NOTES

California's Prayer Healing Dilemma

On February 21, 1984 Laurie Walker telephoned Norma Alpert, an accredited Christian Science practitioner, and asked Mrs. Alpert, in her capacity as a Christian Science practitioner, to pray for her four-year-old daughter, Shauntay Walker, who was sick with symptoms of the flu. Mrs. Alpert agreed to pray for Shauntay.

For several days thereafter, there did not seem to be much change in Shauntay's condition. She was unable to retain food. She didn't want to eat and she wanted to sleep. These symptoms did not remain constant, however. After February 28, 1984 the reports Mrs. Alpert was receiving about Shauntay's condition indicated improvement. Shauntay had begun eating again, although not great amounts, and she was retaining her food. Her bowel movements were normal. She was drinking liquids frequently—7-Up and milk . . . .

On March 8, 1984 at approximately 11:30 p.m., Shauntay began to breathe heavily and irregularly. Laurie called Mrs. Alpert. They prayed and Shauntay gradually began to breathe more quietly. After Shauntay's breathing had returned to normal, Laurie and the practitioner continued praying. Shauntay stopped breathing at about 1:00 a.m. on March 9, 1984.[1]

Introduction

In 1984, at least three California children died of bacterial meningitis because their parents had refused to seek professional medical help, and instead relied on prayer healing as the sole treatment for their children. The parents, all members of the Christian Science Church, did not believe in the use of modern medicine.[2] The parents in each case have been charged with crimes ranging from child abuse to murder.[3]

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1. Defendant's Brief at 18-22, Walker v. Superior Court, 185 Cal. App. 3d 266, 222 Cal. Rptr. 87, *review granted*, No. 24996 (Cal. Sup. Ct. Mar. 27, 1986).

2. *See* Walker v. Superior Court, 185 Cal. App. 3d 266, 222 Cal. Rptr. 87, *review granted*, No. 24996 (Cal. Sup. Ct. Mar. 27, 1986); State v. Glaser, No. A 753942 (Cal. Super. Ct., Los Angeles County Mar. 29, 1985); State v. Rippberger, No. 13301-C (Cal. Super. Ct., Sonoma County July 16, 1985).

3. In *Walker*, Laurie Walker was charged with involuntary manslaughter and felony child endangerment. In *Glaser*, Eliot and Lise Glaser were charged with involuntary man-

Prayer healing is a belief that disease or illness can be cured through faith in God and prayer alone,[4] and its practice is widespread in America.[5] As a tenet of an individual's religious belief, the First Amendment of the United States Constitution limits the government's ability to regulate the free exercise of prayer healing.[6] Parents, however, do not have an absolute right to subject their children to prayer healing.[7] A state has a concurrent right and duty to protect the lives of children within its borders.[8] Since the nineteenth century, states have fulfilled their duty by regulating prayer healing through the enactment of statutes.[9]

Although California has attempted to regulate prayer healing, its resulting statutory scheme establishes "recognized" religions over unrecognized religions in violation of the Establishment Clause.[10] The California statutory scheme also does not adequately warn parents that their conduct is prohibited. This inadequacy violates the parents' right to due process under the Federal and California Constitutions.[11] Consequently, California's regulations may interfere with the parents' free exercise of prayer healing as well as violate the Establishment Clause and the parents' due process rights.

This Note first examines the history of prayer healing and its regulation, and the principles of the Free Exercise, Establishment, and Due Process Clauses. It next analyzes the California statutes in light of these principles. Finally, this Note proposes that California amend its statutory scheme to comport with the free exercise and due process rights of parents who practice prayer healing on their children, and with the state's duty to abide by the Establishment Clause.

I. The History of Prayer Healing and its Regulation

Since prehistoric times, people have been using prayer to cure ailments.[12] Today, faith healing is practiced worldwide.[13] Three of the more prominent religious sects practicing prayer healing do not permit any medical treatment: the Church of God of the Union Assembly, the

slaughter, felony child endangerment, and murder. In *Rippberger*, Mark Rippberger and Susan Middleton were charged with involuntary manslaughter and felony child endangerment.

4. *See* Comment, *Religious Beliefs and the Criminal Justice System: Some Problems of the Faith Healer*, 8 LOY. L.A.L. REV. 396, 397 (1975).

5. *Id.*

6. U.S. CONST. amend. I.

7. *See infra* text accompanying notes 80-98.

8. *See infra* text accompanying notes 59-79.

9. *See infra* text accompanying notes 104-109.

10. U.S. CONST. amend. I.

11. U.S. CONST. amend. V, XIV; CAL. CONST. art. I, § 7.

12. *See* Comment, *supra* note 4, at 396.

13. *Id.*

Worldwide Church of God, and the Faith Assembly.[14] The opposition to the use of medicine by the Worldwide Church of God is so strong that their leader "likens the use of physicians to worship of pagan gods."[15] However, the largest faith healing sects, the Christian Scientists and the Jehovah's Witnesses, do not have such extreme prohibitions on the use of medicine. Christian Scientists are urged to use prayer to cure all ailments, but are allowed to use modern medicine without risking expulsion from the church.[16] Jehovah's Witnesses are allowed to use modern medicine as long as it does not involve the use of blood transfusions.[17]

A. English Regulation of Prayer Healing

The first statutory regulation of prayer healing was England's Poor Law Amendment Act of July, 1868,[18] which provided in part that "when any Parent shall wilfully neglect to provide adequate Food, Clothing, Medical Aid, or Lodging for his child . . . whereby the Health of such Child shall have been . . . injured, he shall be guilty of an Offence . . . ."[19]

In 1894, the English Parliament replaced the Poor Law Amendment Act by enacting the Prevention of Cruelty to Children Act,[20] which provided: "If any person . . . who has the custody, charge, or care of any child . . . wilfully . . . neglects . . . such child, . . . in a manner likely to cause such child . . . injury to its health . . . that person shall be guilty of a misdemeanor."[21] This statute did not specifically mention medical aid, but provided the same protection for children denied medical care as did the Poor Law Amendment Act.[22]

One of the first faith healing cases, *Regina v. Wagstaffe,*[23] was decided in January of 1868, prior to the enactment of the Poor Law Amendment Act. Wagstaffe was tried for manslaughter in the death of his child. As a defense to his failure to provide medical care, Wagstaffe claimed that pursuant to his religious beliefs, he used prayer instead of medicine to attempt to cure his ill child. The jury instructions focused on whether the defendant's religious belief was reasonable. The jury found Wagstaffe not guilty.[24]

14. Ostling, *Matters of Faith and Death,* TIME, Apr. 16, 1984, at 42.
15. *Id.*
16. *See infra* text accompanying notes 139-143.
17. *See infra* text accompanying notes 144-146.
18. 31 & 32 Vict., ch. 122, § 37.
19. *Id.*
20. 57 & 58 Vict., ch. 41.
21. *Id.* at § 1.
22. 31 & 32 Vict., ch. 122, § 37.
23. 10 Cox C.C. 530 (1868).
24. *Id. See* Cawley, *Criminal Liability in Faith Healing,* 39 MINN. L. REV. 48, 54 (1954).

Queen v. Senior[25] was decided by the English Queen's Bench in 1899. At the time, England had adopted the Prevention of Cruelty Act.[26] Senior, a member of a faith healing sect called the "Peculiar People," was indicted for manslaughter after refusing to give medical aid to his nine-month-old infant, who died after contracting diarrhea and pneumonia. The trial judge charged Senior with both misdemeanor-manslaughter and common-law gross and wanton negligence. Senior was convicted of manslaughter.[27]

B. American Regulation of Prayer Healing

In the United States, New York[28] and Oklahoma[29] enacted statutes in the early twentieth century that were similar to the English Poor Law Amendment Act. The American statutes provided misdemeanor penalties for willfully omitting to furnish medical attendance to a minor.[30] Other American states soon enacted similar laws.[31] Later, in the 1970's, states began enacting religious exemptions to these statutes which penalize parents who fail to provide medical care for their children. Today, forty states have enacted some type of religious exemption.[32]

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25. 1 Q.B. 283 (1899). *Queen v. Senior* is considered the leading English decision in this area today. *See* Cawley, *supra* note 24, at 55.

26. *See supra* text accompanying notes 20-21.

27. 1 Q.B. 283 (1899). For a more detailed history of English and Canadian cases in the prayer healing area, see Trescher & O'Neill, *Medical Care for Dependent Children: Manslaughter Liability of the Christian Scientist*, 109 U. PA. L. REV. 203, 205-08 (1960); Cawley, *supra* note 24, at 54-57.

28. *See, e.g.*, People v. Pierson, 176 N.Y. 201, 202, 68 N.E. 243, 244 (1903).

29. *See, e.g.*, Owens v. State, 6 Okla. Crim. 110, 116 P. 345 (1911).

30. *See, e.g.*, *Pierson*, 176 N.Y. at 202, 68 N.E. at 244; *Owens*, 6 Okla. Crim. 110, 116 P. 345 (1911).

31. *See, e.g.*, Mitchell v. Davis, 205 S.W.2d 812 (Tex. Civ. App. 1947); State v. Sandford, 99 Me. 441, 59 A. 597 (1904).

32. ALA. CODE § 26-14-1(2) (1975 & Supp. 1984), § 13A-13-6(b) (1982 & Supp. 1986); ALASKA STAT. § 11.51.120(b) (1983); ARIZ. REV. STAT. ANN. § 8-531.01 (8)(c) (1974); ARK. STAT. ANN. § 42-807(c) (1977 & Supp. 1985); CAL. PENAL CODE § 270 (West Supp. 1987); COLO. REV. STAT. § 19-1-114 (1986); CONN. GEN. STAT. ANN. § 17-38d (West 1975); DEL. CODE ANN. tit. 11, § 1104 (1979); FLA. STAT. ANN. § 415.503(7)(f) (West Supp. 1985); HAWAII REV. STAT. § 350-4 (1976); IDAHO CODE § 18-401(2) (1979); ILL. ANN. STAT. ch. 23, § 2054 (Smith-Hurd Supp. 1986); IND. CODE ANN. § 35-46-1- 4(a), 5(c) (Supp. 1981); IOWA CODE ANN. § 726.6 (West 1979); KAN. STAT. ANN. § 21-3608(1)(c) (1981); LA. REV. STAT. ANN. § 14:403(B)(4) (West 1985); ME. REV. STAT. ANN. tit. 22, § 4010 (Supp. 1986); MD. FAM. LAW CODE ANN. § 5-701(g)(2) (1984); MASS. GEN. LAWS ANN. ch. 273, § 1 (West Supp. 1986); MICH. COMP. LAWS ANN. § 722.634 (1986); MISS. CODE ANN. § 43-21-105(l)(i), (m) (1972 & Supp. 1985); MO. ANN. STAT. § 210.115 (Vernon 1983); MONT. CODE ANN. § 41-3-102(4) (1985); NEV. REV. STAT. ANN. § 200.5085 (1986); N.H. REV. STAT. ANN. § 169-C:3, XIX (Supp. 1986); N.J. STAT. ANN. 9:6-1.1 (West 1976); N.M. STAT. ANN. § 32-1-3(L)(4), (M)(4) (1981); N.Y. PENAL LAW § 260.15 (McKinney 1980); N.C. GEN. STAT. § 7A-517(21) (1986); N.D. CENT. CODE § 50-25.1-05.1 (1981); OHIO REV. CODE ANN. § 2919.22(A) (Anderson 1982 & Supp. 1984), § 2151.421 (Anderson 1976 & Supp. 1984), § 2151.03 (Anderson 1976); OKLA. STAT. ANN. tit. 21, § 852 (West Supp. 1984-85); OR. REV.

At first, American courts inconsistently decided faith healing cases. In 1903, the New York Court of Appeals decided *People v. Pierson*.[33] Pierson, a member of the Christian Catholic Church of Chicago, believed in prayer healing; he was indicted for willfully, maliciously, and unlawfully omitting to furnish medical care for his child who died from pneumonia. The court held that the statute under which he was charged was constitutional:[34] the practice of prayer healing was inconsistent with the peace and safety of the state, which "involve[s] the protection of the lives and health of its children, as well as the obedience to its laws."[35] Pierson was found guilty of manslaughter.

Seventeen years later, in *Bradley v. State*,[36] the Florida Supreme Court found the faith healing defendant Bradley not guilty of manslaughter, even though he failed to provide medical treatment for his burned child.[37]

By the mid-twentieth century, most states followed the New York view in *Pierson*, and overruled faith healing defenses where a statute imposed an affirmative duty on adults to provide medical aid to children.[38] Two cases, *Mitchell v. Davis*[39] and *Craig v. State*,[40] exemplify this trend. In *Mitchell v. Davis*, a Texas court in 1947 held that a parent's opposition to his or her child's medical treatment based on the parent's religious beliefs did not constitute a defense to prosecution for breach of a statutory duty to furnish such treatment to the child.[41] The court declared that "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."[42] In 1959, Maryland also followed the *Pierson* rule in *Craig v. State*. Craig, a member of the Church of God who practiced faith healing, was found criminally liable for the death of his six-month-old daughter because of his refusal to provide her with medical care. The court rejected Craig's claim that his failure to act was

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STAT. § 419.500(l) (1981); PA. STAT. ANN. tit. 11, § 2203 (Purdon Supp. 1984-85); R.I. GEN. LAWS § 40-11-15 (1984); S.C. CODE ANN. § 20-7-490(B), (C)(3) (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 26-10-1.1 (1984); UTAH CODE ANN. § 78-3a-19.5 (Supp. 1983); VT. STAT. ANN. tit. 33, § 682(3)(C) (Supp. 1984); VA. CODE § 16.1- 228(A)(2) (1982 & Supp. 1984); W. VA. CODE § 49-1-3(g)(2)(A) (Supp. 1984); WIS. STAT. ANN. § 48.981(3)(c)(4) (West Supp. 1984-85); WYO. STAT. § 14-3-202(a)(vii) (1978).

33. 176 N.Y. 201, 68 N.E. 243 (1903).

34. *Id.* at 202, 68 N.E. at 244.

35. *Id.* at 204, 68 N.E. at 246.

36. 79 Fla. 651, 84 So. 677 (1920).

37. The court in *Bradley* reasoned that "the absence of medical attention did not cause 'the killing' of the child, even if the failure or refusal of the father to provide medical attention was 'culpable negligence' within the intent of the statute." *Id.* at 653, 84 So. at 679.

38. Trescher & O'Neill, *supra* note 27, at 208-12.

39. 205 S.W.2d 812 (Tex. Civ. App. 1947).

40. 220 Md. 590, 155 A.2d 684 (1959).

41. 205 S.W.2d at 815.

42. *Id.*

constitutionally protected under the Free Exercise Clause of the First Amendment, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[43]

The growing reliability of modern medicine in the mid-twentieth century may have led to the near consensus of states which followed *Pierson*. For instance, in 1904, an Indiana state court stated:

> It is undisputed that medicine, as a science, is now, and has been for a long period of time, generally recognized by law, and the efficacy of medical treatment by a skilled and competent physician is universally conceded. The religious doctrine or belief of a person cannot be recognized or accepted as a justification or excuse for his committing an act which is a criminal offense under the law of the land.[44]

C. California's Statutory Regulation of Prayer Healing

1. Regulation and Proscription

In 1872, California enacted Penal Code section 270, which provided: "Every parent of any child who wilfully omits, without lawful excuse, to perform any duty imposed upon him by law, to furnish necessary food, clothing, shelter, or medical attention for such child, is guilty of a misdemeanor."[45] In 1925, the legislature amended section 270[46] by adding the phrase "or other remedial care"[47] after "medical attendance" in an attempt to exempt faith healing parents.

In 1967, the California Supreme Court decided *People v. Arnold*,[48] the state's first prayer healing case under Penal Code section 270. Florence Ada Arnold was prosecuted for manslaughter in the death of her thirteen-year-old daughter, Sandra. Instead of providing medical care, Arnold, a member of the Church of the First Born, treated her ill daughter by spiritual means in accordance with her religious tenets. The trial court found Arnold guilty of manslaughter based on the misdemeanor-manslaughter rule.[49] The California Supreme Court held that under Penal Code section 270, the "other remedial care" provision of the 1925 amendment did not sanction unorthodox substitutes for medical attend-

43. 220 Md. at 601-02, 155 A.2d at 690-91. *See also* State v. Sandford, 99 Me. 441, 59 A. 597 (1904); Owens v. State, 6 Okla. Crim. 110, 116 P. 345 (1911).

44. State v. Chenoweth, 163 Ind. 94, 96, 71 N.E. 197, 199 (1904).

45. CAL. PENAL CODE § 270 (1872) (current version at CAL. PENAL CODE § 270 (West Supp. 1987)).

46. Cal. Assem. Bill No. 1825 (1925).

47. 1925 Cal. Stat., ch. 325, § 1, p. 544. *See infra* text accompanying note 50.

48. 66 Cal. 2d 438, 426 P.2d 515, 58 Cal. Rptr. 115 (1967).

49. The misdemeanor-manslaughter rule raises a charge of a misdemeanor to involuntary manslaughter if the misdemeanor results in homicide. *See* K. REDDEN & E. VERON, MODERN LEGAL GLOSSARY 343 (1980). For the first application of the rule, see Regina v. Downes, 1 Q.B.D. 25 (1875).

ance;[50] however, the court overturned her conviction because the trial court had erroneously admitted the defendant's statement into evidence.[51]

In 1976, the California Legislature amended section 270 of the Penal Code to include the following exception: "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."[52] *Walker v. Superior Court*,[53] *State v. Glaser*,[54] and *State v. Rippberger*[55] are the first prayer healing cases to be tried since the 1976 amendment of Penal Code section 270. Therefore, these cases afford the first judicial interpretation of the language of the 1976 amendment.

2. *Statutory Defense in Prayer Healing Cases*

The primary issue in prayer healing cases is whether parents have a statutory defense to charges of involuntary manslaughter[56] or felony child abuse.[57] California Penal Code section 270 imposes misdemeanor penalties on adults who fail to provide medical care to their children. The purpose of the statute is to ensure that a parent fulfills his or her duty to provide care for his or her child.[58] California Penal Code section

50. 66 Cal. 2d at 452, 426 P.2d at 524, 58 Cal. Rptr. at 124.

51. *Id.*

52. *See* CAL. PENAL CODE § 270 (West Supp. 1987).

53. 185 Cal. App. 3d 266, 222 Cal. Rptr. 87, *review granted*, No. 24996 (Cal. Sup. Ct. Mar. 27, 1986).

54. No. A 753942 (Cal. Super. Ct., Los Angeles County Jan. 10, 1985).

55. No. 13301-C (Cal. Super. Ct., Sonoma County July 16, 1985).

56. The statute provides in part:

> Manslaughter is the unlawful killing of a human being without malice. It is of three kinds:
>
> (a) Voluntary—upon a sudden quarrel or heat of passion.
>
> (b) Involuntary—in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. This subdivision shall not apply to acts committed in the driving of a vehicle.
>
> (c) Vehicular . . . .

CAL. PENAL CODE § 192 (West Supp. 1987).

57. The statute provides in part:

> (1) Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of such child to be injured, or permits such child to be placed in such situation that its person or health is endangered, is punishable by imprisonment in the county jail not exceeding one year, or in the state prison for 2, 4, or 6 years.

Id. at § 273a.

58. *Id* at § 270 (West Supp. 1985).

273a[59] imposes felony charges on adults who abuse their children. The purpose of the statute, in contrast to section 270, is to protect children from life-threatening situations.[60]

When the legislature amended Penal Code section 270 in 1976, it was aware[61] of a conflict between the section 270 exemption for religious healing and the absence of such an exemption in Penal Code sections 273a and 192.[62] Under section 270, a parent can satisfy the obligation to provide medical care if she uses spiritual treatment. However, under sections 273a and 192, a parent can be held criminally liable if the child suffers harm from prayer healing. During the legislation's pending enactment, the Assembly Committee on Criminal Justice stated:

> The bill appears unclear in two respects. First, section 273a makes it a [felony] for any person to permit a minor under his care or custody to suffer any physical harm or injury. Thus, though the parents may not be liable for failing to provide for the health of the child because they choose treatment by prayer rather than common medical treatment, they would be liable if the child suffered any physiological harm. Second, no 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 [s]hould not be liable for the results of using a permitted mode of healing.[63]

After pointing out the conflict between permitting the use of prayer healing and punishing parents whose children die after receiving only prayer healing as treatment, the legislature failed to provide a religious defense to the section 273a felony child abuse offense. The legislature's failure to enact indicates its intent not to provide a religious defense to felony child abuse charges.[64]

In fact, the legislative intent can be further inferred from its entire removal of a proposed Welfare and Institutions Code section from the final version of the bill amending Penal Code section 270 in 1976.[65] The proposed Welfare and Institutions Code section read: "No child who in good faith is under treatment solely by spiritual means through prayer alone . . . shall, for that reason alone, be considered a person described by Section 600 [which makes certain children dependents of Juvenile Court instead of their parents]."[66] The legislature, by failing to enact this pro-

59. *See infra* text accompanying note 63.

60. CAL. PENAL CODE § 273a (West Supp. 1987).

61. *See* CALIFORNIA ASSEMBLY COMMITTEE ON CRIMINAL JUSTICE, REPORT ON ASSEMBLY BILL 3843 (1976) [hereinafter ASSEMBLY COMMITTEE REPORT]; CALIFORNIA SENATE COMMITTEE ON JUDICIARY, REPORT ON ASSEMBLY BILL 3843 (1976).

62. CAL. PENAL CODE § 192 (West Supp. 1987) (manslaughter).

63. ASSEMBLY COMMITTEE REPORT, *supra* note 61, at 1-2.

64. Place v. Trent, 27 Cal. App. 3d 526, 530, 103 Cal. Rptr. 841, 845 (1984).

65. Cal. Sen. Amend. to Assem. Bill No. 3843 (1975-76 Reg. Sess.) (August 4, 1976).

66. *Id.* (June 11, 1976).

posed section, indicated that children whose lives are in danger can be declared dependents of the court even if their parents claim spiritual treatment as a defense.[67]

California Penal Code section 11165,[68] and Welfare and Institutions Code sections 16509.1[69] and 18950.5[70] state that no child who is provided spiritual treatment shall "for that reason alone" be considered neglected or abused. Although this seems to provide some respite for parents who practice prayer healing on their children, the Colorado Supreme Court interpreted the phrase "for that reason alone" in a child neglect statute[71] similar to California's as restricting the religious defense to situations in which the child's life was not threatened by the parent's failure to provide medical care.[72] Under the Colorado approach, a child may be declared neglected or abused if the omission of medical care would result in serious harm to the child.[73]

Furthermore, in 1978 the California Legislature passed Welfare and

67. *See* Letter from George H. Murphy to the Honorable John T. Knox (May 24, 1976) (discussing Cal. Assem. Bill No. 3843).

68. This statute provides:

> (1) "Severe neglect" means . . . those situations of neglect where any person having the care or custody of a child willfully causes or permits the person or health of the child to be placed in a situation such that his or her person or health is endangered . . . including the intentional failure to provide adequate food, clothing, shelter, or medical care.
>
> (2) "General neglect" means the negligent failure of a person having the care or custody of a child to provide adequate food, clothing, shelter, medical care, or supervision where no physical injury to the child has occurred.
>
> For the purposes of this chapter [Control of Crimes and Criminals], a child receiving treatment by spiritual means as provided in Section 16509.1 of the Welfare and Institutions Code or not receiving specified medical treatment for religious reasons, shall not for that reason alone be considered a neglected child. . . .

CAL. PENAL CODE § 11165 (West Supp. 1987).

69. This statute states:

> No child who in good faith is under treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by a duly accredited practitioner thereof shall, for that reason alone, be considered to have been neglected within the purview of this chapter [State Child Welfare Services].

CAL. WELF. & INST. CODE § 16509.1 (West Supp. 1987).

70. This statute states: "For the purposes of this chapter [Child Abuse Prevention], a child receiving treatment by spiritual means . . . shall not for that reason alone be considered an abused or neglected child." *Id.* at § 18950.5.

71. The Colorado statute provides:

> Notwithstanding any other provision of this title, no child who in good faith is under treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by a duly accredited practitioner thereof shall, for that reason alone, be considered to have been neglected within the purview of this title.

COLO. REV. STAT. § 19-1-114 (1973) (1978 Repl. Vol. 8, § 114).

72. People *ex rel.* D.L.E. (D.L.E. II), 645 P.2d 271, 274 (Colo. 1982).

73. *Id.* at 274-75. *See also In re* Edward C., 126 Cal. App. 3d 193, 178 Cal. Rptr. 694 (1981); *In re* Angela P., 28 Cal. App. 3d 908, 171 Cal. Rptr. 637 (1981).

Institutions Code section 300.5,[74] which explicitly allows judicial intervention to protect a child in need of medical care— even where the parent is providing spiritual treatment.[75] Thus, the legislature has clearly recognized that religious treatment is not a complete defense where a child's life is in danger, and that the court may exercise the state's *parens patriae* power to protect the child.

Finally, when closely examining Penal Code section 270, it appears to confine the religious exemption to misdemeanor charges against parents for failing to provide for their children. Section 270 states that "such [spiritual] treatment shall constitute 'other remedial care,' *as used in this section*."[76] This exemption, combined with the legislative history, can only be interpreted by courts to apply solely to section 270.[77] Thus, no statutory exemption exists to charges of involuntary manslaughter[78] or felony child abuse[79] in prayer healing cases.

II. Free Exercise, Establishment of Religion, and Due Process

A. The Free Exercise of Religious Beliefs

The First Amendment of the United States Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."[80] The First Amendment is made applicable to the states through the Fourteenth Amendment.[81] The Free Exercise Clause was designed to guarantee individual freedom to practice religion,[82] and it prohibits the government from unnecessarily burdening individuals because of their religious beliefs:[83] "the free exercise clause is a mandate of religious voluntarism."[84] In enacting the Free Exercise Clause the Drafters' purpose was " 'to state an objective, not to write a statute.' "[85] Hence, courts have developed rules and principles to

74. CAL. WELF. & INST. CODE § 300.5 (West 1984).

75. *Id.*

76. CAL. PENAL CODE § 270 (West Supp. 1987) (emphasis added).

77. Cf. *Walker v. Superior Court*, in which the court overruled the defendant's motion for dismissal. Justice Sims' concurring opinion states:

> Penal Code section 270 contains no exemption from the parental duty to supply medical attention for a child. Our Supreme Court [in *People v. Arnold*] has ruled that the duty to supply "other remedial care," imposed by section 270, is in addition to, not a substitute for, the statute's duty to supply medical attention. Consequently, I do not agree with the majority's suggestion that section 270 may contain a "faith healing exemption."

185 Cal. App. 3d at 283, 222 Cal. Rptr. at 96 (Sims, J., concurring).

78. CAL. PENAL CODE § 192 (West Supp. 1987).

79. *Id.* at § 273a.

80. U.S. CONST. amend. I.

81. Cantwell v. Connecticut, 310 U.S. 296 (1940).

82. *See* Walz v. Tax Comm'n, 397 U.S. 664, 719 (1970) (Douglas, J., dissenting).

83. *See id.*; *see also* Engel v. Vitale, 370 U.S. 421, 431 (1962).

84. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 818 (1978).

85. *Id.* at 813 (citing Walz v. Tax Comm'n, 397 U.S. at 668).

maintain the spirit of the Drafters' intent.[86]

While the freedom to *believe* in any religious faith is absolute,[87] the freedom to *exercise* that belief is not absolute[88] and must be tempered by the interest in the general public welfare.[89] As long as religious beliefs are not restricted, the government may legislate to a certain extent in areas that interfere with religious practices: "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[90]

In 1878, the Supreme Court decided *Reynolds v. United States*,[91] in which it convicted Reynolds of violating a bigamy statute: knowing that his wife was still alive, Reynolds married another woman in Utah. The Court rejected his defense that his actions were based on his religious beliefs as a member of the Mormon Church, which advocated polygamy. The Court held that such a defense was no justification for committing an overt criminal act.[92]

Since *Reynolds*, courts have attempted to distinguish between religious beliefs and religious practices by balancing the individual's religious interest against the substantiality of the state's interest, or the compelling state interest.[93] If the state's interest does not outweigh the individual's religious interest, then the state's action violates the Free Exercise Clause.[94]

As a general proposition, minors lack the capacity to make decisions affecting their basic constitutional rights: "[T]here is a general recognition of the fact that many persons by reason of their youth are incapable of intelligent decision, as the result of which public policy demands legal protection of their personal as well as their property rights."[95] Few courts recognize that children have a separate constitutional interest independent from their parents or the state unless the child is deemed old enough to participate in decisions affecting her.[96] Courts must therefore balance two perceptions of the child's best interest: the parents' religious and child-rearing interests and the state's interest as *parens patriae*. As

86. *Id.*

87. *Cantwell*, 310 U.S. at 303-04.

88. *Id.*

89. *Id. See also* Reynolds v. United States, 98 U.S. 145 (1878); *In re* Appeal in Cochise County, 133 Ariz. 165, 650 P.2d 467 (1981); Craig v. State, 220 Md. 590, 155 A.2d 684 (1959).

90. Reynolds v. United States, 98 U.S. at 166-67.

91. 98 U.S. 145 (1878).

92. *Id.* at 167.

93. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963); *see also* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 1057-63 (3d ed. 1986) [hereinafter NOWAK].

94. *See* NOWAK, *supra* note 93, at 1057-65.

95. Bonner v. Moran, 126 F.2d 121, 122 (D.C. Cir. 1941).

96. *See* Note, *Choosing For Children: Adjudicating Medical Care Disputes Between Parents and the State*, 58 N.Y.U. L. REV. 157, 168 (1983).

the court noted in *State v. Miskimens*,[97] "[a]n important line must be drawn between the right of an individual to practice his religion by refusing medical treatment for his *own* illness and that of a parent to practice his religion by refusing to obtain or permit medical treatment for *another* person, *i.e.*, his child."[98]

In *Prince v. Massachusetts*,[99] the Supreme Court stated:

> The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death. . . . Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.[100]

In *Prince*, the Supreme Court held constitutional state statutes that made it unlawful for a parent or guardian to furnish a minor with articles to sell in public places,[101] or for a parent or guardian to permit a minor to work in violation of the child labor laws.[102] A guardian of a minor distributing the Jehovah's Witnesses' newspaper, the *Watchtower*, was found guilty of violating the statute even though the guardian accompanied the minor and both were acting pursuant to their religious beliefs. The Court stated that "the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. And neither rights of religion nor rights of parenthood are beyond limitation."[103]

The state has authority to restrict parental control based on its po-

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97. 22 Ohio Misc. 2d 43, 490 N.E.2d 931 (Ohio Com. Pl. 1984).

98. *Id.* at 45, 490 N.E.2d at 934 (emphasis in original).

99. 321 U.S. 158 (1944).

100. *Id.* at 166-67, 170.

101. The Massachusetts statute at issue in *Prince* provided:

> Whoever furnishes or sells to any minor any article of any description with the knowledge that the minor intends to sell such article in violation of any provision of [the child labor laws] . . . or after having received written notice to this effect from any officer charged with the enforcement thereof, or knowingly procures or encourages any minor to violate any provisions of said sections, shall be punished by a fine of not less than ten nor more than two hundred dollars or by imprisonment for not more than two months, or both.

MASS. GEN. LAWS § 80 (1939).

102. The Massachusetts statute also provided:

> Any parent, guardian or custodian having a minor under his control who compels or permits such minor to work in violation of any provision of sections sixty to seventy-four inclusive, . . . shall for a first offense be punished by a fine of not less than two nor more than ten dollars or by imprisonment for not more than five days, or both . . . .

Id. at § 81.

103. 321 U.S. at 166. Note that the *Prince* Court also recognizes rights of parenthood. For a discussion of the rights of parenthood as guaranteed by the right of privacy, see Note, *California Workfare Legislation and the Right to Privacy*, 13 HASTINGS CONST. L.Q. 761 (1986).

lice power[104] and *parens patriae* power,[105] which give states wide discretion to limit parental freedom and authority in areas affecting a child's welfare, including, to some extent, matters of conscience and religious conviction.[106] States restrict parental control of their children's religious beliefs by requiring school attendance,[107] regulating or prohibiting child labor,[108] and mandating vaccinations for children.[109]

B. Establishment of Religion

The First Amendment of the United States Constitution states: "Congress shall make no law respecting an establishment of religion . . . ."[110] The Establishment Clause applies to the states through the Fourteenth Amendment.[111] It prohibits governmental sponsorship of religion: the government cannot aid or formally establish a religion.[112]

Over the years the Supreme Court has developed a three-part test to evaluate establishment clause violations. In order to pass constitutional muster, the statute must: (1) have a secular purpose; (2) have a primary secular effect; and (3) not involve the government in an excessive entanglement with religion.[113] The law also must not create political division along religious lines.[114]

If a regulation imposes a burden on persons' religious beliefs in violation of their free exercise rights, the government may grant a religious exemption.[115] However, any exemption must be drafted broadly enough so as to reflect a valid secular purpose.[116]

C. Due Process

The Fifth Amendment of the Constitution, binding the federal government, states: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."[117] The Fourteenth Amendment of the Constitution similarly provides: "Nor shall any State deprive

104. *See* Ewald, *Medical Decision Making for Children: An Analysis of Competing Interests*, 25 ST. LOUIS U.L.J. 689, 710 (1982).

105. *Parens patriae* has been defined as "literally 'parent of the country,' refer[ring] traditionally to role of state as sovereign and guardian of persons under legal disability." BLACK'S LAW DICTIONARY (5th ed. 1979).

106. *Prince*, 321 U.S. at 167.

107. State v. Bailey, 157 Ind. 324, 61 N.E. 730 (1901).

108. *Prince*, 321 U.S. 158 (1944).

109. Jacobson v. Massachusetts, 191 U.S. 11 (1905).

110. U.S. CONST. amend. I.

111. Cantwell v. Connecticut, 310 U.S. 296 (1940).

112. *See* NOWAK, *supra* note 93, at 1033.

113. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

114. *Id.* at 622-24.

115. *See* NOWAK, *supra* note 93, at 1035.

116. *See* Gillette v. United States, 401 U.S. 437, 454 (1971).

117. U.S. CONST. amend. V.

any person of life, liberty, or property, without due process of law . . . ."[118] The Due Process Clauses were designed to preserve individual freedoms through a check on governmental action.[119] Two types of due process exist: procedural due process and substantive due process. Both protect an individual's interest in life, liberty, and property.[120]

Procedural due process guarantees that the process the government uses when it impairs a person's life, liberty, or property be fair.[121] Procedural due process applies to the trial process,[122] the enforcement of debtor-creditor relationships,[123] and some governmental benefit hearings.[124] Substantive due process guarantees that the law or action that the government enacts does not violate the Bill of Rights.[125] If the law or action violates constitutional provisions, the government has acted beyond the scope of its legislative authority, and the enacted law limits life, liberty, and property in violation of the Due Process Clauses.[126]

To satisfy procedural due process, the language of a statute must be definite enough to provide a standard of conduct for those whose activities are being prohibited.[127] "Vague laws may trap the innocent by not providing fair warning."[128] If a statute's terms are "so vague, indefinite and uncertain" that individuals cannot determine its meaning, the statute violates due process.[129] "[A] statute which either forbids or requires the doing of an act in terms so vague that [people] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."[130] The statute must describe a violation with a reasonable degree of certainty so that an ordinary person can understand what conduct is prohibited.[131] This is especially true with criminal statutes: "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."[132]

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118. U.S. CONST. amend. XIV.
119. L. TRIBE, *supra* note 84, at 501.
120. NOWAK, *supra* note 93, at 461-62.
121. *Id.* at 487.
122. *Id.* at 487-92.
123. *See, e.g.*, Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).
124. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970).
125. NOWAK, *supra* note 93, at 417.
126. *Id.* at 418.
127. Winters v. New York, 333 U.S. 507, 515-16 (1948).
128. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). *See also* People v. Mirmirani, 30 Cal. 3d 375, 636 P.2d 1130, 178 Cal. Rptr. 792 (1981).
129. Lanzetta v. New Jersey, 306 U.S. 451 (1939). *See also* People v. Mirmirani, 30 Cal. 3d 375, 636 P.2d 1130, 178 Cal. Rptr. 792 (1981).
130. Connally v. General Construction Co., 269 U.S. 385, 391 (1926). *See also* People v. McCaughan, 49 Cal. 2d 409, 317 P.2d 974 (1957).
131. *Lanzetta*, 306 U.S. 451 (1939).
132. *Id.* at 453.

D. Independent State Grounds

In regard to religion, the California Constitution provides: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the state."[133] This provision is slightly broader than the Federal Constitution's provision for religious rights, since it also forbids governmental "preference" of religion; however, the provision is only broader with respect to the establishment of religion, not the free exercise of religion.[134]

California's Constitution also provides for due process: "A person may not be deprived of life, liberty, or property without due process of law . . . ."[135] This provision parallels the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Hence, the California Due Process Clause affords no greater protection than its federal counterpart. California courts afford the same free exercise and due process protections under the California Constitution as are afforded under the Federal Constitution.

California courts can decide cases based on rights under the state constitution:

> The courts of California are the exclusive and final arbiters of the "rights" guaranteed by its Constitution, so long as the interpretive results they reach extend, to the citizens within their jurisdiction, equal or greater protection to those extended by the United States Supreme Court under textually parallel provisions of the federal Bill of Rights.[136]

III. The Constitutionality of California's Regulation of Prayer Healing

A. Free Exercise Clause

The right to believe in prayer healing is absolute, whereas the right to exercise prayer healing is not absolute.[137] However, often religious beliefs and practices are so integrally related that to deny an individual the right to the practice of a religion is to deny that individual the right to believe in that religion.[138] This interrelationship between religious practices and beliefs is exemplified by the beliefs and practices of Christian Scientists and Jehovah's Witnesses. An integral part of the Christian Scientist creed is belief in healing by spiritual means.[139] Christian Scien-

133. CAL. CONST. art. I, § 4.
134. Fox v. City of Los Angeles, 22 Cal. 3d 792, 587 P.2d 663, 150 Cal. Rptr. 867 (1978).
135. CAL. CONST. art. I, § 7.
136. Mandel v. Hodges, 54 Cal. App. 3d 596, 616, 127 Cal. Rptr. 244, 257 (1976).
137. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).
138. *See* Comment, *supra* note 4, at 396-400.
139. *See* Trescher & O'Neill, *supra* note 27.

tists practice the teachings of Mary Baker Eddy, who believed that diseases were cured "by the divine spirit, casting out the errors of mortal mind."[140] Christian Scientists believe that their minds deceive their bodies: by believing they are ill, they inflict the illness on their bodies.[141] The only way for a Christian Scientist to effectively cure an illness is to remove the "error" of thinking that the illness exists.[142] However, it is not a sin for a Christian Scientist to seek medical attention. "A member who does turn to medicine is not stigmatized or expelled," writes Christian Science spokesman John Dickson Martin of Indianapolis. "And though Christian Scientists choose to rely on spiritual means for healing, they are certainly not 'against doctors'. They are glad medical treatment is available for those who want it."[143] Jehovah's Witnesses believe that it is a deadly sin to partake the blood of humans or animals,[144] and hence do not believe in blood transfusions.[145] Many devout Jehovah's Witnesses would rather die than take a needed blood transfusion.[146]

The state can regulate the exercise of religion through its role as *parens patriae* as long as the state's interest is so substantial that it outweighs the individual's interest in the free exercise of religion.[147] The *parens patriae* power was used in the 1903 New York faith healing case, *People v. Pierson*.[148] According to the court, the state's interest in peace and safety requires that the state protect the lives and health of its children, as well as require parental obedience to the laws of the state.[149] *Pierson* established that the state, in its role as *parens patriae*, has a highly substantial interest in protecting the lives and well-being of its children, thereby upholding the state's infringement on Pierson's constitutional right of free exercise of religion.

The state's *parens patriae* interest has also been invoked when the state is faced with parents who refuse to allow their children to receive blood transfusions.[150] Many courts have upheld the power of the state to authorize the administration of a blood transfusion over the parent's religious objections when the blood transfusion was shown to be necessary

140. M. EDDY, SCIENCE AND HEALTH WITH KEY TO THE SCRIPTURES 138 (1934).

141. *See* Schneider, *Christian Science and the Law: Room for Compromise?*, 1 COLUM. J.L. & SOC. PROBS. 81 (1965).

142. *Id.*

143. Michelson, *Christian Science Cases Pose Test of Religious Freedom*, L.A. Daily J., Sept. 2, 1985, at 1, col. 6, & at 22, col. 1. *See also* Schneider, *supra* note 141, at 88.

144. *See, e.g.*, Hoener v. Bertinato, 67 N.J. Super. 517, 520 (1961).

145. *Id.*

146. *See* State v. Perricone, 37 N.J. 463, 469, 181 A.2d 751, 754 (1962); *see also* Schneider, *supra* note 141, at 82-83.

147. *See supra* text accompanying notes 93-94.

148. 176 N.Y. 201, 68 N.E. 243 (1903).

149. *Id.* at 205-06, 68 N.E. at 244-45.

150. *See, e.g.*, People *ex rel.* Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769 (1952); Hoener v. Bertinato, 67 N.J. Super. 517, 171 A.2d 140 (1961).

for the preservation of the minor's life or for the success of needed surgery.[151]

In *State v. Perricone*,[152] the parents of an infant child with an enlarged heart refused to consent to blood transfusions because of their religious beliefs as members of the Jehovah's Witness faith. A New Jersey statute provided for the appointment of a guardian if a child was not provided with proper care.[153] The trial court appointed a guardian to consent to the blood transfusions because they were necessary to save the infant's life or mental health. Another statute[154] granted parents the right to provide treatment for ill children in accordance with their religious tenets. The parents attacked the guardian appointment statute on the grounds that it violated their right to freely exercise their religious beliefs. The New Jersey Supreme Court held that the guardian appointment statute did not violate the Free Exercise Clause of the First Amendment.[155] It further held that while the parents were protected from criminal prosecutions for practicing prayer healing on their children, the state was not rendered helpless in protecting children.[156]

In 1970, the New York Court of Appeals, in *In re Sampson*,[157] ordered surgery to partially correct a child's severe facial deformity despite his mother's religious objections. The child's mother, a Jehovah's Witness, objected to the use of blood transfusions on her child. The court's order was based on its finding that the mother had neglected to provide proper medical and surgical care.[158]

A different result under similar facts was reached by the Pennsylvania Supreme Court in *In re Green*.[159] In *In re Green*, Green would

151. *See, e.g.*, Jehovah's Witnesses v. King County Hosp., 278 F. Supp. 488 (D.D.C. 1967); People *ex rel.* Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769 (1952); State v. Perricone, 37 N.J. 463, 181 A.2d 751 (1962); Muhlenberg Hosp. v. Patterson, 128 N.J. Super. 498, 320 A.2d 518 (1974); Hoener v. Bertinato, 67 N.J. Super. 517, 171 A.2d 140 (1961); *In re* Sampson, 65 Misc. 2d 658, 317 N.Y.S.2d 641 (1970).

152. 37 N.J. 463, 181 A.2d 751 (1962).

153. The statute provides:

> When the parents of any minor child or the parent or other person having actual care and custody of any minor child are grossly immoral or unfit to be intrusted with the care and education of such child, or shall neglect to provide the child with proper protection, maintenance and education, . . . it shall be lawful for any person interested in the welfare of such child to institute an action in the Superior Court or the Juvenile and Domestic Relations Court in the county where such minor child is residing, for the purpose of having the child brought before the court, and for the further relief provided by this chapter. The court may proceed in the action in a summary manner or otherwise.

N.J. STAT. ANN. § 9:2-9 (West 1961).

154. *Id.* at § 9:6-1.1.

155. 37 N.J. at 474, 181 A.2d at 757.

156. *Id.* at 478, 181 A.2d at 759.

157. 317 N.Y.S.2d 641 (1970).

158. *Id.* at 656.

159. 448 Pa. 338, 292 A.2d 387 (1972).

not consent to surgery for her son because the surgery required the use of a blood transfusion, and Green, a Jehovah's Witness, objected to such blood transfusions. The surgery was necessary to cure the boy's inability to walk. The court held that the boy's inability to walk was not a threat to society, thus it would not appoint a guardian to consent to the surgery.[160]

In *Wisconsin v. Yoder*,[161] the Supreme Court balanced the state's interest in the well-being of children within its jurisdiction and the parents' right in the free exercise of the Amish religion. The Court held that a Wisconsin statute requiring compulsory school attendance unconstitutionally restricted the religious beliefs of the Amish, who oppose participation in formal public education past the eighth grade.[162] The Court felt that the state's interest in education was readily met by the Amish system of "informal vocational education," and thus compulsory high school education was not a state interest substantial enough to restrict the family's religious beliefs.[163]

The *Yoder* Court recognized that if a religious practice was detrimental to the health or well-being of the child, the state's interest in the child's welfare would overcome a claim of religious freedom.[164] Therefore, the state's interest in protecting the health and welfare of children may override parents' free exercise of faith healing on their children, when the faith healing is detrimental to the child's health or well-being.

In accordance with this principle, California also has a strong state interest in protecting the health and well-being of its children. California's felony child abuse and involuntary manslaughter statutes serve the state's interest as *parens patriae* when children's lives are in danger, as these statutes protect children in life-threatening situations in which only medical attention might save the child. Although faith healing parents have a strong interest in practicing their religious beliefs on themselves and their children, the practice of faith healing sometimes leads to the endangerment of a child's life. Therefore, prayer healing does not provide a sufficient alternative to medical care in life-threatening situations, and the state's interest implicit in Penal Code sections 192 and 273a justifiably and necessarily overrides the parents' free exercise rights.

B. Establishment of Religion

Section 270 of the California Penal Code grants a religious exemption from the duty to provide medical care, to those parents who practice faith healing "in accordance with the tenets and practices of a *recognized*

160. *Id.* at 342-43, 292 A.2d at 389.
161. 406 U.S. 205 (1972).
162. *Id.* at 211.
163. *Id.* at 214-29.
164. *Id.* at 229-30.

religion or religious denomination."[165] As the United States Supreme Court noted in *Lemon v. Kurtzman*,[166] an exemption must pass a three-part test in order to maintain its constitutionality with respect to the Establishment Clause: (1) it must have a secular purpose; (2) it must have a primary secular effect; and (3) it must not involve the government in an excessive entanglement with religion.[167]

In antoher religious exemption case, *Gillette v. United States*,[168] the claimants challenged a statutory exemption to those who by reason of their religious training and belief opposed participation in all wars. The claimants, whose religious philosophy required them to refrain only from participation in unjust wars, charged that the exemption violated the Establishment Clause. The *Gillette* Court stated that a religious exemption could have a secular purpose as long as it was drafted broadly enough.[169] The Court stated that the secular purpose of the Military Service Act in question was to exclude in the fairest way those persons who were not available for military service due to their religious beliefs.[170] California Penal Code section 270 is likewise drafted broadly enough to reflect a valid secular purpose. Section 270's "recognized religion or religious denomination" language was added in order to exclude those parents who used "other remedial care" instead of modern medicine due to their religious beliefs.[171] Therefore, Penal Code section 270 meets the first prong of the *Lemon* test.

In *Gillette*, the Court held that the primary effect of the Military Service Act of 1967 was not to aid religion because it did not encourage any belief.[172] The Military Service Act of 1967 provides:

> Nothing contained in this title . . . shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term "religious training and belief" does not include essentially political, sociological, or philosophical views, or a merely personal moral code.[173]

The exemption in *Gillette* was phrased in terms of "religious training and belief." It did not go as far as California's statute in only exempting "recognized" religions. Therefore, its primary effect was not to aid religion. In contrast, the California statute has the primary effect of

165. CAL. PENAL CODE § 270 (West Supp. 1987) (emphasis added).
166. 403 U.S. 602 (1971).
167. *Id.* at 612-13. *See also supra* text accompanying notes 110-116.
168. 401 U.S. 437, *reh'g denied*, 402 U.S. 934 (1971).
169. *Id.* at 454.
170. *Id.* at 452-56.
171. *See supra* text accompanying notes 48-52.
172. 401 U.S. at 454.
173. 50 U.S.C. App. § 456(j) (1982).

encouraging only "recognized" religious beliefs, rather than not encouraging any particular belief. Section 270 of the Penal Code therefore fails the second prong of the *Lemon* test because it does not have a primary secular effect.

The *Gillette* Court held that the military regulation avoided further entanglement between government and religion because there was *less* need to examine the sincerity and character of individual beliefs.[174] In contrast, the California regulation *requires* examination of the individual's beliefs because an exemption will only be granted to parents who act "in *accordance* with the tenets and practices"[175] of a recognized religion.

In *State v. Miskimens*,[176] an Ohio court held that a statute similar to California Penal Code section 270 violated the Establishment Clause because it did not meet the requirements of the entanglement prong of the *Lemon* test.[177] The statute provided in part:

> It is not a violation of a duty of care, protection, or support . . . when the parent, guardian, custodian, or person having custody or control of a child treats the physical or mental illness or defect of such child by spiritual means through prayer alone, in accordance with the tenets of a recognized religious body.[178]

The court stated that this provision

> hopelessly involves the state in the determination of questions which should not be the subject of governmental inquisition and potential public ridicule—questions such as what is a "recognized religous body," by whom must it be "recognized," what are its tenets, did the accused act in accordance with those tenets, what are "spiritual means," and what is the effect of combining some prayer with some treatment or medicine.[179]

The court's language equally applies to the Establishment Clause analysis of California Penal Code section 270: "The determination of such issues runs clearly afoul of at least one recognized test for determining an impermissible establishment problem, *i.e.*, the 'excessive entanglement' test . . . ."[180] California Penal Code section 270 therefore fails both the second and third prongs of the *Lemon* test in violation of the Establishment Clause.

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174. 401 U.S. at 456-58.
175. CAL. PENAL CODE § 270 (West Supp. 1987) (emphasis added).
176. 22 Ohio Misc. 2d 43, 490 N.E.2d 931 (Ohio Com. Pl. 1984).
177. *Id.* at 45, 490 N.E.2d at 934.
178. OHIO REV. CODE ANN. § 2919.22(A) (Page 1982 & Supp. 1984).
179. 22 Ohio Misc. 2d at 45, 490 N.E.2d at 934.
180. *Id.*

C. Due Process

California's statutory scheme regarding faith healing must be examined as a whole in order to analyze whether California Penal Code section 273a, regarding felony child abuse, and section 192, regarding involuntary manslaughter, are "so vague, indefinite and uncertain"[181] that they violate the Due Process Clauses of the State and Federal Constitutions.

California statutes provide numerous examples of state support for religious practitioners and persons depending upon prayer healing. For instance, under California Business and Professions Code section 2063,[182] it is illegal to practice medicine without a license from the State of California, but the statute does not apply to treatment by prayer.[183] Likewise, the use of unauthorized methods or drugs for treatment of cancer is prohibited by California Health and Safety Code section 1709,[184] but exempts religious practitioners and "any person [who] depends exclusively upon prayer for healing . . . ."[185] The health services of religious practitioners are covered by Medi-Cal and Medicaid under California Welfare and Institutions Code section 14000.[186] Finally, California Welfare and Institutions Code section 16509 states: "Cultural and religious child-rearing practices and beliefs which differ from general community standards shall not in themselves create a need for child welfare services unless the practices present a specific danger to the physical or emotional safety of the child."[187]

Although a layperson cannot be expected to comprehend the nuances of every statute,[188] the existence of these statutes—in addition to Penal Code section 270, which exempts faith healing parents from misde-

181. *Lanzetta v. New Jersey*, 306 U.S. at 451.

182. The statute states:

> Nothing in this chapter [Medicine] shall be construed so as to discriminate against any particular school of medicine or surgery, school or college of podiatric medicine, or any other treatment, nor shall it regulate, prohibit, or apply to any kind of treatment by prayer, nor interfere in any way with the practice of religion.

CAL. BUS. & PROF. CODE § 2063 (West Supp. 1986).

183. *Id.*

184. This statute provides:

> The failure of any individual, person, firm, association, or other entity representing himself, or itself, as engaged in the diagnosis, treatment, alleviation, or cure of cancer to comply with any of the regulations promulgated under this chapter [Cancer] is a misdemeanor. . . . The provisions of this chapter shall not apply to any person who depends exclusively upon prayer for healing in accordance with the teachings of a bona fide religious sect, denomination, or organization, nor practitioner thereof.

CAL. HEALTH & SAFETY CODE § 1709 (West 1979).

185. *Id.*

186. CAL. WELF. & INST. CODE § 14000 (West Supp. 1987).

187. *Id.* at § 16509.

188. State v. Miskimens, 22 Ohio Misc. 2d 43, 47-48, 490 N.E.2d 931, 937 (Ohio Com. Pl. 1984).

meanor charges for denying their children medical care—might indicate to the layperson that Penal Code sections 273a and 192 are inapplicable to faith healing cases. Due process requires notice to defendants that their conduct is criminal.[189] However, section 270 is the only criminal statute that mentions religious treatment, and it grants an exemption if religious treatment is used. Section 270's religious exemption condones the practice of faith healing but does not warn faith healing parents of potential criminal prosecutions for manslaughter or felony child abuse.

D. Independent State Grounds

California's Constitution provides the same protections to its citizens in the areas of free exercise of religion and due process of law as does the United States Constitution.[190] Therefore, California courts have used the same analysis of free exercise and due process claims as the federal courts.[191] Since California's prayer healing regulation does not violate the Free Exercise Clause of the Federal Constitution,[192] yet violates the Due Process Clause of the Federal Constitution,[193] it necessarily follows that the legislation does not violate the free exercise provisions of the California Constitution, but violates the due process provision of the California Constitution.

The California Constitution provides broader protections against the establishment of religion than does the United States Constitution because it prohibits not only the establishment, but also the preference of religion.[194] Therefore, California courts have utilized a slightly broader analysis in establishment claims.[195] However, since California's prayer healing exemption violates the Establishment Clause of the Federal Constitution,[196] it will necessarily violate the broader California Constitution.[197]

189. United States v. Harriss, 347 U.S. 612, 617 (1953).

190. *See supra* text accompanying notes 133-136.

191. *See, e.g.*, Jaffe v. Unemployment Ins. Appeals Bd., 156 Cal. App. 3d 719, 202 Cal. Rptr. 812 (1984); Erzinger v. Regents of Univ. of Cal., 137 Cal. App. 3d 389, 187 Cal. Rptr. 164 (1982), *cert. denied,* 462 U.S. 1133 (1983); *In re* Edward C., 126 Cal. App. 3d 193, 178 Cal. Rptr. 694 (1981); Citizens for Parental Rights v. San Mateo County Bd. of Educ., 51 Cal. App. 3d 1, 124 Cal. Rptr. 68 (1975).

192. *See supra* text accompanying notes 137-164.

193. *See supra* text accompanying notes 181-189.

194. *See supra* text accompanying notes 133-134.

195. *See, e.g.*, Fox v. City of Los Angeles, 22 Cal. 3d 792, 587 P.2d 663, 150 Cal. Rptr. 807 (1978); Feminist Women's Health Center, Inc. v. Philibosian, 157 Cal. App. 3d 1076, 203 Cal. Rptr. 918 (1984); Mandel v. Hodges, 54 Cal. App. 3d 596, 127 Cal. Rptr. 244 (1976).

196. *See supra* text accompanying notes 165-180.

197. *See supra* text accompanying note 136.

IV. A Proposal to Amend California's Statute

California should amend the California Penal Code to alleviate the statute's problems with both the Establishment Clause and the Due Process Clause by incorporating parts of the Military Service Act of 1967[198] and Oklahoma's faith healing exemption[199] into the present section 270. The proposed amended statute would read as follows: "If a parent provides a minor with treatment by spiritual means alone by reason of religious training or belief, such treatment shall constitute 'other remedial care,' as used in this section, provided, that medical care shall be provided where permanent physical damage could result to such child."

By substituting the "by reason of religious training or belief" language from the Military Service Act of 1967 for "in accordance with the tenets and practices of a recognized religion or denomination," the statute should pass establishment clause challenges. The Military Service Act language has already passed constitutional muster in *Gillette v. United States*.[200]

Oklahoma's Title 10, section 1130B[201] provides:

> Nothing in this section shall be construed to mean a child is endangered for the sole reason the parent or guardian, in good faith, selects and depends upon spiritual means alone through prayer, in accordance with the tenets and practice of a recognized church or religious denomination for the treatment or cure of disease or remedial care of such child; provided, that medical care shall be provided where permanent physical damage could result to such child; and that the laws, rules and regulations relating to communicable diseases and sanitary matters are not violated.[202]

This statute is more effective than California's faith healing statute because the Oklahoma statute clearly states that the religious exemption will not apply "where permanent physical damage could result to such child."[203] California law presently specifies no such limitation to the religious exemption in Penal Code section 270. The Oklahoma statute provides for a religious exemption so that parents are able to practice their religious beliefs without violating the law; however, it also specifically provides for the use of medical care when the child's life is in danger.[204] Although California lower courts have recently interpreted California's

198. *See supra* text accompanying note 173.

199. *See infra* text accompanying note 201.

200. 401 U.S. 437, *reh'g denied*, 402 U.S. 934 (1971). *See supra* text accompanying notes 168-175.

201. OKLA. STAT. ANN. tit. 10, § 1130B (West Supp. 1985).

202. *Id.*

203. *Id.*

204. *Id.*

statutory scheme in this manner,[205] the statute does not inform faith healing parents of their duty to provide medical care; thus, the statute violates their due process right to notice of criminal conduct.[206]

Conclusion

Prayer healing pits the individual's rights of free exercise and due process against the state's rights as *parens patriae* to protect the well-being of children within its jurisdiction, and the state's duty not to unconstitutionally establish religion. Parents have a right to choose their own religious beliefs and to exercise them freely. They also have a due process right to fair and adequate notice that their exercise of religious practices may be curtailed, and criminalized, by the state.

Although parents' rights to *believe* in faith healing is absolute, their right to *exercise* it on their children is not. In certain circumstances, the state's interest in children's health and well-being is substantial enough to outweigh the parents' right to exercise their belief in faith healing.

So as not to violate the parents' due process rights, parents must be warned that in life-threatening situations, practicing faith healing on their children, without providing medical care, is prohibited. California's statutory scheme does not adequately warn parents that their conduct may be prohibited, thus the statutory scheme violates their due process rights.

The state must also be careful not to establish religion in its accommodation of individuals' free exercise rights. The California statutory scheme violates the Establishment Clause by granting an exemption only to faith healers of "recognized" religions, thereby establishing "recognized" religions over "unrecognized" religions.

The proposed statute should serve as a model to California and other states. It provides for the practice of faith healing, protecting individuals' rights to free exercise of religion, however it does not allow the use of prayer healing alone where the child risks suffering permanent physical harm. Thus, the proposed statute properly balances the individual and state interests involved, without overcompensating for the individual interests by exempting those who practice faith healing by reason of their religious training or beliefs. It also notifies individuals of exactly when the balance tips in favor of the state's interest: when the child's physical well-being is threatened. If enacted, the proposed statute would protect the parents' free exercise of prayer healing to the fullest extent possible without establishing "recognized" religions, while simultane-

205. In Walker v. Superior Court, 185 Cal. App. 3d at 274-75, 222 Cal. Rptr. at 91, the court held that the legislature's intent in amending Penal Code section 270 was not to provide a religious exemption for homicide.

206. United States v. Harriss, 347 U.S. at 617.

ously providing parents with due process protection by adequate notice of prohibited conduct.

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