

LIVING ON A PRAYER: FAITH HEALERS ESCAPING
CRIMINAL LIABILITY FOR CHILD ABUSE THROUGH
RELIGIOUS AFFIRMATIVE DEFENSES & EXEMPTION LAWS

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I. THE HISTORY OF FAITH HEALING

The power of faith healing consists of physical healing through spiritual means with rituals and prayer,¹ as opposed to scientific-based medicine. Faith healing exists in various religions—dominant mostly in the Christian, Jewish, and Islamic faiths.² However, it is considered to be exclusively a Christian phenomenon, with the belief of physical healing from practices of Jesus Christ.³

Religion-based healing generated a public interest in the late nineteenth century to the early twentieth century in both the United States and Great Britain.⁴ In Great Britain, these beliefs stemmed from a sect called the Peculiar People who were at the center of controversy from the mid-1800s through the 1930s.⁵ The controversies involved religious-based medical neglect of children.⁶ The members of this church “took their cue from the Epistle of James and treated their children’s illnesses exclusively with prayer and anointing.”⁷ This resulted in serious illnesses and deaths among many children in the church.⁸

In the United States, faith healing started gaining popularity during the nineteenth century in the American

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¹ See generally Shirley Darby Howell, *Religious Treatment Exemption Statutes: Betrayest Thou Me with a Statute?*, 14 SCHOLAR: ST. MARY’S L. REV. ON MINORITY ISSUES 945, 948-49 (2012).

² *Id.* at 950.

³ “The Christian gospels report that Jesus healed lepers, the blind, and the lame.” See *id.* at 951. “One church scholar argues that ‘Christianity survived and succeeded at least partly because of its reputation for performances of healing.’” *Id.* at 951.

⁴ SHAWN FRANCIS PETERS, *WHEN PRAYER FAILS: FAITH HEALING, CHILDREN, AND THE LAW* 9 (2008).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ English authorities initiated manslaughter and child neglect prosecutions against parents of the sect “who had relied solely on spiritual-healing practices to treat their sick children.” See *id.*

Frontier.⁹ French explorer Jacques Cartier conducted healing ceremonies for Native Americans; itinerant ministers claimed to heal bodily illness in the name of Jesus Christ.¹⁰ Some ministers “captured the imagination of thousands with their traveling tent revivals and flamboyant faith-healing sessions.”¹¹

In the late nineteenth century, author Mary Baker Eddy wrote a book titled, *Science and Health*, taking on a radical approach to faith healing—claiming that an illness is considered a dream in which Christian Science healers could awaken the patient with prayer “emphasizing ‘Truth’ and ‘Love.’”¹² She urged for patients to relieve themselves through their faith, as she believed it was a way of resisting illness.¹³ Mary Baker Eddy is considered to be the discoverer and founder of the Church of Christ and Christian Science teachings, based on the healings of Jesus Christ.¹⁴ This was ultimately the foundation for Christian Science and the power of faith healing in the United States. The Christian Science religion was officially established and acknowledged in the United States in 1879.¹⁵ Although it is considered to be a small religion—about 400,000 members worldwide—it is considered to be the most politically powerful Christian denomination to practice faith healing.¹⁶

II. RELIGIOUS SECTS OF FAITH HEALING PRACTICES

A. An Overview of Christian Science Churches

There are several churches and sects in the United States that practice faith healing whose members reject medical treatment and instead favor physical healing with the power of prayer. These beliefs are widely practiced by “Christian Scientists,

⁹ Howell, *supra* note 1, at 951.

¹⁰ *Id.* at 951–52.

¹¹ *Id.* at 952.

¹² *Id.*

¹³ *Id.* at 953.

¹⁴ Mary Baker Eddy was inspired by faith healing through an experience in her mid forties, when she slipped and fell on ice and was expected to die from her injuries. *Mary Baker Eddy—Discoverer, Founder, Author, Teacher*, CHRISTIAN SCIENCE, <http://myopendoors.com/old-site-structure/what-is-christian-science/mary-baker-eddy-discoverer-founder-author> (last visited May 17, 2016). She asked for her Bible and was miraculously healed after reading a passage about Jesus healing a man with a withered hand. *Id.* She continued to study the Bible after relapsing, but was permanently healed of her injuries without the use of medication. *Id.*

¹⁵ Howell, *supra* note 1, at 953.

¹⁶ *Id.* at 953–54.

Pentecostals, members of the Church of the First Born, the Followers of Christ, and myriad smaller sects.”¹⁷

Members of these sects can be seen in courts across the country fighting against manslaughter, negligence, and homicide charges whose children have died as a result of denying appropriate medical treatment.¹⁸ Although not always successful, these parents will tend to use their affiliation with one of these Christian sects as a shield against prosecution.¹⁹

B. How Christian Science and Pentecostalism Work with Faith Healing

One early example of faith healing Christian Science parents who sought spiritual healing over medical treatment for their child were Rita and Doug Swan in 1977.²⁰ They believed that “disease was an illusion and that ‘the most dangerous thing they could do was to show lack of faith in God by relying on medical treatment.’”²¹ The couple paid a Christian Science practitioner to come to their home in an attempt to heal their baby when he developed a fever.²² The practitioner told the Swans that a fever was considered to be a fear, and soon after the baby miraculously recovered from her prayers.²³ However, the baby again developed a fever and unfortunately did not improve with help of a second Christian Science practitioner’s spiritual practices.²⁴ The practitioner accused the child’s mother of “sabotaging her work with fear” and convinced both parents that the “defects in their own thoughts” were responsible for their child’s sickness.²⁵ When the baby was getting progressively worse, the parents decided on a strategy for the only allowable way to get their child to a doctor,

¹⁷ Harriet Hall, *Faith Healing: Religious Freedom vs. Child Protection*, SKEPTICAL INQUIRER (July/Aug. 2014), http://www.csicop.org/si/show/faith_healing_religious_freedom_vs_child_protection.

¹⁸ See generally *id.*

¹⁹ “Until recently, religious shield laws have protected them from prosecution, but the laws are changing, as are public attitudes. Freedom of religion has come into conflict with the duty of society to protect children.” *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Hall, *supra* note 17.

²⁴ *Id.*

²⁵ *Id.*

which was complaining of a broken bone.²⁶ The baby eventually died.²⁷

Another prominent example of a faith healing church is the Faith Assembly Church.²⁸ This church—founded in the 1970s in Indiana—is not considered to be an affiliate of Christian Science faith, but is instead a branch of Pentecostalism.²⁹ Similar to the Christian Science faith, infant deaths are not unusual in this sect.³⁰ According to a study conducted by the Center for Disease Control and the Indiana Board of Health in 1983, pregnant members of the Faith Assembly Church were more than eighty-six times more likely to die than other pregnant mothers in the state of Indiana.³¹ Additionally, the mortality rate of infants up to twenty-eight days old born to members of the Faith Assembly Church was 270 percent higher than those infants in the state of Indiana born to non-member parents.³² Similar to Christian Science churches, this sect also believes in knowingly and intentionally withholding adequate medical treatment from a child.³³

C. *The Followers of Christ Church*

A major faith healing sect that rejects medical treatment is the Followers of Christ Church.³⁴ Established in Oregon, this church contains 1,200 active and practicing members mostly

²⁶ The Church allows broken bones to be treated by the doctor. *Id.* The couple took their child to the doctor, but did not mention anything about him having a fever. *Id.*

²⁷ After the child's death, the Swans resigned from the church; "Rita Swan has devoted her life to preventing the deaths of other children from faith healing. She founded the Matthew Project, which developed into a foundation called CHILD (Children's Healthcare Is a Legal Duty)." *Id.*

²⁸ See generally Hall, *supra* note 17.

²⁹ *Id.*

³⁰ J.C. Lee, *Faith Assembly Film to Document Faith-Healing Church and Those Who Died Because of Its Beliefs*, ELKHART TRUTH (Apr. 13, 2015), <http://www.elkharttruth.com/hometown/goshen/2015/04/12/Faith-Assembly-film-to-document-faith-healing-church-and-those-who-died-for-its-beliefs.html>.

³¹ *Policy & Legal*, CHILDREN'S HEALTHCARE IS A LEGAL DUTY, INC. http://childrenshealthcare.org/?page_id=24 (last visited Nov. 21, 2015).

³² *Id.*

³³ The most common cause of death among children in this church was infant mortality during home birth, which was rare among Christian Science children's deaths because it now supports prenatal care and hospital births. *See id.*

³⁴ See generally Jeffrey Turnoy, Comment, *Faith Healing Prosecutions in Oregon: The Fine Line Between Parental Constitutional Rights and Governmental Interests*, 48 WILLAMETTE L. REV. 273, 277 (2011).

residing in Oregon City, Oregon.³⁵ The church also has a big presence in many other western states, including a heavy population in Idaho.³⁶ One central belief of this church is that its members are to “rely on their belief in God, rather than doctors or modern medicine, to heal themselves and others of sickness and injury”³⁷ Going to the doctors for treatment is considered to be a “lack of faith,” as their main source of healing comes from Almighty God—deemed to be the highest authority.³⁸ The members’ faith healing belief comes from the Book of James in the King James Version of the Bible, which states:

Is any sick among you? Let him call for the elders of the church; and let them pray over him, anointing him with oil in the name of the Lord: And the prayer of faith shall save the sick, and the Lord shall raise him up; and if he have [sic] committed sins, they shall be forgiven him.³⁹

In their practices of faith healing, members of the Followers of Christ Church use this verse to care for someone who is sick or injured.⁴⁰ They “pray, anoint with oil, lay on hands, fast, and drink small quantities of wine” instead of visiting a doctor.⁴¹

Between 1955 and 1998, seventy-eight children have reportedly died in the Followers of Christ Church in Oregon City, Oregon as a result of these religious practices.⁴² In Idaho, there exists a place called the Peaceful Valley Cemetery, where as many as 600 children from the Followers of Christ Church are buried.⁴³ These children died as a result of being denied adequate medical treatment for preventable illnesses, including food-poisoning and

³⁵ *Id.* at 277. There is also a heavy presence in the state of Idaho. *See* Leah Sottile, *Idaho’s Faith-Healing Debate Pits Child Welfare Against Parental Rights*, ALJAZEERA AM., (Feb. 22, 2015, 5:00AM), <http://america.aljazeera.com/articles/2015/2/22/idahos-faith-healing-debate-pits-child-welfare-against-parental-rights.html>.

³⁶ Sottile, *supra* note 35.

³⁷ Turnoy, *supra* note 34, at 277.

³⁸ *Id.* at 278.

³⁹ *Id.*

⁴⁰ The members believe it is God’s instruction to use this verse to help those that are sick or injured. *See id.* at 278.

⁴¹ *Id.*

⁴² *Policy & Legal*, *supra* note 31.

⁴³ Sottile, *supra* note 35.

pneumonia,⁴⁴ and take up almost one quarter of the entire cemetery.⁴⁵

It is questionable as to how members of these churches and religious denominations have legally been able to withhold medical treatment for their children and only heal through spiritual means. The First Amendment right to religious freedom, however, has given these members the ability to practice faith healing through religious exemption laws.

III. WHAT ARE RELIGIOUS EXEMPTION LAWS?

A. *The United States Constitution and the Freedom of Religion*

Religious exemption laws stem from the First Amendment of the United States Constitution. The Free Exercise Clause in the Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”⁴⁶ The Free Exercise Clause has become the center of controversy in regard to faith healing and religious remedies for illnesses because it gives citizens the ability to practice and follow any religion as he or she decides, even when those religious practices involve neglecting medical care for children. Although the Supreme Court has yet to hear a faith healing case, federal and state courts have frequently interpreted the Free Exercise Clause when it comes to faith healing issues.⁴⁷ The Clause itself establishes that “the parents have rights to freely exercise their religion without governmental interference.”⁴⁸ However, courts have not always interpreted the Clause literally and have upheld laws considered to be an interference with the free exercise of religion.⁴⁹

The Supreme Court has interpreted the Free Exercise Clause of the First Amendment in many controversial religious issues.⁵⁰ The start of the Free Exercise challenges began in the 1940s with a string of cases regarding the Jehovah’s Witness

⁴⁴ *Id.*

⁴⁵ See M. Dolon Hickmon, *For Sect in Idaho, Faith Healing Becomes Faith Killing*, ONFAITH (Apr. 25, 2014), <http://www.faithstreet.com/onfaith/2014/04/25/for-sect-in-idaho-faith-healing-becomes-faith-killing/31811>.

⁴⁶ U.S. CONST. amend. I.

⁴⁷ See generally Turnoy, *supra* note 34, at 293.

⁴⁸ *Id.*

⁴⁹ See *id.*

⁵⁰ See generally *id.*

religion.⁵¹ In *Cantwell v. Connecticut*,⁵² the Supreme Court ruled that the freedom for an individual to adhere to a religious organization or certain form of worship cannot be restricted by law.⁵³ In *Minersville Sch. Dist. v. Gobitis*,⁵⁴ the Court interpreted the Constitution as acting like a broad immunity that protects religious beliefs that are in the minority of society.⁵⁵ Soon after, the Court interpreted the Free Exercise Clause in *West Virginia State Bd. of Educ. v. Barnette*⁵⁶ and ruled that the government cannot prescribe a standard regarding matters of religion pursuant to the Federal Constitution.⁵⁷ The Court stated that the purpose of the Bill of Rights:

[W]as to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.⁵⁸

These early cases indicated that the Constitution—more specifically the Free Exercise Clause of the First Amendment—protects those religions that are not considered to be a part of the majority's beliefs in society.

These early cases were also the beginning of the Supreme Court's application of the First Amendment's freedom of religion to the states,⁵⁹ leading to the current test for challenging restrictions on the free exercise of religion that came about in *Emp't Div. v. Smith (Smith II)*.⁶⁰ In *Smith v. Emp't Div. (Smith I)*,⁶¹ the Court

⁵¹ *Id.*

⁵² 310 U.S. 296 (1940).

⁵³ *Id.* at 303.

⁵⁴ 310 U.S. 586 (1940).

⁵⁵ *Id.* at 593.

⁵⁶ 319 U.S. 624 (1943).

⁵⁷ *Id.* at 642.

⁵⁸ *Id.* at 638.

⁵⁹ Turnoy, *supra* note 34, at 294-95.

⁶⁰ 494 U.S. 872 (1990). Also known as Smith II, this case involved a member of the Native American church who was employed as a drug rehabilitation counselor and was denied unemployment compensation because he ingested peyote during a religious ritual; this was considered a form of misconduct that disqualified the employee from receiving Oregon unemployment compensation benefits. *Id.* at 874.

⁶¹ *Id.* at 874.

ruled that if a state were to ban acts that were being engaged only for religious reasons or for the religious belief that is being displayed, it would be a serious prohibition on an individual's free exercise of religion.⁶² In other words, the government may not be in violation of the Free Exercise Clause if the application of a neutral law "proscribes (or prescribes) conduct that his religion "prescribes (or proscribes)."⁶³ But, the First Amendment is deemed violated if the particular law targets a certain religion or religious practice.⁶⁴

Subsequently, the Court created the "hybrid rights" test, which is the current rule applicable today.⁶⁵ This test essentially allows for neutral laws, generally applicable to religious practices or conduct, to be struck down under the First Amendment of the Constitution if another type of constitutional protection is involved.⁶⁶ For instance, another type of right that it may involve is a parent's right "to preside over the care and upbringing of their children."⁶⁷ Furthermore, in regards to a faith healing challenge, a parent will not only have to show that the government action imposed a burden upon his or her religious practices, but that it also adversely affected another constitutionally protected right.

As illustrated, religious exemption laws ultimately derived from the Free Exercise Clause of the First Amendment. Before a court can make a decision regarding a Free Exercise challenge, the party challenging the government's action has to prove that the action imposes a significant burden on the individual's religion.⁶⁸ If a burden is established, then the court may proceed with the Free Exercise challenge and analysis.⁶⁹ As for a specific faith healing case, a parent must show that another constitutionally protected right was involved.

The Free Exercise principle is considered to be an essential component to faith healing traditions, as it gives individuals the right to practice any religion freely. It can also be said that the

⁶¹ 721 P.2d 445 (Or. 1986).

⁶² *Id.* at 218.

⁶³ *Smith II*, 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263, n. 3 (1982) (Stevens, J., concurring in judgment)).

⁶⁴ The case would be subject to strict scrutiny where the government would have to prove a compelling state interest. *Id.* at 921. *See also* Turnoy, *supra* note 34, at 295–96.

⁶⁵ *Smith II*, 494 U.S. at 881.

⁶⁶ *See generally id.*

⁶⁷ Turnoy, *supra* note 34, at 296.

⁶⁸ *Lee*, 455 U.S. at 256–57.

⁶⁹ *See generally id.*

First Amendment gives a right for parents to withhold medical care and treatment from children because of these protected religious beliefs. However, current case law shows that there is little protection under the Free Exercise Clause of the First Amendment for failing to provide adequate medical treatment to a child because of religious beliefs and practices.⁷⁰ Religious exemption laws provide protection for parents or legal guardians who refuse to seek appropriate medical treatment for their children. These laws exempt criminal liability from charges including child neglect and abuse, involuntary manslaughter, and negligent homicide.⁷¹

B. Child Abuse Prevention and Treatment Act (CAPTA)

As previously explained, the Constitution provides parents a protected liberty to raise their children as they desire.⁷² However, the parent–child relationship also involves rights and responsibilities from the state and federal government as well as the child and parents.⁷³ If parents are unable to fulfill their duties and responsibilities in protecting the well–being of their child, the state and federal government are able to step in and “take action to protect the child from harm.”⁷⁴ These assumed responsibilities come from legislation Congress has passed and amended over the years, aiming to protect the well–being of children.⁷⁵ One major piece of legislation that provides child protection is the Child Abuse Prevention and Treatment Act.

Enacted in 1974, the Child Abuse Prevent and Treatment Act (“CAPTA”) provides state funding nationwide to prevent, investigate, and prosecute child abuse.⁷⁶ The funding is intended to enhance state resources to improve assessment and investigation of cases pertaining to child abuse, neglect, and

⁷⁰ *Faith-Healing a First Amendment Dilemma*, FIRST AMENDMENT CENTER (Mar. 24, 2010), <http://www.firstamendmentcenter.org/faith-healing-a-first-amendment-dilemma>.

⁷¹ Jerry A. Coyne, *Faith Healing Kills Children: It’s Time to Eliminate Religious Exemptions From Medical Care*, SLATE (May 21, 2015, 2:53 AM), http://www.slate.com/articles/health_and_science/medical_examiner/2015/05/religious_exemptions_from_medical_care_faith_healing_kills_children.html.

⁷² See Child Abuse Prevention and Treatment Act, Pub. L. No. 93–247, 88 Stat. 4 (1974), amended by CAPTA Reauthorization Act of 2010, Pub. L. No. 111–320, 124 Stat. 3459 (2012) <https://www.acf.hhs.gov/sites/default/files/cb/capta2010.pdf>.

⁷³ *See id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *See generally* 42 U.S.C.S. § 5106c (2010).

abuse-related fatalities.⁷⁷ The funding is also allocated to states for the investigation and prosecution of these child abuse and neglect cases that involve children who are victims of sexual abuse and exploitation,⁷⁸ in addition to those who are victims with disabilities or serious health issues.⁷⁹

In order to receive federal funding, one major requirement is for a state to establish a task force.⁸⁰ The task force consists of professionals who have the knowledge and experience regarding the criminal justice system, and issues pertaining to victims of “child physical abuse, child neglect, child sexual abuse and exploitation, and child maltreatment related fatalities.”⁸¹ The task force is intended to assist the state for children’s justice and is to include a variety of professionals and experts, including attorneys, judges, child advocates, health and mental professionals, parents, and former victims of child abuse.⁸²

In 1996,⁸³ Congress added another provision to CAPTA that states:

(a) In general

Nothing in this subchapter and subchapter III of this chapter shall be construed--

(1) as establishing a Federal requirement that a parent or legal guardian provide a child any medical service or treatment against the religious beliefs of the parent or legal guardian; and

(2) to require that a State find, or to prohibit a State from finding, child abuse or neglect in cases in which a parent or legal guardian relies solely or partially upon spiritual means

⁷⁷ 42 U.S.C.S. § 5106c(a)(1)–(2) (2010).

⁷⁸ 42 U.S.C.S. § 5106c(a)(3) (2010).

⁷⁹ 42 U.S.C.S. § 5106c(a)(4) (2010).

⁸⁰ *See generally* 42 U.S.C.S. § 5106c(c) (2010).

⁸¹ *See id.*

⁸² *Id.*

⁸³ *Policy & Legal, supra* note 31.

rather than medical treatment, in accordance with the religious beliefs of the parent or legal guardian.⁸⁴

Essentially, CAPTA does not contain a federal requirement in which parents or legal guardians must provide their children with adequate medical treatment if it is against their religious beliefs.⁸⁵ While the federal government requires states to maintain task forces in assessing and addressing child neglect, including the protection of children's health needs,⁸⁶ it is inconsistent for states to simultaneously allow parents to continue practicing their faith healing beliefs by withholding medical treatment from their children,⁸⁷ in addition to providing religious defenses for their actions that result in fatalities.

Although Congress's attempt to combat against child abuse and neglect in the United States has been depicted through their legislation, no federal provision has been implemented to protect children who are withheld from receiving adequate medical treatment.⁸⁸ Currently, there is no federal law compelling parents and legal guardians to provide their children with medical treatment that is considered to be against their religious beliefs.⁸⁹ With CAPTA, the federal government gives deference to the states to create their own laws pertaining to religious exemptions and liability for parents who withhold medical treatment.⁹⁰ The states are responsible for how they want to regulate faith healing, "allowing them—but not requiring them—to prosecute parents who rely on faith—healing rather than medical treatment for their children."⁹¹ The lack of proper federal legislation to protect children from faith healing beliefs gives states excessive discretion to create religious exemption laws defending and shielding faith healing parents from criminal liability. This also gives states the

⁸⁴ 42 U.S.C.S. § 5106i (2010).

⁸⁵ *See id.*; *see also Policy & Legal, supra* note 31.

⁸⁶ *See* 42 U.S.C.A. § 5106a(13)(B) (2010).

⁸⁷ *See Policy & Legal, supra* note 31.

⁸⁸ *See Faith–Healing a First Amendment Dilemma, supra* note 70.

⁸⁹ *See id.*

⁹⁰ *See id.*

⁹¹ *See id.*

ability to not take any sort of action at all, which goes against the government's *parens patriae* duty of protecting all children.⁹²

C. Deference to the States

Because there is no federal law regulating faith healing beliefs of parents or legal guardians withholding medical treatment from children,⁹³ states are given significant deference in creating religious exemption laws—if they choose to do so. Some states to a certain extent allow parents to raise a religious defense against the prosecution of a child's death resulting from the reliance of faith healing.⁹⁴ The considerable deference to the states has caused a variety of religious exemption laws, making religious beliefs more or less of a defense against faith healing practices.⁹⁵ Some states “allow almost unconditional protection for parents, while most limit exclusive reliance on faith–healing when a child's life is in danger.”⁹⁶ It has been a continuing battle between the rights of the parents' freedom of religious practices versus the ability of the government to protect children's well-being.

IV. STATES WITH THE MOST PROTECTION FOR FAITH HEALING PARENTS

It is fair to say that there is a national concern regarding the leniency of religious defenses for faith healing parents.⁹⁷ Thirty–nine states, including the District of Columbia, do not provide criminal punishment for parents or legal guardians that withhold medical treatment from their children for religious purposes.⁹⁸ The deference to the states allow state governments to create laws that provide lenient defenses and ultimately allow for

⁹² See Rebecca Williams, *Faith Healing Exceptions Versus Parens Patriae: Something's Gotta Give*, 10 FIRST AMEND. L. REV. 692, 729 (2012).

⁹³ 42 U.S.C.A. § 5106i(a)(1) (2010) (“Nothing in this subchapter and subchapter III of this chapter shall be construed . . . —as establishing a Federal requirement that a parent or legal guardian provide a child any medical service or treatment against the religious beliefs of the parent or legal guardian”); see also NAT'L CENTER FOR PROSECUTION OF CHILD ABUSE, NAT'L DISTRICT ATTORNEYS ASS'N, U.S. DEP'T OF JUSTICE, RELIGIOUS EXEMPTIONS TO CHILD NEGLECT 1 (2015).

⁹⁴ See *Faith–Healing a First Amendment Dilemma*, *supra* note 70.

⁹⁵ *Id.*

⁹⁶ See *id.*

⁹⁷ See M. Dolon Hickmon, *When Faith Healing Becomes Faith Killing*, PATHEOS (Sept. 4, 2014), <http://www.patheos.com/blogs/camelswithhammers/2014/09/when-faith-healing-becomes-faith-killing/>.

⁹⁸ NAT'L CENTER FOR PROSECUTION OF CHILD ABUSE, NAT'L DISTRICT ATTORNEYS ASS'N, U.S. DEP'T OF JUSTICE, RELIGIOUS EXEMPTIONS TO CHILD NEGLECT (2015).

parents to escape liability from a wide variety of crimes—ranging from misdemeanors all the way to providing a defense for child endangerment⁹⁹ and capital murder.¹⁰⁰ Because there is no federal regulation of religious exemption laws, it is important to explore the states that afford the most protective exemptions for faith healing parents, which include Iowa, Idaho, Arkansas and Ohio.

A. Iowa

Iowa is considered one of several states that have the fewest restrictions towards religious defenses. In other words, it is one of the few states that not only allows for a religious defense to be used as an affirmative defense in a case towards child abuse, but for some of the most serious crimes like child endangerment¹⁰¹ and manslaughter.¹⁰²

1. Iowa's Definition of Child Abuse

The Iowa Code provides definitions of “child” and “child abuse” on behalf of the state for purposes of criminal liability.¹⁰³ According to subsection (c) of the Code, “a parent or guardian legitimately practicing religious beliefs who does not provide specified medical treatment for a child for that reason alone shall not be considered abusing the child”¹⁰⁴ However, the subsection also provides that a court order must not be precluded if the court determines that medical services must be provided for the child's health.¹⁰⁵ Overall, the withholding of adequate medical treatment from children for purposes of the parents' religious practices does not constitute child abuse in the state of Iowa.

2. Iowa's Affirmative Defense

As one of the most lenient exemption laws in the United States, the Iowa Code provides significant protection for faith healing parents and legal guardians by providing them a defense to one of the most serious crimes against children: felony child

⁹⁹ See IOWA CODE § 726.6(1)(d) (2015).

¹⁰⁰ See ARK. CODE ANN. § 5–10–101(a)(9)(B) (2012).

¹⁰¹ See generally RELIGIOUS EXEMPTIONS TO CHILD NEGLECT, *supra* note 98; *Religious Defenses in State Penal Codes*, CHILDREN'S HEALTHCARE IS A LEGAL DUTY, INC. (CHILD), <http://childrenshealthcare.org/wp-content/uploads/2014/07/State-exemptions-criminal2.pdf> (last visited Dec. 30, 2015). See *Policy & Legal*, *supra* note 31.

¹⁰² See generally *Policy & Legal*, *supra* note 31.

¹⁰³ See IOWA CODE §232.68 (2015).

¹⁰⁴ § 232.68(2)(A)(4)(c).

¹⁰⁵ *Id.*

endangerment.¹⁰⁶ Section 726.6 of the Iowa Code provides descriptions of when a person or member of the household in which a child resides commits child endangerment.¹⁰⁷ However, subsection (1)(d) of this provision provides an exception to child endangerment.¹⁰⁸ It provides that:

[T]he failure to provide specific medical treatment shall not for that reason alone be considered willful deprivation of health care if the person can show that such treatment would conflict with the tenets and practices of a recognized religious denomination of which the person is an adherent or member. This exception does not in any manner restrict the right of an interested party to petition the court on behalf of the best interest of the child or minor.¹⁰⁹

This defense also applies to a first-degree manslaughter charge in Iowa because provision 707.5 only requires that the prosecution show a “public offense” has been committed.¹¹⁰

Iowa provides an affirmative defense for parents seeking spiritual healing and treatment for their children by providing them with the burden of showing an interference with their religion.¹¹¹ Parents or guardians must show that their faith is a recognized and legitimate religious denomination and that providing their children with proper medical treatment goes against the “tenets and practices” of their faith.¹¹² Essentially, Iowa gives parents the ability to deprive their children of necessary treatment while escaping any criminal liability as long as they can prove to a court that their religion is legitimate. More specifically, it gives them the ability to escape potential liability from child endangerment and first-degree manslaughter.

B. Idaho

Idaho is considered yet another state that provides a significant amount of protection for faith healing parents and legal guardians to some of the most serious crimes, such as

¹⁰⁶ See *Policy & Legal*, *supra* note 31; see also *Religious Defenses in State Penal Codes*, *supra* note 101.

¹⁰⁷ See IOWA CODE § 726.6(1) (2015).

¹⁰⁸ See *id.*

¹⁰⁹ §726.6(1)(d).

¹¹⁰ See *Religious Defenses in State Penal Codes*, *supra* note 101.

¹¹¹ See § 726.6(1)(d).

¹¹² See *id.*

manslaughter.¹¹³ This protection is linked to the heavy presence of faith healing religions that exist in Idaho, specifically the Followers of Christ Church, as discussed previously.¹¹⁴

Idaho Code § 18-1501 contains general provisions that hold persons criminally liable for anything that may cause great bodily harm or death upon a child.¹¹⁵ However, subsection four of the statute provides that: “the practice of a parent or guardian who chooses for his child treatment by prayer or spiritual means alone shall not for that reason alone be construed to have violated the duty of care to such child.”¹¹⁶ Similar to Iowa’s Code,¹¹⁷ Idaho recognizes and affords protection for parents who choose spiritual practices to heal their children, although Iowa’s Code makes no mention of faith healing’s effect on the parents’ legal duty to their children.¹¹⁸ In addition to charges of child endangerment, this religious defense also affords protection for parents against an involuntary manslaughter charge—pursuant to Idaho Code § 18-4006(2)—because the provision requires the prosecution to show only that an unlawful act has been committed in order for the defense to become available.¹¹⁹

In its civil code, Idaho also provides religious exemptions for faith healing parents and guardians regarding child neglect, stating: “[N]o child whose parent or guardian choose for such child treatment by prayers through spiritual means alone in lieu of medical treatment shall be deemed for that reason alone to be neglected or lack parental care necessary for his health and well-being”¹²⁰ In addition, Idaho also contains a provision where the court considers if the treatment being given to the child by prayer is through spiritual means alone or if the “parent, guardian or legal custodian are adherents of a bona fide religious denomination that relies exclusively on this form of treatment in lieu of medical treatment.”¹²¹

¹¹³ See *Policy & Legal*, *supra* note 31.

¹¹⁴ See *Sottile*, *supra* note 35.

¹¹⁵ See generally IDAHO CODE § 18-1501(1)–(3) (2015).

¹¹⁶ § 18-1501(4); see § 18-401(2).

¹¹⁷ See IOWA CODE § 726.6(1)(d) (2015).

¹¹⁸ Compare *id.*, with § 18-1501(4).

¹¹⁹ See IDAHO CODE § 18-4006(2) (2015); see also *Religious Defenses in State Penal Codes*, *supra* note 101.

¹²⁰ IDAHO CODE § 16-1602(28)(a) (2015).

¹²¹ IDAHO CODE § 16-1627(3) (2015).

Essentially, Idaho Code § 16-1602(28)(a) accepts healing through spiritual means as a legal and legitimate substitute to providing medical treatment, rather than recognizing that the deprivation of proper treatment is considered child neglect.¹²² Idaho's exception to child neglect is detrimental to the government's concern and protection over children because it allows faith healing parents an acceptable defense when dealing with a child neglect charge.

A major concern for these Idaho criminal and civil codes is that they give privilege to those parents that rely exclusively on spiritual means to heal a child.¹²³ Basically, faith healing parents are allowed an affirmative defense through Idaho's religious exemption when they only conduct spiritual healing practices.¹²⁴ If the parent combines these practices with other remedies, such as providing their child a cool bath or giving them Gatorade to feel better, the religious exemption will not apply and can potentially result in prosecution.¹²⁵ The religious exemption will also not be applicable if the parents call 9-1-1 at the last minute because it will not be considered relying solely on spiritual means.¹²⁶

Another concern regarding the criminal and civil codes is the consideration of bona fide religions that are included as part of the religious exemption law.¹²⁷ The Idaho Code § 16-1627(3) provides that a court shall consider if the faith healing was through spiritual means only or if the parents were considered part of a bona fide religion.¹²⁸ However, many Idaho court rulings have determined that religious exemptions cannot be given only to those parents who belong to certain churches.¹²⁹ Instead, it must provide a defense to everyone who has personal beliefs regarding faith healing, whether or not they are associated with a particular church.¹³⁰ It is questionable whether a state has rights to determine if the parents are members of a bona fide religion, and if they should provide exceptions only to parents of a bona fide

¹²² See *id.*; see also H.R. 458, 62nd LEG., 2d Spec. Sess. (Id. 2014).

¹²³ See *Child Faith-Deaths in Idaho*, IDAHOCHILDREN.ORG <http://idahochildren.org/articles/worst-in-nation/>.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ See generally *id.*

¹²⁸ IDAHO CODE §16-1627(3) (2015).

¹²⁹ See *Child Faith-Deaths in Idaho*, *supra* note 123.

¹³⁰ *Id.*

religion,¹³¹ rather than allowing any person to withhold medical treatment for any reason they decide to give. Although the First Amendment provides a right to religious freedom and even though the government has broad authority in regulating parental actions of their children,¹³² letting all parents act out in their full religious and personal beliefs without limitations would cause significant disorder in society.¹³³

It may be difficult to grasp where these extremely lenient religious exemptions come from and how the state legislature could pass such laws. The Idaho criminal and civil codes are most likely a result of extensive lobbying on the part of the Christian Science Church. Because of the high population of these faith healers located in Idaho, it is sufficient to conclude that these religious exemption laws were enacted because of lobbying at both the state and federal level.¹³⁴ In the 1970s, “Idaho enacted laws exempting parents from criminal injury, nonsupport, and manslaughter charges” if they relied only on spiritual means to heal their sick child.¹³⁵ These exemptions used Christian Science terminology and were referred to as the “Christian Science Amendments.”¹³⁶ The Christian Science Church was the only lobbyist pushing for this federal policy.¹³⁷ At the same time, the Church also lobbied in other states for such exemptions to be included in criminal codes, in addition to the civil codes.¹³⁸ Many states have done this and several have yet to repeal or modify them.¹³⁹

In light of the frequent deaths and lenient restrictions on parents’ defenses, Idaho’s legislature made an attempt to prohibit faith healing parents from using their religion as a shield from

¹³¹ See *id.*

¹³² See *Prince v. Massachusetts*, 321 U.S. 158 (1944). In this case, the Supreme Court ruled that the State’s authority over children’s activities is broader than over actions of adults. *Id.* at 168. The Court argued that evils appropriate for action include the harms arising from certain activities and its effect on children; in order to reach those evils, legislation shall be appropriately created within the State’s police power, even if it’s against the parent’s control of the child. *Id.* at 166–70.

¹³³ *Child Faith—Deaths in Idaho*, *supra* note 123.

¹³⁴ See *Hickmon*, *supra* note 97.

¹³⁵ *Child Faith—Deaths in Idaho*, *supra* note 123.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ See

id.

criminal liability by creating the Idaho House Bill 458.¹⁴⁰ The proposed statute provides:

The practice of a parent or guardian who chooses for his child treatment by prayer or spiritual means alone shall not for that reason alone be construed to have violated the duty of care to such child. However, this exemption shall not apply whenever a child's medical condition has caused death or permanent disability.¹⁴¹

Representative John Gannon introduced the bill to amend existing religious exemption laws so that the exemptions would not apply to faith healing when the child's medical condition caused a disability or resulted in their death.¹⁴² The proposed House Bill gained immense support from the Idaho Prosecuting Attorneys Association, the Idaho Pediatrics Association, CHILD, The Interfaith Alliance, Child Friendly Faith Project and other scholars and politicians.¹⁴³ One argument in support of the statute is that faith healing is faith killing and there is a significant difference between the belief of God's ability to heal someone versus the belief that people can earn their place in the afterlife by essentially letting their children die.¹⁴⁴ However, it was strongly opposed by religious citizens and conservative politicians who argued that the statute infringed on religious freedom and faith healers' idea of eternity.¹⁴⁵ In response, Representative Gannon claimed that the provision is simply a child's right to live to adulthood.¹⁴⁶

In February 2014, Idaho's potential for doing away with the lenient religious exemptions dissipated when House Speaker Scott Bedke announced that the House Bill proposal would not be debated.¹⁴⁷ Although no reason was provided for why the legislature would not consider the amendment, it is possible they feared the many activists fighting for religious freedom against the

¹⁴⁰ See H.R. 458, 62nd Leg., 2d Spec. Sess. (Id. 2014).

¹⁴¹ *Id.*

¹⁴² Hickmon, *supra* note 97.

¹⁴³ *Id.*

¹⁴⁴ Pastor Doug Bursch, who is also an adjunct professor for Life Pacific College, offered this insight in support of the House Bill. See Hickmon, *supra* note 44.

¹⁴⁵ *See id.*

¹⁴⁶ *See id.*

¹⁴⁷ See Hickmon, *supra* note 97.

values of child welfare.¹⁴⁸ The Idaho legislature has basically ignored the critical issue of faith healing defenses to prevent controversy. However, little do they realize that this is not an issue of politics and bipartisanship, but it is rather a critical issue regarding child abuse and an attempt to prevent unnecessary deaths of children.

C. Other States' Religious Exemption Laws

1. Arkansas

One of the most extreme religious defense laws is exemplified through Arkansas's state penal code. Arkansas is the only state in the United States that provides a religious exemption to the charge of capital murder.¹⁴⁹ Arkansas's religious defense provides:

It is an affirmative defense to any prosecution under this subdivision (a)(9) arising from the failure of the parent, guardian, or person standing in loco parentis to provide specified medical or surgical treatment, that the parent, guardian, or person standing in loco parentis relied solely on spiritual treatment through prayer in accordance with the tenets and practices of an established church or religious denomination of which he or she is a member¹⁵⁰

Arkansas explicitly allows parents and guardians an affirmative defense—giving them the burden to prove that the murder was a result of the sole reliance on spiritual treatment through prayer according to their membership of a certain church or religious denomination.¹⁵¹

2. Ohio

Ohio is another state that provides a defense to a felony charge of endangering the welfare of a child.¹⁵² Ironically written in the first subsection of the statute for violation of endangering the welfare of a child, Ohio gives an affirmative defense to faith healing parents.¹⁵³ The Code first provides that it is a violation of a

¹⁴⁸

Id.

¹⁴⁹

See Policy & Legal, supra note 31; *see also* Hickmon, *supra* note 97.

¹⁵⁰

ARK. CODE ANN. § 5–10–101(a)(9)(B) (2015).

¹⁵¹

See id.

¹⁵²

See OHIO REV. CODE ANN. § 2919.22(a) (LexisNexis 2015).

¹⁵³

Id.

duty of care, protection, or support for a parent or person acting in loco parentis to create “a substantial risk to the health or safety of the child.”¹⁵⁴ However, the Code subsequently provides that there is no violation of duty on behalf of the parents or guardians if they choose to heal their children through spiritual means alone if that child has a physical or mental illness.¹⁵⁵

Similar to other state exemption laws for felony charges—such as Idaho’s Code¹⁵⁶—Ohio also addresses the duty of care on behalf of the parent.¹⁵⁷ In essence, if parents or guardians violate the duty of care, protection, or support for their child solely because of their religious practices, they are exempt from criminal charges.¹⁵⁸ Once again, faith healing parents in Ohio have an opportunity to escape criminal liability—more specifically, a felony charge—with Ohio’s state exemption laws.¹⁵⁹

In addition to the religious exemption law for endangering the welfare of a child in Ohio Revised Code §2919.22(a), Ohio also provides a religious exemption law in its Revised Code § 2151.03 for child neglect charges.¹⁶⁰ According to this provision, the Code provides:

Nothing in this chapter shall be construed as subjecting a parent, guardian, or custodian of a child to criminal liability when, solely in the practice of religious beliefs, the parent, guardian, or custodian fails to provide adequate medical or surgical care or treatment for the child. This division does not abrogate or limit any person’s responsibility under section 2151.421 of the Revised Code to report child abuse that is known or reasonably suspected or believed to have occurred, child neglect that is known or reasonably suspected or believed to have occurred, and children who are known to face or are

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ IDAHO CODE § 18–1501(4) (2015).

¹⁵⁷ *Compare id.*, with OHIO REV. CODE ANN. § 2919.22(a) (2015).

¹⁵⁸ OHIO REV. CODE ANN. § 2919.22(a) (2015); *see also Ohio Exempts Faith Healing from Child Abuse Laws*, SECULAR LEFT (Feb. 20, 2015), <http://www.secularleft.us/archives/2014/02/ohio-exempts-faith-healing-from-child-abuse-laws.html>.

¹⁵⁹ *See* § 2919.22(a).

¹⁶⁰ *See* OHIO REV. CODE ANN. § 2151.03(B) (LexisNexis 2015).

reasonably suspected or believed to be facing a threat of suffering abuse or neglect¹⁶¹

This subsection explicitly exempts faith healing parents from criminal liability of child neglect charges when they fail to provide proper medical treatment for their child.¹⁶² The Code then provides that the provision does not preclude individuals from reporting child abuse or neglect that is suspected to have occurred.¹⁶³ Further, the state provision enables the exercise of authority—whether it is by the state or any court—to intervene and “ensure that medical or surgical care or treatment is provided to a child when the child’s health requires . . . [such] treatment.”¹⁶⁴

One interpretation of this provision could be that the only way children from faith healing parents receive appropriate medical treatment is if an individual reports it.¹⁶⁵ It essentially encourages individuals to act and report if they observe any child neglect.¹⁶⁶ Once reported, the proper authority can take action to ensure that the child receives proper medical treatment.¹⁶⁷ It seems as though the provision provides a safeguard, allowing the state to intervene when child neglect is suspected.¹⁶⁸ But, because of the religious exemption, faith healing parents will still be able to escape criminal liability even when the neglect is reported.¹⁶⁹

V. OREGON: LESS PROTECTION FOR FAITH HEALING PARENTS

Although there is significant deference to the states regarding the implementation of religious exemption laws because of the lack of federal action—which is detrimental in one respect—it is also considered beneficial to states intending to restrict these faith healing laws. States that want to afford the greatest protection against religious exemption laws are able to do so in accordance with their state legislature. With this deference, states have an opportunity to provide strict laws based on certain factors

¹⁶¹

Id.

¹⁶²

See id.

¹⁶³

Id.

¹⁶⁴

Id.

¹⁶⁵

If it’s reported, the state or a court may intervene. *See generally id.*

¹⁶⁶

See generally § 2151.03(B).

¹⁶⁷

See generally id.

¹⁶⁸

See generally id.

¹⁶⁹

The reporting of child neglect only allows the child to receive the adequate treatment it needs, but not to hold anyone parents liable for it if the reason for the neglect was practice of certain religious beliefs. *See generally id.*

that are specific to the particular state, such as high populations of faith healing religions and churches.

A. *Oregon*

Oregon is considered to be the home of the Followers of Christ Church with the majority of its members residing in Oregon City, Oregon.¹⁷⁰ From 1955 to 1998, Oregon reported that seventy-eight children died as a result of the sect's faith healing practices.¹⁷¹ This can be correlated to the high population of faith healing members that reside in Oregon. The high population of faith healing members also caused the Oregon legislature to enact a first and second-degree manslaughter religious defense for parents who relied on spiritual treatment as a way to heal their children.¹⁷² However, Oregon House Bills 2494 and 2721 later removed these affirmative defenses, beginning in 1999.¹⁷³

1. Amended Oregon House Bill 2494

Prior to the amended House Bill 2494, Oregon contained an affirmative defense for faith healers, protecting faith healing parents against the charges of manslaughter; more specifically, the affirmative defense applied to manslaughter charges in the second degree, along with criminal mistreatment in the first and second degrees.¹⁷⁴ These defenses were mostly applicable to those belonging to the Followers of Christ Church and other similar faith healing sects. The affirmative defense for second-degree manslaughter provided:

It is an affirmative defense to a charge of violating subsection (1)(c)(B) of this section that the child or dependent person was under care or treatment solely by spiritual means pursuant to the religious beliefs or practices of the child or person or the parent or guardian of the child or person.¹⁷⁵

In 1999, the Oregon legislature passed House Bill 2494, which removed a lot of religious affirmative defenses

¹⁷⁰ See Turnoy, *supra* note 34, at 277.

¹⁷¹ *Policy & Legal*, *supra* note 31.

¹⁷² These defenses were enacted in 1997. *See id.*

¹⁷³ Turnoy, *supra* note 34, at 277.

¹⁷⁴ *See id.*

¹⁷⁵ S. 614 69th Leg. Assem. (Or. 1997).

from criminal statutes.¹⁷⁶ However, it did not remove the religious affirmative defense for one of the most serious offenses, second-degree manslaughter.¹⁷⁷ It was still a vast attempt to remove affirmative defenses, but more work needed to be done.

2. Oregon House Bill 2721

In the wake of two major Oregon trials where members of the Followers of Christ Church were being prosecuted for providing only spiritual treatment to their children, the Oregon legislature created House Bill 2721.¹⁷⁸ This new bill removed all affirmative defenses for criminal offenses—most importantly removing them from murder, first-degree manslaughter, and first-degree criminal mistreatment of a child who was treated through spiritual means below the age of eighteen.¹⁷⁹ The bill was aimed specifically towards the Followers of Christ Church in response to the sect's history of children dying from preventable and treatable medical conditions.¹⁸⁰ Although controversial, the recent House Bill eliminating faith healing affirmative defenses was a significant exercise of the state's authority, given the deference to the states.

VI. RELIGIOUS AFFIRMATIVE DEFENSES TROUBLING COURTS

The deference that has been afforded to the states for managing religious exemption laws has deeply troubled courts. The rulings of cases in different states with different affirmative defenses have created an inconsistency throughout American society. As previously illustrated, religious exemption laws have been dependent on the states' demographics, religious lobbying, and the courts' tolerance/intolerance of faith healing defenses.

A. *State v. Hickman: The Reasonable Person Standard*

¹⁷⁶ See Turnoy, *supra* note 34, at 275.

¹⁷⁷ See H.R. 2494, 70th Leg. Assemb., Reg. Sess. (Or. 1999).

¹⁷⁸ Turnoy, *supra* note 34, at 276.

¹⁷⁹ See H.R. 2721, 76th Leg. Assemb., Reg. Sess. (Or. 2011). The new House Bill applies to children who are eighteen years old and younger, whereas the former one applied only to children fifteen years old and younger. Compare *id.*, with H.R. 2494, 70th Leg. Assembl. Reg. Sess. (Or. 1999).

¹⁸⁰ Steve Mayes, *Oregon Lawmakers Appear Ready to End Legal Protections for Faith-Healing Parents*, THE OREGONIAN/OREGON LIVE, (Feb. 20, 2011, 11:00 PM), http://www.oregonlive.com/oregon-city/index.ssf/2011/02/oregon_lawmakers_appear_ready_to_end_faith-healing_protections_for_parents_of_dying_children.html.

1. Facts

Defendants Dale and Shannon Hickman were avid members of the Followers of Christ Church in Oregon.¹⁸¹ As previously discussed, this sect instructs its members to rely on faith healing rather than to seek medical treatment for illnesses.¹⁸² When Shannon was between thirty and thirty-two weeks pregnant, she began experiencing labor complications.¹⁸³ She gave birth to a boy in her mother's home, which was tradition for Followers of Christ Church members.¹⁸⁴ The defendants' son, David, was born about two months premature, weighing only three pounds and seven ounces.¹⁸⁵ He died nine hours after he was born—receiving no medical attention or care.¹⁸⁶ The defendants were charged with second-degree manslaughter under ORS 163.125¹⁸⁷ and were alleged to have been criminally negligent in the death of their child.¹⁸⁸

2. Legal Arguments

The State specifically alleged that Dale and Shannon Hickman “failed to be aware of the substantial and unjustifiable risk that David, without medical treatment, would die and, further, that their failure to recognize that risk was a gross deviation from the standard of conduct that a reasonable person in their position would have observed.”¹⁸⁹ In response, the defendants factually did not include a religious defense and instead responded to the State's reasonable person standard—arguing that a reasonable person would not have known that the baby was dying or in danger or dying.¹⁹⁰ However, the defendants relied on their religious beliefs for their legal theory, arguing that the State needed to prove a higher culpable mental state.¹⁹¹ Specifically, the

¹⁸¹ State v. Hickman, 358 P.3d 987, 988 (Or. 2015).

¹⁸² *Id.*

¹⁸³ *Id.* at 989.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Hickman*, 358 P.3d at 987–88.

¹⁸⁷ This is the revised Oregon manslaughter charge, also known as House Bill 2721. See H.R. 2721, 76th Leg. Assemb., Reg. Sess. (Or. 2011).

¹⁸⁸ The State charged each defendant with criminal negligence, alleging that each were negligent in causing their son's death through neglect or maltreatment. See *Hickman*, 358 P.3d at 991.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

defendants sought an acquittal,¹⁹² alleging that the State was not held to the necessary burden and instead only argued that “defendants acted with ‘criminal negligence,’ rather than with ‘knowledge’ that David would die as a result of their failure to provide medical care for him.”¹⁹³

3. Outcome

After a second-degree manslaughter conviction in Oregon’s trial court and an affirmed conviction in the appellate court, the Supreme Court of Oregon affirmed the second-degree manslaughter conviction of Dale and Shannon Hickman.¹⁹⁴ The Supreme Court ruled that the Oregon manslaughter statute is applicable on its face and neither discriminates against nor targets any particular religious sect.¹⁹⁵ The Court asserted that “the crime of second-degree manslaughter by neglect or maltreatment applies on equal terms and with equal force to any parent or guardian who fails to be aware of a substantial and unjustifiable risk that withholding basic necessities from a child will result in that child’s death.”¹⁹⁶

4. Implication

In this case, the Supreme Court of Oregon implemented the State’s reasonable person standard to determine the defendants’ conviction, stating that the risk must be evaluated based on whether “a reasonable person would have been aware of the *risk* of David’s death.”¹⁹⁷ The Court did not evaluate whether the defendants’ religiously motivated conduct was reasonable, because the defendants never argued that they should be fully exempt from prosecution—due to their religiously motivated conduct.¹⁹⁸ The defendants instead argued “that the second-degree manslaughter statute should apply to them *differently* because their conduct was religiously motivated.”¹⁹⁹ However, the Oregon Supreme Court deemed the reasonable person standard as fully applicable because

¹⁹² *See id.*

¹⁹³ *Id.* at 992.

¹⁹⁴ *Hickman*, 358 P.3d at 1000.

¹⁹⁵ Interestingly enough, this statute previously contained the affirmative defense for faith healing parents against manslaughter charges in Oregon. *See id.*

¹⁹⁶ The Court also indicates that the statute does not mention anything of religion or religious sects. *Id.* at 995.

¹⁹⁷ *Id.* at 999.

¹⁹⁸ *Id.* at 995.

¹⁹⁹ *Id.* (Emphasis added).

of the facially neutral statute, and ruled that the State need not prove a higher culpable mental state.²⁰⁰

The State's reasonable person standard in this case could be a result of the newly reformed House Bill, eliminating all affirmative defenses from criminal charges, including manslaughter. The reasonable person standard regarded the defendants in this case as reasonable individuals, whether they acted in a religiously motivated way or were just simply negligent. The biggest implication of the case is that the standard used was without regard to religion, even though the defendants wanted to be treated differently because of their belief in faith healing. The Court articulated that the State does not need to prove a higher culpable mental state than what is prescribed by the criminal statute because it would amount to the State showing a preference for religion over non-religion.²⁰¹ Although the defendants did not put on the argument that they should be exempt from prosecution because of their faith healing, one has to wonder how the Oregon courts would have responded to this defense, especially with the newly revised House Bill.²⁰²

B. State v. Crank: Dodging the Bullet

1. Facts

Jacqueline Crank and her daughter, Jessica belonged to the Universal Life Church—started by Ariel Ben Sherman in Lenoir City, Tennessee.²⁰³ In 2002, Jessica became ill and was diagnosed with a form of cancer, which was the cause of her death shortly thereafter at age fifteen.²⁰⁴ Crank and Sherman were indicted for child neglect based on the failure to “obtain adequate treatment for Jessica.”²⁰⁵ The indictment was dismissed and later reinstated

²⁰⁰ Compare *Hickman*, 358 P.3d at 995, with *State v. Worthington*, 282 P.3d 24 (Or. Ct. App. 2012) (ruling that the State need not prove a higher culpable mental state because of defendant's religious practices—specifically that the Defendant had knowledge his conduct would result in her death).

²⁰¹ The Court argued the higher burden would go against what the framer's intended. *Hickman*, 358 P.3d at 994.

²⁰² How would the courts have reacted to this, especially since they just eliminated all of the criminal statutes' affirmative defenses in Oregon? See generally H.R. 2721, 76th Leg. Assemb., Reg. Sess. (Or. 2011).

²⁰³ *State v. Crank*, 468 S.W.3d 15, 18 (Tenn. 2015).

²⁰⁴ *Id.*

²⁰⁵ *Id.*

on appeal where Sherman was convicted.²⁰⁶ On remand,²⁰⁷ the defendant challenged the constitutionality of the child neglect statute²⁰⁸ and moved to dismiss the charge based on the spiritual treatment exemption provided for in the Tennessee Code.²⁰⁹ The trial court found Crank guilty of child neglect and the Court of Criminal Appeals affirmed the conviction.²¹⁰

2. Outcome

The Supreme Court of Tennessee had to address major constitutional issues in regards to the child neglect statute and the Tennessee spiritual treatment exemption law. First, the Court ruled that the spiritual treatment exemption law was not unconstitutionally vague because the language is “sufficiently clear when ‘construed according to the fair imports of its terms’”²¹¹ The Court also argued that the statute is not vague because the exemption law only protects individuals who meet specific criteria, such as being a member of a certain church and whose conduct qualifies as child abuse or neglect.²¹²

Second, the Court addressed the defendant’s argument that she is entitled to a hearing pursuant to Tennessee’s Preservation of Religious Freedom Act because the State burdened her free exercise of religion by charging her with child neglect.²¹³ This Act provides that “no government entity shall substantially burden a person’s free exercise of religion even if the burden results from a rule of general applicability” unless the government can prove it is doing so to further a compelling governmental interest.²¹⁴ The

²⁰⁶ Sherman, the founder of the church, later died during the pendency of his appeal. *See id.*

²⁰⁷ The trial court again dismissed the charge against defendant, arguing that a certain portion of the child neglect statute only applied to children under thirteen years old; the Court of Criminal Appeals reversed that judgment, reinstated the indictment, and remanded back to the trial court for further proceedings. *See id.*

²⁰⁸ Defendant challenged the constitutionality of the child abuse and neglect statute, relying on the Due Process, Establishment, and Equal Protection Clauses of the Constitution. *See Crank*, 468 S. W.3d at 19.

²⁰⁹ The exemption provides that child abuse and neglect does not occur when a child is “provided treatment by spiritual means through prayer alone in accordance with the tenets or practices of a recognized church or religious denomination” *See id.*, (quoting TENN. CODE ANN. § 39–15–402(c) (amended 2005)).

²¹⁰ Defendant appealed to the Supreme Court of Tennessee. *See id.*

²¹¹ The Court went through each term of the statute to determine if it is clear what each one means. *See id.* at 27 (citing § 39–15–402(c)).

²¹² *See id.* at 28.

²¹³ *Id.* at 30.

²¹⁴ *Crank*, 468 S. W.3d at 30.

Court ruled that the Act could be retroactively applied, seeing as it took effect in 2009.

3. Implication

Although the Supreme Court of Tennessee affirmed the defendant's conviction, the Court successfully avoided addressing the issue of whether the state's spiritual treatment exemption law violated the state and federal Establishment and Equal Protection Clauses. The Court argued that it will not "pass on the constitutionality of a statute, or any part of one, unless it is absolutely necessary for the determination of the case and of the present rights of the parties to the litigation."²¹⁵ The only remedy for finding the terms of the exemption law unconstitutional would be to strike the exemption instead of reversing the conviction in favor of the defendant.²¹⁶ In this case, the Supreme Court of Tennessee looked to favor Crank in terms of affording her relief.²¹⁷ Because invalidating the exemption would not have given her any sort of relief besides elision,²¹⁸ the Court felt it unnecessary to address the constitutionality of the exemption law.²¹⁹ Even if the exemption violated the state and federal constitutions, the only remedy would have been to elide the exemption rather than prohibit the enforcement of child abuse and neglect laws.²²⁰ The Court essentially dodged a bullet.

C. *Commonwealth v. Schaible: Sentencing*

1. Facts

This media-frenzied case involved Defendants Catherine and Herbert Schaible from Philadelphia, Pennsylvania who were charged with third-degree murder, endangering the welfare of a child ("EWOC"), and criminal conspiracy.²²¹ Their seven-month old son died in 2013 from bacterial pneumonia along with severe dehydration and an infection—all of which were treatable if given

²¹⁵ See *id.* at 28 (quoting *State v. Murray*, 480 S.W.2d 355 (Tenn. 1972)).

²¹⁶ *Id.* at 28.

²¹⁷ *Id.*

²¹⁸ Doctrine of elision allows a court to omit an unconstitutional part of a statute and find the remaining provisions to be constitutional and effective. See *id.*, (quoting *State v. Tester*, 879 S.W.2d 823, 830 (Tenn. 1994)).

²¹⁹ For this issue, the Court claimed the determinative inquiry was whether the Defendant would be entitled to relief if her challenge was successful. *Id.* at 28.

²²⁰ *Id.*

²²¹ *Commonwealth v. Schaible*, No. 1003 EDA 2014, 2015 Pa. Super. Unpub. LEXIS 3377, at *1, *3 (Pa. Super. Ct. Sept. 15, 2015).

proper medical attention.²²² Instead of seeking medical help, the defendants sought healing through their religious practices.²²³

The defendants pleaded *nolo contendere* to the charges and were sentenced to concurrent prison terms—three and a half to seven years followed by thirty months reporting probation.²²⁴ The trial court also sentenced the defendants to prison terms of three and a half to seven years' imprisonment for violating their probation—interestingly enough—in relation to previous charges of involuntary manslaughter, EWOC, and criminal conspiracy, which arose from the 2010 death of another child of theirs, Kent Schaible.²²⁵ That case also involved the defendants not seeking proper medical treatment for their son.²²⁶ The trial judge in Kent's case sentenced both of the defendants to ten years of probation and directed that the parents provide each of their children with routine medical checkups and to seek medical attention for their children if they become ill.²²⁷

2. Legal Arguments

The Commonwealth filed a motion to modify the sentence, which the trial court denied.²²⁸ The Commonwealth then filed a notice of appeal—raising the issue of whether the trial court abused its discretion in departing downwards from the sentencing guidelines.²²⁹ Additionally, the Commonwealth was concerned that the trial court erred because it failed to consider: the gravity of the offense, the necessary rehabilitation of the offenders, protection of the public, and, most importantly, an adequate penalty for the murder of a child.²³⁰

On appeal, the Pennsylvania Superior Court cited its standard of review, which gives significant deference to the trial

²²² *See id.* at *1–2.

²²³ Catherine Schaible claimed her and her husband did not seek medical attention because of their religious beliefs; defendants instead contacted their family members and pastor who all gathered and prayed for their son, Brandon. *See id.* at *2.

²²⁴ The trial court also ordered for Defendants to not make any future medical decisions regarding their other children. *See id.* at *3–5.

²²⁵ *Id.*

²²⁶ *See id.* at *4–5.

²²⁷ *Schaible*, 2015 Pa. Super. Unpub. LEXIS 3377, at *4–5.

²²⁸ The trial court denied on the grounds that the sentencing judge will not appealed unless there is an abuse of discretion is shown. There is significant deference to the sentencing judge. *See id.*

²²⁹ *Id.* at *5.

²³⁰ *Id.* at *7–9.

court and where the appellant needs to fulfill a burden to prove an abuse of discretion.²³¹ The Superior Court essentially cited and argued the same main points of the trial court when it made its decision to sentence the defendants downward from the guidelines.²³² One reason the trial court gave the lenient sentencing was because the defendants entered pleas of *nolo contendere*.²³³ The second reason, however, was because “this is not the kind of family that ought to be or needs to be torn apart forever.”²³⁴

On further explanation, the sentencing judge defended the parents, finding that the actions towards their two children were not from being uncaring or unloving parents, but instead argued that the Schaibles were wonderful, caring, and loving people²³⁵ with no prior records or history of violence regarding their children.²³⁶ The judge asserted that the only problem with these parents was their absurd views on medical care for their children.²³⁷ The judge stated that the defendants should have never had custody of their children, especially while they were young, but conversely stated that “in every other area of parenting[,] their children and they should be able to resume their relationship”²³⁸

The Pennsylvania Superior Court continued to cite to the trial judge, who argued that the punishment should not simply fit the crime, but also the criminal.²³⁹ In this case, the judge found the parents to have demonstrated great remorse, grief, and an understanding of their responsibility for the death of two of their children.²⁴⁰ Therefore, their prison sentences were justified.²⁴¹ In response to the Commonwealth’s argument of the Defendants sentencing not being in compliance with the necessary rehabilitative needs, the trial judge simply state:

²³¹ *Id.* at *6.

²³² *See generally id.* at *7–9.

²³³ *Schaible*, 2015 Pa. Super. Unpub. LEXIS 3377, at *9.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.* at *22–23.

²³⁷ *Id.*

²³⁸ *Id.* at *16.

²³⁹ *Schaible*, 2015 Pa. Super. Unpub. LEXIS 3377, at *22.

²⁴⁰ *Id.* at *24.

²⁴¹ *Id.*

I am not inexperienced in listening to defendants' expressions of remorse and acceptance of responsibility at sentencing, and I firmly believe that Herbert and Catherine Schaible finally understand the consequences of what they have done and why they made these terrible wrong choices. To the extent such a thing is possible, they are rehabilitated.²⁴²

The Pennsylvania Superior Court affirmed—showing significant compassion towards the faith healing parents.

3. Implication

Once again, another state court avoided addressing the religious exemption issue, with the Pennsylvania Superior Court giving all of its deference to the sentencing judge.²⁴³ The Superior Court argued that they could not second-guess the trial courts' determinations just because it may displease the Commonwealth.²⁴⁴ Essentially, The Superior Court dodged the bullet by not having to address any substantive issue regarding the lenient sentencing or religious arguments. Although this case does not pertain to faith healing affirmative defenses, it is simply another way of showing how the effect of deference to the states for religious exemption laws extends beyond trials and pleadings into the sentencing stage.

VII. THE GOOD AND BAD OF RELIGIOUS AFFIRMATIVE DEFENSES

A. *Why Tolerate Religious Affirmative Defenses?*

In one regard, faith healing affirmative defenses are considered to be an exercise of an individual's First Amendment right to religious freedom, where religious exemption laws are considered to be the government's implementation of this fundamental right.²⁴⁵ In addition to religious freedom, religious affirmative defenses can be considered an exercise of a parental right, since parents have the constitutional right to raise their children and make decisions on their behalf. More specifically, parents have the constitutional right to further their children's

²⁴² *Id.* at *25.

²⁴³ *See generally id.*

²⁴⁴ *Id.* at *25.

²⁴⁵ *See generally Faith–Healing a First Amendment Dilemma, supra* note 70.

religious development,²⁴⁶ which gives parents the ability to conduct religious and spiritual treatment practices. A plausible argument for faith healing parents is that they can make decisions regarding their children's health treatments through faith healing if they choose to under First Amendment protections and without being criminally punished.

For criminal charges and liability, advocates of religious affirmative defenses could push for higher standards, requiring the government to fulfill a higher burden of showing a culpable mental state.²⁴⁷ Just as what the defendants requested for in *Hickman*, religious affirmative defenses could require that a higher mental state should be applied, even if it is more than what the criminal statute requires. This would hold faith healers to a higher standard than the reasonable person, because the lack of giving adequate medical treatment would be the result of religious beliefs and practices instead of simple negligence.

B. Why Not Tolerate Religious Affirmative Defenses?

Although the First Amendment has been interpreted to forbid government interference from restraining religious beliefs and practices, it also has been interpreted to limit religious acts. In another perspective, faith healing affirmative defenses essentially allow for faith healers to escape criminal liability. As previously explained, many religious exemption laws created by state legislatures in various states openly excuse faith healing parents from criminal punishment because of their religious beliefs, even if it results in the death of a child.

Allowing religious affirmative defenses not only lets faith healing parents escape criminal liability, but it also displays a societal tolerance of child neglect and abuse. It creates the opportunity for individuals, who see faith healing parents escaping liability by not providing medical treatment to their children, to participate and potentially use it as an excuse if they cannot afford or do not want to spend money on their children's healthcare. Banning these religious affirmative defenses does not infringe on

²⁴⁶ See Jonathan F. Will, *My God My Choice: The Mature Minor Doctrine and Adolescent Refusal of Life-Saving or Sustaining Medical Treatment Based upon Religious Beliefs*, 22 J. CONTEMP. HEALTH L. & POL'Y 233, 250 (2006).

²⁴⁷ Such as the Defendants in *State v. Hickman*, 358 P.3d 987, 988 (Or. 2015), who wanted a higher standard to be applied in order to determine the culpable mental state for the charge of second-degree manslaughter. More specifically, Defendants wanted the state to prove they had knowledge that death would result. See *id.* at 996.

an individual's First Amendment protection. Instead, it protects innocent children and their right to reach adulthood.

VIII. CONCLUSION

Faith healing affirmative defenses should not be tolerated in the United States, as it allows parents to escape criminal liability and also justifies child neglect and abuse with faith healing practices. Due to the lack of federal legislation regulating faith healing exemption laws and affirmative defenses in the United States,²⁴⁸ deference to the states in forming these laws have created a vast inconsistency. As previously shown, some states contain significant protection for faith healing parents against the most serious criminal charges²⁴⁹ whereas other states contain little to almost no protection.²⁵⁰ Therefore, to avoid the inconsistent legislation and rulings, it is necessary for Congress to step in and create a federal statute—applicable for all states—that bans faith healing affirmative defenses and exemption laws for criminal liability against child abuse altogether. It should be Congress's objective to cease the deference to the states²⁵¹ and to protect its youngest citizens by giving them an ability to live healthy lives into adulthood.

²⁴⁸ CAPTA is the only form of federal regulation for child abuse and neglect, giving states the authority to create/regulate religious affirmative defenses. *See generally* Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974), *amended by* CAPTA Reauthorization Act of 2010, Pub. L. No. 111-320, 124 Stat. 3459 (2012), <https://www.acf.hhs.gov/sites/default/files/cb/capta2010.pdf>.

²⁴⁹ *See e.g.*, ARK. CODE ANN. § 5-10-101(a)(9)(B) (2012).

²⁵⁰ *See e.g.* H.R. 2721, 76th Leg. Assemb., Reg. Sess. (Or. 2011).

²⁵¹ The deference gives a dangerous amount of discretion to state legislatures and courts to be influenced by lobbyists and advocates of religious affirmative defenses.