercise protection.[105] The constitutional right to religious freedom includes the authority of churches to independently decide matters of faith and doctrine.[106]

We do not grant churches and religious bodies a categorical exemption from liability for punitive damages. But under these facts, the risk of intruding—through the mechanism of punitive damages—upon the forbidden field of religious freedom is simply too great.

A third, independent reason the punitive damages award must be reversed is that it violates the Minnesota statute on punitive damages. That statute requires "clear and convincing evidence" that the defendant showed a "deliberate disregard" for the rights or safety of others. This statutory standard is met where the defendant has "knowledge of facts or intentionally disregards facts that create a high probability of injury" to others and the defendant "deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury."[107] But,

> [g]ood faith is a proper defense to punitive damages, even though defendants might have been mistaken in their beliefs that a party was in jeopardy or that their actions were correct.[108]

Here, the punitive damages award must be reversed because it is unchallenged that all defendants, including the church, acted in good faith. And there is no "clear and convincing evidence" that the church acted in "deliberate disregard" of Ian's rights. The church's only contact with Ian was when Van Horn told officials of the church in Boston that a Christian Science parent in Minnesota was using spiritual care for her seriously-ill child. Knowledge of illness is insufficient, by itself, to support an award of punitive damages.

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105 . Citing *Thomas v. Review Board*, 450 U.S. 707, 713, (1981) (religious beliefs protected by the Free Exercise Clause), discussed at § A4l above.

106 . Citing *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952), discussed at IB3.

107 . Citing Minn. Stat. § 549.20, subd. 1(a) and 1(b) (1992).

108 . *Peterson v. Sorlien*, 299 N.W.2d 123,129 (Minn. 1980), *cert.* denied, 450 U.S. 1031 (1981).

> We also note that the church teaches its members to "obey" all laws, including the reporting of contagious disease to local authorities. This, too, suggests the church lacked the malice required under Minnesota law for the imposition of punitive damages.[109]

The court also reviewed the award of compensatory damages. The appellants had argued that the religious freedom guarantees of the Minnesota and federal constitutions barred the award of compensatory damages for religious practice.

> [They] generally argue that permitting this case to proceed improperly placed the Christian Science religion on trial and that allowing the jury to evaluate the reasonableness of appellants' conduct—which conformed to their genuine religious beliefs—amounted to an evaluation of those beliefs.
>
> We disagree. Although one is free to believe what one will, religious freedom ends when one's conduct offends the law by, for example, endangering a child's life.

Then followed the usual quotations from *Cantwell v. Connecticut* (First Amendment "embraces two concepts—freedom to believe and freedom to act"),[110] *U.S. v. Lee* (conflicting religious belief affords no excuse for resisting payment of taxes),[111] *Gillette v. U.S.* (conflicting religious belief affords no excuse for resisting compulsory military service),[112] *Prince v. Massachusetts* (conflicting religious belief affords no excuse for violating child labor laws[113] and *Reynolds v. U.S.*:

> Laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices. * * * Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious beliefs superior to the law of the land, and in effect permit every citizen to become a law unto himself.[114]
>
> Appellants are free to believe what they will—and to teach and preach what they believe. But, when belief leads to conduct, the conduct is subject to regulation. Here, regulation is necessary for the protection of children[,] and appellants' conduct, though rooted in religion, is subject to state regulation.
>
> But even conduct—when religiously driven—enjoys some constitutional protection, so we next evaluate the constitutionality of a tort-liability sanction against appellants' conduct.... Minnesota courts balance the state's

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109 . *Lundman v. McKown*, 50 N.W.3d 807 (1995).

110 . 310 U.S. 296, 303-304 (1940), discussed at IIC3b, where it is pointed out that the truism "the first is absolute, but, in the nature of things, the second cannot be" misrepresents the thrust of the decision, which is found a few lines later: "In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom."

111 . 455 U.S. 252, 261 (1982), discussed at § A9b above, where it is evaluated as not one of the Supreme Court's most persuasive discussions of legitimate constraints upon free exercise of religion.

112 . 401 U.S. 437, 463 (1971), discussed at §A5k above, also one of the court's less illuminating efforts.

113 . 321 U.S. 158,171 (1944), discussed at IIAl.

114 . *Reynolds*, 98 U.S. 145, 166-167 (1878), discussed at § A2a above.

> interest against the actor's free-exercise interest in religiously-based conduct. Where, as here, it is undisputed that the religious belief is sincerely held and that the religious belief would be burdened by the proposed regulation, the balancing test requires proof of a compelling state interest. Here, appellants concede that Minnesota has a compelling interest in protecting the welfare of children.... There must also be no less-restrictive means to accomplish the state's goal, here to insure the safety of children. Appellants argue that there are less-restrictive alternatives to this civil action....
>
> Although we agree that Minnesota statutes include some accommodation to the Christian Science religion, [they] should not be read as authorizing reliance on prayer as a sole treatment for seriously-ill children under all circumstances or (by implication) as proscribing civil lawsuits. The statutes simply indicate the legislature's willingness to tolerate this religious practice—up to a point. We reject appellants' argument that the Minnesota legislature has sanctioned prayer alone to treat a child battling a life-threatening disease.
>
> Appellants also argue that there are two less-restrictive alternatives that would serve Minnesota's interest in protecting children: mandated notice to public authorities when a seriously-ill child is being treated by spiritual means, and criminal prosecution of a custodial parent in case of death.
>
> But the first alternative—a reporting requirement—does not always work and therefore is not a preclusive requirement. See Hermanson v. State (seven-year-old diabetic died in spite of Florida's criminally sanctioned reporting requirements); Walker v. Superior Court (authorities generally will not learn of faith healing unless someone dies).[115] Likewise, criminal liability is not a preclusive less-restrictive alternative because it is fallible and requires that the state, rather than private parties, expend resources to bring forth a corrective response.... We rule that the trial court could adjudicate this action without offending the right to free exercise of religion.

It is surprising that the court should not reason—as it did a few lines later—that criminal penalties are potentially more severe than civil penalties and therefore are not less restrictive. Both are "fallible," in the sense that the outcome is not assured until the jury brings in its verdict. But the notion that criminal sanctions are more restrictive because the state has to pay the bill for prosecutions boggles the mind. This may make civil actions by private parties preferable from the state's point of view because they are cheaper, but it hardly constitutes enforcement of the laws. And "less restrictive" is supposed to refer to the degree of restriction imposed on the religious practice, not on the state's budget.

Next the court grappled with the claim that the appellants were deprived of due process of law by not being afforded fair notice of conduct that would result in civil liability. They urged that the case should be controlled by the criminal case, *Minnesota v. McKown*, which turned on whether the exception for spiritual healing in

115. 604 So.2d 775 (1992); 763 P.2d 852, 871 (1988); discussed at § (4) and § (1), respectively, above.

the child neglect statute caused the criminal manslaughter statute to fall short of satisfying "the fair notice requirement inherent in the concept of due process."[116] But the *Lundman* court thought otherwise.

> But this is a civil action based on common-law negligence, and any confusion on what appellants could or could not lawfully do without being subject to *civil liability* is of much less force than uncertainty as to what they could or could not do before being subject to *criminal prosecution*.[117]

(This was just the opposite of what the *Lundman* court had said about "less restrictive alternatives"!)

> It is significant also that this case is based on common law negligence, as distinguished from a claim created by the legislature. The common law derives its authority solely from custom and use; it originates as courts recognize, affirm, and enforce such customs and uses.... As a product of the courts, the common law has developed case by case in response to social needs; the common law has evolved gradually as society has changed and new rights have been recognized.... Our decision today is simply one more effort to ascertain and apply what is just.
>
> It should not be a surprise when a rule of common law is first applied retrospectively as, to a degree, we do in this case. That the rights awarded and obligations imposed in this case may not have been perfectly perceived yesterday is of little constitutional concern.... There is, however, substantial precedent for overriding religious belief in matters of health—and liability should have been foreseen.[118] The due process requirement of fair notice has not been violated.

As has been seen throughout this section on medical treatment, the precedents do not all run one way, and encouragement can be found in the case law for opposite conclusions. It is true that the common law has evolved gradually as judges have seen the need to rectify previously unrecognized injustices, but a newly "discovered" right or harm that is then enforced "retrospectively" does not fit well with the principle of justice that a person should have fair warning that a contemplated action (or inaction) may be punishable at law. While ignorance of the law is no excuse, judicial creation of law *de novo* is no justification. A judicial announcement that "the due process requirement of fair notice has not been violated" in such circumstances is unconvincing.

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116 . See discussion of *McKown, supra*, at § (4).

117 . Citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* (courts have a "greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe") 455 U.S. 489, 498-499 (1982).

118 . Citing, among others, *Jehovah's Witnesses v. King County Hospital*, 278 F. Supp. 488 (Wash. 1967), discussed and criticized at § C3f above; *In re Sampson*, 278 N.E.2d 918 (1972), discussed and criticized at § C3h above. Neither is a gleaming beacon of judicial insight, and there are contrary signs in the case law, as indicated in § C as a whole.

More instructive, however, is the way the court dealt with whether the various defendants were negligent as charged.

> The basic elements of a negligence claim are (1) the existence of a duty, (2) breach of that duty, (3) injury proximately caused by the breach, and (4) damages.... Appellants challenge the existence of a duty of care and breach of that duty.
>
> Where the facts are not in controversy, the existence of duty is a question of law.... Generally, there is a duty to aid another only if a "special relationship" exists between the parties.... A special relationship exists where one party has custody of another under circumstances that deprive the other of normal opportunities of self-protection.... A special relationship may also arise where one accepts responsibility to protect another, although there was no initial duty.
>
> Kathleen McKown does not dispute that she owed a duty of care to her son. A custodial parent has a special relationship to a dependent and vulnerable child that gives rise to a duty to protect the child from harm. The other appellants argue, however, that they had no duty of care and that the trial court erred as a matter of law in holding that they each had a special relationship with Ian....
>
> William McKown argues that he owed no legal duty to Ian because he was a stepparent and because Kathleen McKown was solely responsible for making decisions about Ian's health care.... [W]e disagree that his relationship as a stepparent did not impose a duty of care. The record indicates that William McKown acted consistent with a special relationship existing between Ian and him. During Ian's last days, William McKown was fully aware of the gravity of Ian's condition, was frequently present as an on-the-scene caregiver, and attempted to assist Ian in several ways.... Because Ian could not walk or talk, William McKown carried Ian from his bed to the table in an attempt to offer him food and liquid...and companionship. Finally, although he did not remain awake through the night when Ian died, William McKown testified that he spent most of the evening "in the doorway [to Ian's room] making sure I could be summoned for help, if necessary."... [O]ur recognition of a duty [of care] is based on our conclusion that a stepparent may not avoid responsibility by simply pointing to the natural parent and proclaiming that the parent had legal control over and full responsibility for the child. Here, the law required that William McKown step forward to rescue Ian.

This was an ironic twist in the law, holding the stepfather liable for compensatory damages because he had conscientiously tried to be of help in any way he could—consistent with his and his wife's beliefs that they were doing what they could and should do for Ian's benefit as they understood it. (That was not the only ground for a duty of care; the court also stated, "[W]e believe there is a presumption that `custodial' stepparents...assume special-relationship duties to stepchildren.... The partnership involved in marriage is presumed to extend to care of children, absent some most unusual disclaimer.... There was no disclaimer in this case.")

Appellant Quinna Lamb, the Christian Science nurse hired by Kathleen McKown to care for Ian in the McKown home, argues that she did not have a duty of care. We disagree. Both indicia of a "special relationship" apply: Lamb had significant "custody or control" of Ian under circumstances where Ian lacked even his limited minor's capacity for self-protection—that is why mother hired Lamb—and she accepted the responsibility to care for Ian and to protect him by providing professional services in return for cash wages....

During a good part of her involvement, though it was brief, a telephone call to involve a provider of conventional medical care would likely have led to the administration of insulin and would likely have saved Ian's life. Lamb argues against finding a duty because advising medical treatment is antithetical to Christian Science nursing. But in other situations Christian Scientists are instructed to cooperate with public officials—even when that cooperation runs contrary to Christian Science doctrine. Specifically, Christian Scientists have been instructed, ever since founder Mary Baker Eddy wrote on the question, to promptly notify local health officials whenever they know or have reason to believe that an individual has a communicable disease and "the law so requires."

Indeed, one Christian Science manual can be read to imply that situations may arise where medical treatment may be required. Christian Science parents are warned of limitations on their right to impose Christian Science care on their children:

> The rights of Christian Scientists to select Christian Science treatment for their children in lieu of medical treatment will continue to be respected by public officials so long as [the officials] are assured that *effective* care is being given our children.

Christian Science Comm. on Publication for Minnesota, *Legal Rights and Obligations of Christian Scientists in Minnesota*, 5 (1976) (emphasis added). Conversely, therefore, Christian Science parents are at least warned that their right to withhold conventional medical treatment is not absolute; parents are warned that when officials are not confident that effective care is being given, the right to select Christian Science treatment may end. That advice—or warning—logically extends beyond parents. Ian's situation was an instance where Christian Science professionals should have been aware of the requirement that they had to yield to the law of the community. We reject Lamb's argument that she had no professional duty except to persist in following pure Christian Science doctrine.

We also reject Lamb's argument that she is exempt from civil liability because the mother controlled what type of care Ian would receive. Lamb was alone with Ian from 1:00 until 2:00 a.m. while Kathleen McKown slept, and Lamb also held herself out as a professional Christian Science nurse with special training, skill, and experience in caring for others (albeit through Christian Science means). Regardless of who had ultimate authority in overseeing Ian's care, Lamb was obligated during her engagement to make Ian's welfare her paramount interest; she could not yield to a parent's directions; protecting a child's life transcends any interest a parent may have in exercising religious beliefs. Furthermore,

> Lamb's argument fails because William and Kathleen McKown, too, were required to abandon the unlawful stance that Lamb now claims they imposed on her.
>
> In the common law tradition, our holding today serves as notice to all professional Christian Science caregivers—be they practitioners, nurses, or others—that they cannot successfully disavow their professional duty to a child by deferring to the parent as the ultimate decision-making authority.

In this remarkable passage the court warned parents of limitations on their right "to *impose* Christian Science care on their children," which sounds as though it were some dictatorial exercise of force in the service of dogma. It is no less "imposing" their beliefs on their children when they choose homeopathic or chiropractic or conventional medical care or whatever they think best for them. In any case, it is the natural and essential role of parenthood to provide (not "impose") what they believe is in the child's best interest, and that is exactly what the parents in this case were doing, and what they were hiring Christian Science professionals to provide. They may have been mistaken in their choice, as conventional medical caregivers sometimes are, but that is not necessarily "negligence," as indeed the law of Minnesota stated that it was not—until the courts reconstrued the law in *Minnesota v. McKown*.

The court then undertook to explain to Christian Scientists the true meaning of their doctrine—that Mary Baker Eddy *wanted* them to "cooperate with public officials" (which was not quite what she said[119]). Therefore, they should have abandoned spiritual treatment by prayer in favor of conventional medical treatment at some legally undetermined but immensely consequential point in Ian's illness. Not content with embarking on the risky course of interpreting a religion's doctrine to its members, the court also construed their manual of information for members in Minnesota—that they must convince public officials that "*effective* care" is being given their children—to mean that when public officials are not so convinced, the right to rely on Christian Science treatment may end, and that therefore they should abandon such treatment at some point and call the doctor.

The logic of this line of reasoning is hard to follow, and does not seem consistent with the Supreme Court's advice in a case cited by the *Lundman* court for another purpose, *Thomas v. Review Board*: "[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation."[120]

The court's caveat to all Christian Science practitioners and nurses within its jurisdiction, which might have come with better grace *before* holding them liable in the current case, in effect announced that at some indeterminate point in the spiritual treatment of a child's illness they must abandon the whole purpose and function of their training and profession and cede responsibility to conventional medical

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119. See quotations at beginning of this section, which seem to suggest that she did not "want" them to cooperate with public officials, but conceded that obeying the law could be less harmful than resisting it, and any harm in so doing should be overcome by spiritual means.

120. 450 U.S. 707, 716 (1981).

professionals—who may not necessarily accept that responsibility on the instant because they do not (yet) have the duty of care attributed to the defendants and may not wish to incur liability in a case possibly already irremediably spoiled by previous caregivers.

> Mario Tosto, the practitioner hired by Kathleen McKown to pray for Ian, generally argues that he did not owe a duty to Ian beyond Christian Science prayer for Ian's recovery (something he did from his own home). Again, we disagree, and affirm the trial court conclusion that Tosto owed a broader duty to Ian. Tosto, though he had no initial duty to Ian, accepted a responsibility to serve Ian and thereafter, through conversations with mother and nurse, held considerable power over Ian's welfare. Tosto was hired and paid $446 by the McKowns to play a professional and pivotal role in caring for Ian. The evidence indicates mother turned to Tosto for guidance throughout the final stage of Ian's illness.... Hence, Tosto accepted a professional's responsibility for Ian's health care. Tosto was compelled to make Ian's welfare his dominant interest.
>
> We emphasize that the law required Tosto—as a trained Christian Science practitioner—to temper his use of Christian Science health care to conform his actions to the law of the community. Christian Science teachings direct him to follow the tenets of the religion, but, as a health-care provider, he is also required to yield to civil authority "when the law so requires."

Of course, the "law" did not "so require" at the time. It was only after the court "retrospectively" announced *ex post facto* that the law required Christian Scientists at some unspecified point to abandon Christian Science teaching and practice in favor of conventional medical treatment that the defendants learned they were liable for huge damages for failure to "estimate" correctly what that point was and what they should have done.

> Tosto argues that his control of Ian's care was subject to Kathleen McKown's ultimate authority. He argues that he was engaged by her only for Christian Science care, and that it runs counter to Christian Science teachings to acknowledge the need for medical care or to call for such care. But like Lamb, he could not hide behind mother. He had a responsibility on these facts to acknowledge that Christian Science care was not succeeding and to persuade mother to call in providers of conventional medicine or, persuasion failing, to override her and personally call for either a doctor or the authorities.

One can imagine a scenario in which the *medical* care providers failed to save the child's life, or perhaps even, through misadventure, worsened his condition and contributed to his death, whereupon the practitioner who overrode the parents' wishes and called them in might be liable to the parents in damages for wrongful death! Then the Christian Science practitioners could join the ranks of the medical profession's targets of malpractice litigation, who often feel that they are "damned if they do and damned if they don't."

> Appellant James Van Horn, the one-man Minnesota committee to protect Christian Science doctrine and practice from attack, argues that he did not have a special relationship because his only connection with Ian was his knowledge that Ian was ill. We agree and reverse the jury verdict and trial court holding that Van Horn had a legal duty toward Ian.... Van Horn never accepted "power" over Ian's care, and he never accepted responsibility to protect Ian.... Any duty he had ran to his employer, the church, not to Ian.... The position of the Committee on Publication does not include a duty of care toward individual Christian Scientists.

The court likewise reversed the lower court's judgment against Clifton House, the Christian Science nursing facility, which was based on the supposition that it had "sent" the Christian Science nurse, who then acted as its "agent." "But the jury's finding of a principal-agent relationship...is without evidentiary support and is erroneous as a matter of law...because Clifton House did not have a right to control Lamb's actions."

Lastly, the court dealt with the liability of the First Church of Christ, Scientist, in Boston for *compensatory* damages. The jury found that Tosto and Lamb were "agents of the church," and that their actions were "authorized by the church." Therefore, the jury held that the church, as principal, owed a duty to Ian.

> But there is no evidence...that the church acted as principal to Tosto or Lamb—there was never any agreement between them that manifested either consent or the right to control. [They were listed in a Christian Science directory, b]ut we decline to affirm a jury's finding of agency based purely on advertisements in a journal published by the alleged principal, even if advertisers are screened. "Seals of approval" do not create agencies.
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> * * *
>
> Finally, a church is not a lawn-mower manufacturer that can be found negligent for failing to affix a warning sticker near the blades. As previously noted, the constitutional right to religious freedom includes the authority of churches—not courts—to independently decide matters of faith and doctrine, and for a church as an institution to believe and speak what it will. When it comes to restraining religious *conduct*, it is the obligation of the state, not a church and its agents, to impose and communicate the necessary limitations—to attach the warning sticker. A church always remains free to espouse whatever *religious belief* it chooses; it is the *practice of its adherents* that may be subject to state sanctions.
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> * * *
>
> [T]o apply the standard of care of a reasonable person, while not taking account of religious belief, is inappropriate under the facts presented. Our conclusion is based on our recognition that an individual's right to religious autonomy is a core ideal of both the state and federal constitutions; we must defend the right of any citizen to hold whatever religious beliefs he or she may choose. This is especially true where, as

> here, the undisputed facts demonstrate that appellants genuinely believed that Christian Science care was appropriate in treating Ian.
>
> But appellants' *personal* rights to freely practice religion are not the only rights to be considered. It is crucial to distinguish between an adult's right to practice religion by refusing medical treatment for his or her *own* illness and the right to practice religion by refusing to seek or provide medical treatment for *another* person—especially when the other person is a child.... To grant appellants an outright exemption from negligence liability based on their religious beliefs would insulate Christian Scientists from tort liability in cases involving children; we will not embrace a negligence standard that would ignore the rights of Ian Lundman.... So, though we apply a standard of care taking account of "good-faith Christian Scientist" beliefs, rather than an unqualified "reasonable person standard," we hold that reasonable Christian Science care is circumscribed by an obligation to take the state's (and child's) side in the tension between the child's welfare and the parents' freedom to rely on spiritual care.... Religious practices must bend to the state's interest in protecting the welfare of a child whenever the child might die without the intervention of conventional medicine.
>
> We note that this circumscribed qualification on the reasonable person standard of care is easier stated than applied; slippery-slope concerns arise. Questions will be raised regarding the age at which a child may free others of responsibility to turn to conventional medicine, how ill a child must be before conventional medicine must be called on, how to deal with serious but less than life-threatening illness, and how to deal with an adult deprived of the capacity to choose. We decline to draw any bright-line rules. Our decision is based on the specific facts presented in this case (and generally undisputed by the parties): that the patient was a child, and that the defendants had a genuine, good-faith belief in their religion. Under these facts, a reasonable person—who is a good-faith Christian Scientist—standard of care applies.... But under that standard, when the Christian Scientist appellants were put to a choice between fidelity to religious belief or serious injury and potential death to the child—judged by the law's general acceptance of conventional medicine—the child's right to life prevails....
>
> We hold as a matter of law, therefore, that the four duty-bound defendants breached the standard of care for a reasonable Christian Scientist, who was obligated—with knowledge of a child's grave illness—to seek assistance in conventional medicine. Further, their separate breaches of duty proximately caused Ian's death.[121]

Therefore, the court affirmed the award of compensatory damages of $1,500,000 against Kathleen and William McKown, Quinna Lamb and Mario Tosto. Chief Judge Klaphake concurred in that judgment but would not have reversed the award of compensatory damages against Van Horn and the church, believing that Van Horn had exercised potentially decisive influence over the parents' course of conduct, and

121 . *Lundman v. McKown, supra.*

that he, Tosto and Lamb, were agents of the church in Boston because it could have ended their careers by displacing them and thus had "control" over them sufficient to create a relationship of agency.

This case concludes (for the present) the wrestling by the courts with the difficult question of spiritual treatment of seriously ill children without ever having reached the most difficult questions: what should be the legal disposition of cases in which the parents are not as reasonable and pragmatic as Christian Scientists? How about those who believe that healing is achieved by miraculous intervention of divine power when besought by charismatic "healers" and/or collective exercises of intercessory prayer? Or those who believe that medical intervention is *never* permissible and can indeed affront the Divine Power whose will is shunned by resort to material dosages and manipulations, so that the child (or adult) who tries to gain a brief extension of earthly existence forfeits eternal life? They would probably get even shorter shrift than did the Christian Scientists in most of these cases, as indeed happened to the "Faith Assembly" defendants in *Hall v. Indiana*.[122]

122 . See discussion of *Hall v. Indiana* at § 4b above.