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Religious Beliefs and the Criminal Justice System: Some Problems of the Faith Healer

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RELIGIOUS BELIEFS AND THE CRIMINAL JUSTICE SYSTEM: SOME PROBLEMS OF THE FAITH HEALER

I have no power to heal. All that I can do is to remind them of the bigness of God, the greatness of God, that he is still God Almighty. I am only the vessel that is surrendered. God does the rest.

—Kathryn Kuhlman[1]

I. INTRODUCTION

Reliance on prayer and faith as part of the healing process is undoubtedly as old as human history. In "primitive" cultures, which have little in the way of economic specialization, the only specialist may be the shaman, a combination priest-healer whose duty is to communicate with supernatural forces, incomprehensible to most.[2] There is little differentiation between "faith" and "healing." Survival of society depends on the good health of every working member, and a society which has little in the way of effective medicine could be expected to rely heavily on help from supernatural powers—but rarely are faith and medicine thought to be mutually exclusive.[3]

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1. GOD CAN DO IT AGAIN 9 (1969).

2. *See, e.g.*, C. LÉVI-STRAUSS, *The Sorcerer and His Magic*, in STRUCTURAL ANTHROPOLOGY 161 (Anchor Books ed. 1967) (discussing the education of the shaman and the psychology of shamanism in several primitive cultures); Risse, *Shamanism: The Dawn of a Healing Profession*, 71 WIS. MED. J., Dec., 1972, at 18 (discussing the role of the shaman as physician). Shamanism as a healing art addresses itself to the full range of disease manifestation. Although western cultures tend to dichotomize disease manifestations into "psychic" and "somatic" in origin, shamanism does not tend to recognize such a distinction either in origin or in cure. "Faith healing" may be based on a similar theoretical approach.

The shaman plays an important role in interpreting the meanings of religious beliefs and customs regulating social organization and order within the community. Balikci, *Shamanistic Behavior Among the Netsilik Eskimos*, in MAGIC, WITCHCRAFT AND CURING 191 (J. Middleton ed. 1967). The shaman in his role as advisor-interpreter of the social order is also, in effect, a primitive legal specialist.

3. W. HOWELLS, THE HEATHENS: PRIMITIVE MAN AND HIS RELIGIONS 97-98 (Natural History Lib. ed. 1962) discusses this concept among "primitive" peoples. M. CLARK, HEALTH IN THE MEXICAN-AMERICAN CULTURE 115-16 (1970) describes the role of Catholic and Protestant beliefs with regard to healing in a Mexican-American community. Prayer is held to be a valuable, but not an exclusive remedy. She describes the minister of one Pentecostal church in the area as being "against doctors," but states that the majority of believers in the Pentecostal sects seem not to discourage the use of medical facilities on the theory that the doctor is also an agent of God. *Id.* at 116. Provonsha,

There are numerous religious sects, however, in the United States and elsewhere, which preach faith healing and which at times reject the use of modern medicine.[4] Many of the American cults which exist today sprang up over one hundred years ago, when medical science was considerably less reliable and when there may have been many plausible reasons to distrust the discipline.[5] Today, most Americans would probably view religion and medicine as two distinct concepts, having little in common. To some, however, "faith" and "healing" are not so easily separable, and this may become a source of difficulty, since "faith" is protected by the Constitution, but "healing" may be subject to regulation.

For the purposes of this Comment, "faith healing" is defined as the belief that disease may be cured by faith, prayer, and the divine power of God alone, without the use of drugs or devices of any kind,[6] and includes the beliefs of those who do not believe in "disease" or "cure" in the usual medical sense.[7] Although these beliefs are conceptually distinguishable from the practice of medicine, they present

Faith Healing, and the Faith Healers, 1962 MED. ARTS & SCI. 38, elaborates on the perceived conflict between faith and healing going back to the early days of Christianity.

4. Two recent studies describing the Pentecostal sects which preach faith healing are Pattison, Lapins & Doerr, *Faith Healing*, NERVOUS & MENTAL DISEASE, Dec., 1973, at 397 [hereinafter cited as Pattison] and M. Siegel, Inferences Regarding Beliefs About Health and Illness as Deduced from the Observation of a Charismatic Prayer Group, 1970 (unpublished thesis in U.C.L.A. Biomedical Library) [hereinafter cited as Siegel]. The Siegel study deals with a religious prayer group in the Southern California metropolitan area; the group's members are described as being of diverse backgrounds, and the composition of the meetings may vary from week to week. They did not form a close-knit social community. *Id.* at 30-31.

By contrast, the subjects of the Pattison study were all members of Seattle area churches. They were similar in educational and occupational background and formed definite social groups in which the social life was generally church-centered. Pattison, *supra* at 398.

The Siegel group was extremely unlikely to find conflict between faith healing and modern medicine. They generally saw divine intervention as a complement to medical science and stressed co-operation between the two systems. Although they believed that God can do what doctors cannot, they also believed, in large part, that the deity may intervene through the use of doctors. Siegel, *supra* at 89-103.

5. For a history of the religious approach to healing, see R. BARTON, RELIGIOUS DOCTRINE AND MEDICAL PRACTICE (1958).

6. *Cf.* People v. Jordan, 172 Cal. 391, 398, 156 P. 451, 454 (1916); Cawley, *Criminal Liability in Faith Healing*, 39 MINN. L. REV. 48 (1954) [hereinafter cited as Cawley].

7. This category includes the well-known Christian Science Church, whose members believe that disease is a physical manifestation of errors of the mind. *See* Schneider, *Christian Science and the Law: Room for Compromise?*, 1 COLUM. J.L. & SOC. PROB. 81 (1965) [hereinafter cited as Schneider]; Steinhardt, *Christian Science: Religious Freedom and State Control*, 7 MIAMI L.Q. 358 (1953).

similar practical problems: to believers of these sects, there is little or no distinction between "faith" and "healing," and any government attempt to require medical treatment is considered by them to be an infringement on what they perceive as their constitutional right to practice their beliefs without governmental interference. Religious beliefs may also dictate the use of certain drugs or devices, for healing or otherwise, which are not recognized as useful by medical science,[8] or may cause the believer who otherwise submits himself to medical treatment to refuse the prescribed cure.[9] While these cases present a different problem from that of true "faith healing," they may at times involve analogous legal problems.

Some religions teach that prayer and faith aid in recovery from illness. Modern medicine and psychiatry would concur that the patient's recovery may be hastened and enhanced by faith in the cure.[10] Most people, however, think of religion and medicine as operating independently, and one is not thought to be an appropriate "substitute" for the other.[11] That the beliefs of most Americans do not conflict with scientific medicine is suggested by the fact that all states have laws regulating

8. *E.g.*, Scientology. *See* United States v. Article or Device . . . "Hubbard Electrometer," 333 F. Supp. 357 (D.D.C. 1971).

9. For example, the Jehovah's Witnesses sect, which permits most medical treatment, forbids blood transfusions.

10. That the "power of suggestion" can affect even those who believe they have a thoroughly "scientific" attitude is discussed in Evans, *The Power of the Sugar Pill*, 7 PSYCHOLOGY TODAY, Apr., 1974, at 55, and Koenig, *Lee's Bilious Pills: The Placebo Effect in Patent Medicine*, 7 PSYCHOLOGY TODAY, Apr., 1974, at 60 (in which the author also discusses the regulation of patent medicines by the Food and Drug Administration).

It is a common misconception that the "power of suggestion" can only affect "mental" disease; the functions of "mind" and "body" are not so easily separable. It is well-documented that apparently psychological factors (*i.e.*, "faith") can cause rapid physical death, Cannon, *"Voodoo" Death*, 44 AM. ANTHROPOLOGIST 169 (1942), and disease, Gillin, *Magical Fright*, 11 PSYCHIATRY 387 (1948). For a recent discussion of this phenomenon, see Lex, *Voodoo Death: New Thoughts on an Old Explanation*, 76 AM. ANTHROPOLOGIST 888 (1974). Conversely, a belief in the efficacy of the cure may in itself accelerate the healing process. *See generally* L. SAUNDERS, CULTURAL DIFFERENCES AND MEDICAL CARE (1954); Torrey, *The Case for the Indigenous Therapist*, 20 ARCHIVES OF GENERAL PSYCHIATRY 365 (1969) (labeling as the "edifice complex" the fact that, for many people, entering the hospital may have therapeutic value in itself).

11. A line of cases going back to The Queen v. Senior, [1899] 1 Q.B. 283, states that where a parent has a duty expressed by statute to provide medical care for a child, nothing else may be substituted. *E.g.*, People v. Arnold, 66 Cal. 2d 438, 452, 426 P.2d 515, 524, 58 Cal. Rptr. 115, 124 (1967); State v. Chenoweth, 71 N.E. 197 (Ind. 1904); Craig v. State, 155 A.2d 684 (Md. Ct. App. 1959); State v. Watson, 71 A. 1113 (N.J. 1909); Commonwealth v. Hoffman, 29 Pa. County Ct. 65, 67 (1903).

the practice of the "healing arts."[12] Further examples of compatibility include the authority of the states to require vaccination of school children,[13] blood tests required to obtain a marriage license,[14] and school medical and dental examinations.[15] Some states provide exceptions to

12. The California statute provides for the licensing and regulation of the medical practitioner's activities. CAL. BUS. & PROF. CODE ANN. § 2135 *et seq.* (West 1974). The code specifically states that "treatment by prayer" shall not be prohibited. *Id.* § 2146.

According to Trescher & O'Neill, *Medical Care for Dependent Children: Manslaughter Liability of the Christian Scientist*, 109 U. PA. L. REV. 203, 216 (1960) [hereinafter cited as Trescher & O'Neill], the typical statutory exemption of spiritual healing from regulation is an indication of government acceptance of spiritual means of healing. It is possible in many cases, however, to read the statutes not as "exemptions" for any particular "method of healing," but simply as the legislatures' recognition of the danger of potential abuse of first amendment rights under the guise of regulation of a state interest. For example, California Business and Professions Code section 2146 (CAL. BUS. & PROF. CODE ANN. § 2146 (West 1974)) does not "exempt" anything, but simply makes clear that certain rituals, considered by some to have healing properties, were never intended to be regulated. Thus, in People v. Jordan, 172 Cal. 391, 156 P. 451 (1916), the court held that the rationale for the prayer "exemption" lies in the fact that prayer's effectiveness is entirely independent of anatomical knowledge (*id.* at 396, 156 P. at 453) and that the "exemption" is constitutional since it is "natural," "intrinsic," and "reasonable" (*id.* at 398, 156 P. at 454). *But see* People v. Cosper, 76 Cal. App. 597, 600, 245 P. 451, 466 (1926) (warning that religion may not be used as a "mere subterfuge to escape the prohibitory provisions of the Medical Practice Act").

13. California requires that prior to entry in school, children under the age of sixteen be immunized against measles, CAL. HEALTH & SAFETY CODE ANN. § 3400 (West Supp. 1975), and polio, *id.* § 3380. Exceptions are provided where the parent or guardian files a letter or affidavit stating that immunization is contrary to his religious beliefs. *Id.* §§ 3404, 3884.

Where no such exceptions are provided, vaccination requirements are often enforced over the parents' religious objections. In Jacobson v. Massachusetts, 197 U.S. 11 (1905), Justice Harlan, speaking for the majority, stressed the state's primary responsibility to look after the common good and stated that "[s]ociety based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy." *Id.* at 26. In *Jacobson*, however, the parents had not presented religion per se as an excuse, and there was an epidemic of smallpox in the area at the time, a fact which the Court took into account in weighing the state's interest. Other cases upholding the state's power to require vaccination include Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (dictum); Vonnegut v. Baun, 188 N.E. 677 (Ind. 1934); Hartman v. May, 151 So. 737 (Miss. 1934); State v. Drew, 192 A. 629 (N.H. 1937); *In re* Whitmore, 47 N.Y.S.2d 143 (Dom. Rel. Ct. 1944); City of New Braunfels v. Waldschmidt, 207 S.W. 303 (Tex. 1917).

14. California Civil Code section 4300 requires that blood tests for syphilis be performed by a licensed physician before a marriage license may be issued. CAL. CIVIL CODE § 4300 (West Supp. 1975). The statute provides no exceptions, but, under another provision, a judge may waive the requirement in case of "emergency or other sufficient cause," provided public health is not endangered. *Id.* § 4306.

15. In California, although the Department of Public Health has the authority to investigate diseases related to children (CAL. HEALTH & SAFETY CODE ANN. § 301 (West

these and other requirements for some religious groups which oppose them,[16] but, particularly at an earlier period when these groups were less well-known, such regulations caused considerable conflict.[17]

The rights guaranteed by the first amendment to the United States Constitution, including the right to the free exercise of religion, are among the most highly prized and jealously guarded of American freedoms. Some legal scholars would go so far as to consider freedom of religion an almost unqualified right,[18] and strong support has existed throughout our country's history for the concept that freedom of religion should occupy a "preferred position" in the scheme of American liberties.[19]

The first amendment provides, in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[20] The courts have consistently viewed this provision as meaning that the freedom to believe is absolute and may not be infringed upon, but that "free exercise" does not necessarily include the right to act on one's beliefs.[21] In deciding what acts may

Supp. 1975)), it has no authority to force compulsory medical or physical examination. *Id.* § 302.

16. Trescher & O'Neill, *supra* note 12, at 215-16, discusses religious exemptions to Pennsylvania's statutory requirements as indicative of the Pennsylvania legislature's "approval and acceptance of spiritual means of healing" and Christian Science in particular. Many states provide such exemptions for the purpose of avoiding conflicts between civil authority and religious freedom, but during emergencies, the state's authority is more likely to be exercised. *See, e.g.*, Vonnegut v. Braun, 188 N.E. 677 (Ind. 1934).

17. *See, e.g.*, cases cited in note 13 *supra*.

18. The concurring opinion of Justices Black and Douglas in West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), states a strong case for first amendment freedoms short of infringement on the general public welfare:

> These laws must, to be consistent with the First Amendment, permit the widest toleration of conflicting viewpoints consistent with a society of free men. . . . The ceremonial, when enforced against conscientious objectors, more likely to defeat than to serve its high purpose, is a handy implement for disguised religious persecution. As such, it is inconsistent with our Constitution's plan and purpose.

Id. at 644.

19. Prince v. Massachusetts, 321 U.S. 158, 164 (1944); Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943); Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1939); United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938); *see* Comment, *The Drug Religions and the Free Exercise Clause*, 1 U. TOL. L. REV. 202, 204 (1969) [hereinafter cited as *Drug Religions*].

20. U.S. CONST. amend. I. For a discussion of the history and background of the adoption of this portion of the first amendment, see Fernandez, *The Free Exercise of Religion*, 36 S. CAL. L. REV. 546 (1963). A recent case, Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973), discusses the establishment clause and provides a three-part test for constitutionality. A law must: reflect a clearly secular legislative purpose; have a primary effect that neither advances nor inhibits religion; and avoid excessive entanglement with religion. *Id.* at 773.

21. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1939); Reynolds v.

be prohibited, despite the objection that such a prohibition would infringe on religious freedom, the courts have traditionally employed a balancing test, weighing what the state perceives as its interest in maintaining a well-ordered society (usually phrased in terms of the "peace and safety" of the community)[22] against the freedom of the individual to act in accordance with the dictates of his religion[23] and his right to be left alone.[24] Formerly, the courts seemed to place a heavier emphasis on the state's regulatory powers, but recent cases, notably *Wisconsin v. Yoder*,[25] have defined religious freedom in broader terms, allowing the individual considerable liberty of action where the state's interest is not seen as "compelling."[26]

Some states, including California, have attempted to ease some of the apparent conflict by defining "freedom of religion" more narrowly than

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United States, 98 U.S. 145, 166-67 (1879). The question of the truth or falsity of religious beliefs, no matter how "preposterous" they may seem to "most people," may not be put to the jury. The questions of fraud and good faith, however, are appropriate matters for the trier of fact. *See* Cleveland v. United States, 329 U.S. 14 (1946); United States v. Ballard, 322 U.S. 78 (1944); Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944); People v. Pierson, 68 N.E. 243 (N.Y. 1903).

22. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1941) (state may prohibit the public use of "fighting words"); Cox v. New Hampshire, 312 U.S. 569, 574 (1941) (affirming conviction of religious group for parading without a permit); Jacobson v. Massachusetts, 197 U.S. 11, 28 (1905) (see note 13 *supra*); Hardwick v. Board of School Trustees, 54 Cal. App. 696, 706, 205 P. 49, 53 (1921) (peace and safety are not jeopardized by children's refusal, on religious grounds, to participate in dancing classes).

23. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1939); Schneider v. New Jersey, 308 U.S. 147, 160 (1939) (city ordinance against distribution of literature held invalid, as it abridged Jehovah's Witnesses' rights of free speech).

24. Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965); *cf.* Time, Inc. v. Hill, 385 U.S. 374 (1966). Few court decisions discuss a "right to be left alone" in relation to the freedom to practice religious beliefs. Perhaps they feel the problem is fully covered by the first amendment. However, then-Judge Burger, in his dissenting opinion in the denial of rehearing of Application of President & Directors of Georgetown College, Inc., 331 F.2d 1010, 1016-17 (D.C. Cir. 1964), quoted Justice Brandeis' views on privacy as expressed in Olmstead v. United States, 277 U.S. 438 (1928), to support application of a "right to be left alone" to all thoughts and feelings: "I suggest he [Brandeis] intended to include a great many foolish, unreasonable and even absurd ideas which do not conform, such as refusing medical treatment even at great risk." *Id.* at 1017.

A 1972 amendment to the California constitution added a specific provision guaranteeing all people an inalienable right to privacy. CAL. CONST. art. I, § 1. *See generally* Comment, *Unauthorized Rendition of Lifesaving Medical Treatment*, 53 CALIF. L. REV. 860, 874 (1965) [hereinafter cited as *Unauthorized Rendition*].

25. 406 U.S. 205 (1972).

26. Sherbert v. Verner, 374 U.S. 398, 403 (1963); *see* Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development* (pts. 1 & 2), 80 HARV. L. REV. 1381 (1967), 81 HARV. L. REV. 513 (1968).

does the United States Constitution.[27] The California constitution states that the freedom to practice one's religion is "not . . . construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state."[28]

The criteria used in the balancing test, by both the state and federal courts, include the necessity of the particular practice to the "central core" of the belief system,[29] the degree of impact the behavior is thought (by the court) to have on society as a whole,[30] and the *bona fides* of the individual's belief in the necessity of the practice[31] (although the factual content of the beliefs themselves may never be called into question[32]). The Supreme Court has at times, however, drawn a somewhat puzzling distinction between "religion" and "morals," holding that "morals" are more easily regulated.[33]

When the believer in faith healing, or his child, becomes ill and does not go through what the majority of society, and the government, con-

27. CAL. CONST. art. I, § 4. Similar provisions are found in many state constitutions. *E.g.*, ILL. CONST. art. I, § 3; N.Y. CONST. art. I, § 3. Of course, since the first amendment is applicable to the states, state constitutional provisions cannot limit rights secured by the United States Constitution.

28. CAL. CONST. art. I, § 4. The California Attorney General concluded that the religious use of peyote would not be permitted under this provision (39 OP. CAL. ATT'Y GEN. 276 (1962)), a view later rejected by the California Supreme Court in People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964), and *In re* Grady, 61 Cal. 2d 887, 394 P.2d 728, 39 Cal. Rptr. 912 (1964). The Attorney General considered the California qualification to be "implied" in the United States Constitution. 39 OP. CAL. ATT'Y GEN. at 277. Although this provision would seem to give the California constitution a potentially more restrictive application than is apparent on the face of the United States Constitution's first amendment, in fact the policy considerations are much the same.

29. *See* People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964); Davis, *Plural Marriage and Religious Freedom: The Impact of Reynolds v. United States*, 15 ARIZ. L. REV. 287 (1973) [hereinafter cited as Davis].

30. Sherbert v. Verner, 374 U.S. 398, 406 (1963); *see* note 165 *infra* and accompanying text. The "Sunday closing law" cases are illustrative. McGowan v. Maryland, 366 U.S. 420, 425-26 (1961), Two Guys From Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582, 590 (1961), Braunfeld v. Brown, 366 U.S. 599, 613 (1961), and Gallagher v. Crown Kosher Supermarket of Massachusetts, Inc., 366 U.S. 617, 622-23 (1961), hold that a law which does not compel a repugnant belief, nor prohibit outright a religious practice, does not violate the free exercise of religion and will be upheld if the state can show some valid secular goal.

31. United States v. Ballard, 322 U.S. 78 (1944).

32. Fowler v. Rhode Island, 345 U.S. 67, 70 (1953); United States v. Ballard, 322 U.S. 78, 86-87 (1944).

33. Of particular significance in this respect are the Mormon polygamy cases, where the Court has consistently held that the state's interest in protecting public health, safety and morals outweighs the individual's interest in practicing what to him is a religious belief:

sider the "proper channels" to be cured, he may find himself caught up in a conflict between two of the most highly valued ideals in the American system—freedom of religion and the "sanctity" of human life. From society's standpoint, the problem is most acute when a child is involved. There the state may step in, in its role as *parens patriae*, declare the child "neglected," and hand him over for treatment, regardless of the parents' religious belief.[34] This is a drastic step and one which the courts are naturally reluctant to take. In the case of an adult believer who appears to be of sound mind, there is more of a "hands-off" attitude, but the courts will, at times, step in when they fear that a life hangs in the balance.[35] Under ordinary circumstances, however, the case of a true believer in faith healing will not even come to the

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> To permit this would make the professed doctrines of religious belief superior to the law of the land, and in effect permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

Reynolds v. United States, 98 U.S. 145, 167 (1879); *see* Davis v. Beason, 133 U.S. 333 (1890) (religion is no defense to a criminal charge).

Both *Reynolds* and *Davis* draw analogy to the religious practice of human sacrifice, which, the Court says, would be banned under any circumstances. *Davis*, in a most curiously reasoned opinion, goes on to state that "[t]o call [the] advocacy [of polygamy] a tenet of religion is to offend the common sense of mankind." 133 U.S. at 341-42. To follow this reasoning, a state could declare any practice it found "odious" a crime, and forbid it. The same panel, in Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890), upheld the power of Congress, in organizing the territorial government of Utah, to modify or revoke the charter of the Church because it advocated polygamy, "a crime against the laws, and abhorrent to the sentiments and feelings of the civilized world," and altogether a "barbarous" practice. *Id.* at 48. The Late Corporation was possessed of considerable interests in land which, on its demise, would escheat to the grantor—the United States. For an historical background of these cases, the political compromises which resulted, and their impact on modern law, see Cawley, *supra* note 6; Davis, *supra* note 29.

The problem did not die with the Mormon Church's official ban on the practice of polygamy. It is still practiced by some members of the so-called "Fundamentalist sect" of the Mormon Church, one of whom was convicted of violating the Mann Act (18 U.S.C. § 2421 *et seq.* (1970)). The Supreme Court held that "[w]hether an act is immoral within the meaning of the statute is not to be determined by the accused's concepts of morality. Congress has provided the standard." Cleveland v. United States, 329 U.S. 14, 20 (1946). The courts may not judge whether or not a belief is "religious," but may decide whether or not it is "moral," the distinction being somewhat vague. Justice Murphy dissented, alluding to cultural factors and urging that the religious beliefs and social mores of the accused's society be taken into account. *Id.* at 24-29.

One commentator defines the term "faith healing" to apply only to members of sects which believe in healing exclusively by prayer. Cawley, *supra* note 6, at 48. In practice, however, such a belief is rare. *See* note 4 *supra*. The legal problems are the same, even if the religion does not strictly forbid the use of scientific medicine. The religion may be the cause of failure to seek medical attention in time to effectuate a cure, or may prevent the patient from making full use of the available medical remedies.

34. *See, e.g., In re* Green, 292 A.2d 387 (Pa. 1972).

35. *See* note 74 *infra* and accompanying text.

attention of the authorities, unless and until someone dies. Those who recover have had their beliefs reinforced, and no one complains.[36]

Consider the following hypothetical case. A young child is the victim of severe diabetes; doctors prescribe frequent injections of insulin to keep the child alive. The child and his parents are members of a religious group which believes in the power of "divine healing" but also believes in the efficacy of drugs, under certain conditions, and does not forbid the injections. One Sunday in church a visiting preacher addresses the congregation on the subject of healing through faith. He describes his own recovery from paralysis, accomplished through the power of faith alone, but neglects to mention that he was in the hospital at the time of the cure. The preacher does not touch the child, but does suggest that the taking of medication may indicate a lack of true faith. The meeting generates much excitement. Active participation and "speaking in tongues" are encouraged by the sect. In response to the preacher's message, the congregation prays together, and the child begins to feel that something inside him is changing. Later, he announces to his friends that he is "cured." The insulin is thrown away. The next day the child feels worse, but the family, advised by members of their church group, decides not to give the medication. They feel that the child has probably been cured and that the medicine could not help at this point and might possibly be harmful. The minister is aware of, but takes no active part in, these activities. Within three days, the child is dead. The congregation continues to pray that he might be brought back to life. The preacher quietly leaves town.[37]

What potential criminal liabilities stem from such a case?[38] Would

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36. *See* L. SAUNDERS, CULTURAL DIFFERENCES AND MEDICAL CARE 144-45 (1954) (comparing "folk" and "scientific" medical treatments and concluding that the prestige of both systems derives from the fact that most patients get well no matter what is done to them).

37. Based in part on the facts of People v. Parker, No. CR 29566 (Super. Ct., San Bernardino County, Cal. 1974), as they appeared in the Los Angeles Times (Aug. 26, 1973, § 1, at 3, col. 1, & 19, col. 1; Aug. 27, 1973, § 2, at 1, col. 3, & 4, col. 7; Aug. 30, 1973, § 1, at 3, col. 1, & 28, col. 1). Embellishments are the author's own, and the "case" as it appears is fictional. In the actual case, the parents were found guilty of involuntary manslaughter and felony child abuse. Los Angeles Times, July 20, 1974, § 1, at 24, cols. 7-8. The "preacher" testified at the trial.

38. Potential civil liability, if any, is beyond the scope of this Comment. In a civil action for assault and battery, consent is a complete defense, whether or not the act is illegal. Sayadoff v. Warda, 125 Cal. App. 2d 626, 271 P.2d 140 (1954). It is possible to imagine a situation, analogous to a doctor-patient relationship, in which a "quack" could be liable in tort for failure to warn of a known risk, or for going beyond the scope of the "patient's" consent. However, criminal liability also attaches in these situations. *See, e.g.*, State v. Karsunky, 84 P.2d 390 (Wash. 1938). The bona fide faith healer

the problem be significantly different if an adult, rather than a child, had died? If the "healer" or the pastor of the church had taken a more active role, had diagnosed the source of the disease in a non-conventional way, had prescribed any medication or mode of treatment, or had charged a fee for his services? If the child had not died, but had become crippled or more seriously ill, or if the disease, although not fatal, would subject the child to medically preventable pain, or shorten his life considerably?

This Comment will address itself to these questions in light of the current judicial attitude toward freedom of religion.

II. THE BELIEVERS

A. The Parents' Liability

The parents may be found guilty of child neglect, whether or not the child dies as the result of faith healing treatments, if the trier of fact finds that the situation was one in which medical attention would normally be required. The prosecution, however, has the burden of proving that the treatment was strictly necessary, and that burden is frequently difficult to sustain.[39] The basis of liability in this situation is generally a statute which charges the parents with a legal duty to provide food, clothing, shelter, medical attention, and other necessities of life to the child.[40] The cases are consistent only in that they almost uniformly reject "freedom of religion" as a defense to this charge.[41] If

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who uses no drugs is not analogous to a doctor in this regard, since he disclaims personal responsibility. He does not purport to cure through his own superior knowledge, but claims, at most, to be a vehicle of divine power, which performs the actual healing.

In the case of a child, parental consent should be sufficient to bar an assault and battery or wrongful death action in tort. Moreover, if the beneficiaries of a wrongful death action were in any way responsible for the death, they may be barred from bringing the action. W. PROSSER, HANDBOOK ON THE LAW OF TORTS 913 (4th ed. 1971) [hereinafter cited as PROSSER]. Therefore, the only case in which any potential recovery for wrongful death may lie is a situation where treatment is performed without consent.

39. People v. Yates, 114 Cal. App. 782, 298 P. 96 (Super. Ct. App. Div. 1931); State v. Beach, 329 S.W.2d 712 (Mo. 1959).

40. Section 270 of the California Penal Code provides:

> If a parent of a minor child willfully omits, without lawful excuse, to furnish necessary clothing, food, shelter or medical attendance, or other remedial care for his or her child, he or she is guilty of a misdemeanor punishable by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment.

CAL. PENAL CODE § 270 (West Supp. 1975). For summaries of the early English common law and the effects of these statutes, see Trescher & O'Neill, *supra* note 12; Note, *Juveniles: The Child, Medicine and the Law*, 39 MISS. L.J. 508 (1968).

41. People v. Arnold, 66 Cal. 2d 438, 426 P.2d 515, 58 Cal. Rptr. 115 (1967); State

the child dies, the parents may be charged with manslaughter, the statute being the basis for the legal duty from which criminal neglect may be inferred.[42]

The California case of *People v. Arnold*[43] illustrates the position of a parent who believes in faith healing. Mrs. Arnold had been charged with and convicted of involuntary manslaughter in the death of her daughter, under California Penal Code section 270.[44] At the time of her death, the girl was attended only by her mother and the elders of the "Church of the First Born," who believe in faith healing. The court of appeal explained the basis for liability:

> It is the duty of one having legal and physical custody of a minor child to furnish it with necessary medical aid in event of illness, and if such person neglects to furnish such aid and as a proximate cause of that failure death occurs, involuntary manslaughter has been committed.[45]

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v. Chenoweth, 71 N.E. 197 (Ind. 1904); Craig v. State, 155 A.2d 684 (Md. Ct. App. 1959); State v. Watson, 71 A. 1113 (N.J. 1909); Commonwealth v. Breth, 44 Pa. County Ct. 56 (1915); Commonwealth v. Hoffman, 29 Pa. County Ct. 65 (1903); *see* Annot., 100 A.L.R.2d 483, 516-17 (1965) (citing a number of cases in discussing whether or not religion is a defense). While State v. Sandford, 59 A. 597 (Me. 1904), is often cited as supporting religion as a defense, the facts of the case do not support such a general proposition. First, the leader of a religious community, not a parent, was on trial, and, second, the issue on appeal was a misleading jury instruction, not whether religion may be a defense to child neglect charges. Dictum in the case does suggest that religion may be available as a defense to child neglect charges. *Id.* at 601.

42. *See* The Queen v. Senior, [1899] 1 Q.B. 283. Each of the fifty states and Canada have similar child protection statutes. Cawley, *supra* note 6, at 54-57. California Penal Code section 272 provides in part:

> Every person who commits an act or omits the performance of any duty, which act or omission tends to cause or encourage any person under the age of twenty-one years to come within the provisions of Sections 600, 601, or 602 of the Welfare and Institutions Code . . . is guilty of a misdemeanor . . . .

CAL. PENAL CODE § 272 (West 1972). California Welfare and Institutions Code section 600 provides in part:

> Any person under the age of eighteen years who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge such person to be a dependent child of the court:
>
> . . . .
>
> (b) who is . . . not provided with the necessities of life . . . .

CAL. WELF. & INST'NS CODE ANN. § 600 (West 1972).

Under California law, a person who kills another may be guilty of involuntary manslaughter if the killing occurs "in the commission of an unlawful act, not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection . . . ." CAL. PENAL CODE § 192 (West 1972).

43. 47 Cal. Rptr. 525 (1966).

44. CAL. PENAL CODE §§ 270, 272 (West 1972); *see* note 40 *supra*.

45. 47 Cal. Rptr. at 527-28.

The opinion of the court of appeal was vacated, and the California Supreme Court reversed Mrs. Arnold's conviction, finding that statements were introduced at trial in violation of *Escobedo v. Illinois*.[46]

The *Arnold* case might at first glance appear anomalous in that it states a rule of law (a person who neglects his duty to another commits manslaughter if that neglect proximately causes the other's death[47]), and then proceeds to avoid it on other grounds (no matter how well justified in the particular instance). However, a reading of the cases in which similar charges have been brought reveals a surprising number in which manslaughter or criminal neglect convictions have been reversed on appeal, often on grounds unrelated to the charge itself.[48] This may reflect an unstated judicial policy of sympathy for the

46. 378 U.S. 478 (1964). The court also relied on People v. Dorado, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169 (1965), which along with *Escobedo* provides that an accused be advised of her rights to counsel and to remain silent.

47. 66 Cal. 2d at 442-43, 426 P.2d at 517-18, 58 Cal. Rptr. at 117-18.

48. People v. Pierson, 68 N.E. 243 (N.Y. 1903), is a leading case. Despite the fact that the child died, the father in *Pierson* was charged and convicted, not of homicide, but of a misdemeanor violation of the child neglect statute. Craig v. State, 155 A.2d 684 (Md. Ct. App. 1959), in a similar fact situation, held that the evidence was insufficient to show proximate cause because by the time it became apparent that the child was dying, he might have been beyond help. *See generally* People v. Arnold, 66 Cal. 2d 438, 426 P.2d 515, 58 Cal. Rptr. 115 (1967); Bradley v. State, 84 So. 677 (Fla. 1920) (the neglect did not "cause" the death, despite the fact that it may have accelerated it); State v. Chenoweth, 71 N.E. 197 (Ind. 1904) (father acquitted); State v. Sandford, 59 A. 597 (Me. 1905) (religious leader's conviction reversed; jury instructions required the jury to rule according to its belief in the efficacy of prayer); State v. Beach, 329 S.W.2d 712 (Mo. 1959) (reversal of mother's conviction due to insufficient evidence suggests that a very clear-cut case would be necessary to sustain conviction); State v. Watson, 71 A. 1113 (N.J. 1909) (both parents' manslaughter convictions reversed because the jury did not have the opportunity to decide whether the negligence was "willful"); Beck v. State, 233 P. 495 (Okla. Crim. Ct. App. 1925) (homicide not charged; father found guilty of a misdemeanor violation of the child neglect statute; the appellate court, while affirming the conviction, found that the sentence of the trial court, $50 fine and 6 months in jail, was too harsh, and modified it to a $50 fine only); Owens v. State, 116 P. 345 (Okla. Crim. Ct. App. 1911) (father's misdemeanor conviction for child neglect affirmed although opinion does not indicate whether or not the child died); State v. Barnes, 212 S.W. 100 (Tenn. 1919) (father's indictment on homicide charge upheld, but there is no record of the outcome of the trial).

An exhaustive search has failed to turn up a single appellate case upholding a parent or guardian's conviction on homicide charges, where religion was presented as a defense. Two cases widely quoted for the proposition that such a result is "the law" are Commonwealth v. Breth, 44 Pa. County Ct. 56 (1915), and Commonwealth v. Hoffman, 29 Pa. County Ct. 65 (1903). Both are Pennsylvania trial court opinions. Some commentators believe that these cases no longer reflect Pennsylvania law:

> "[W]hile a conviction of involuntary manslaughter may, under some circumstances be predicated upon death attributable to the failure to provide medical care, the character of the ailment, the good faith of the parent is of supreme importance. If the failure to provide medical care is the result of religious tenet or sincere belief

plight of parents who are caught between the law of the land and the firm belief that their way of healing is the right one and the one most beneficial to their children's welfare.[49] The stated policy of the law seems clear, however—the saving of a life, particularly the life of a child, takes precedence over religious beliefs.

In cases where the child's disease is not immediately fatal, the law gives the parents much greater freedom to follow their religious convictions, particularly since the alternative, declaring the child neglected and taking it out of the parents' care, is acceptable to most courts only in the most extreme circumstances.

The recent Pennsylvania case of *In re Green*[50] illustrates a modern court's decision when faced with the conflict between a parent's religious belief[51] and the state's interest in regulating public health and safety. Ricky Green was unable to stand or walk, and his situation could have been alleviated by surgery, but the operation was not, strictly speaking, necessary to save his life.[52] Ricky's mother could not, in conscience, consent to the blood transfusions necessary to make the surgery reasonably safe.[53]

Was Ricky neglected? The court held that he was not, because his life was not in danger.[54] The court discussed the cases which discriminate between the right to believe and the right to act on those beliefs,[55]

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in the inefficacy of the medical treatment there may be no criminal responsibility under the law."

Trescher & O'Neill, *supra* note 12, at 217, *quoting* Commonwealth v. Cornelius, No. 105, Apr. Sess. (Quar. Sess. Ct. 1956) (Reimel, J., oral opinion). If this statement reflects Pennsylvania law, it represents a departure from the traditional rule. It may, however, be consistent with the unstated policy, if not the letter, of previous law. In Commonwealth v. Sheridan, No. 26307 (Super. Ct., Barnstable County, Mass. Nov. 1967) (*see* L. WEINREB, CRIMINAL LAW 179-83 (1969)), a Christian Scientist was convicted of manslaughter in the death of her five-year-old daughter from complications of pneumonia. Mrs. Sheridan was placed on probation for 5 years, without imposition of sentence. If this is the typical disposition of this type of case, it is no wonder that they seldom seem to go up on appeal.

49. *See* 9 DEPAUL L. REV. 271 (1960) (suggesting that although religion is "no defense" to a criminal neglect charge, it is nonetheless the "best defense").

50. 292 A.2d 387 (Pa. 1972).

51. The mother was a Jehovah's Witness. She did not object to medical treatment per se, but refused to agree to blood transfusions, without which the doctors felt the needed surgery would be excessively dangerous. *Id.* at 388. Her situation is analogous to that of believers in faith healing in that, under the circumstances, the cure was in direct conflict with her beliefs. The major distinction here is that a believer in faith healing might not have presented the child to the doctor in the first place.

52. *Id.*

53. *Id.*

54. *Id.* at 392.

55. Braunfeld v. Brown, 366 U.S. 599 (1961); Cantwell v. Connecticut, 310 U.S. 296

and distinguished them, relying on recent Supreme Court cases defining the scope of the first amendment freedoms.[56] The court theorized that Ricky's condition, however painful to himself, was not a substantial threat to society.[57]

The *Green* holding is a departure from the rationale, if not the end result, of the earlier cases. The Supreme Court, in *Prince v. Massachusetts*,[58] while not directly concerned with a child's physical health, discussed at length the "accommodation" between freedom of religion and the exercise of state authority and concluded that "[t]he state's authority over children's activities is broader than over like actions of adults,"[59] since the future of society is seen to depend on the well-rounded growth of young people.[60] Both the majority and dissenting opinions in *Prince* use the criterion of danger to the individual child's welfare,[61] which seems to be rejected by the Pennsylvania court in *Green*.[62]

If the Supreme Court were to follow the *Green* rationale, which apparently allows for greater individual choice, it would probably make little practical difference, since *Green* makes it clear that if a life were immediately in danger, a court would be more likely to step in.[63]

Traditionally the parents have been allowed considerable discretion in the choice of remedy where the condition does not involve serious risk of life, particularly where the medical remedy is itself inherently dangerous.[64] However, the New York case of *In re Sampson*,[65] de-

(1939); Davis v. Beason, 133 U.S. 333 (1890); Reynolds v. United States, 98 U.S. 145 (1879).

56. Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

57. 292 A.2d at 389. The case was remanded, in part, to determine Ricky's wishes, since he was an "intelligent child of sufficient maturity," sixteen years of age, and the record on appeal did not indicate whether or not he belonged to, or believed in, the religion in question. *Cf.* Wisconsin v. Yoder, 406 U.S. 205, 241-49 (1972) (Douglas, J., dissenting in part).

58. 321 U.S. 158 (1944) (statute forbidding a minor from selling religious literature does not violate freedom of religion).

59. *Id.* at 165, 168.

60. *Id.* at 165.

61. *Id.* at 166-67; *id.* at 174-75 (dissent); *see* Note, *The Right to Die*, 18 U. FLA. L. REV. 591, 593 (1966).

62. 292 A.2d at 391-92.

63. *Id.*

64. *See In re* Seiferth, 127 N.E.2d 820, 822-25 (N.Y. 1955) (appointment of guardian to be reserved for "drastic situation"); *In re* Tuttendario, 21 Pa. Dist. 561 (Quar. Sess. Ct. 1912) (parents feared surgery might kill the child); *In re* Hudson, 126 P.2d 765, 777-78 (Wash. 1942) (amputation of a congenitally deformed arm; the child's life not immediately in danger); Annot., 30 A.L.R.2d 1138 (1953). *But see* People *ex rel.*

cided the same year as *Green*, held that the state has the authority to compel a dangerous procedure for only a partial cure, without the consent of either parent or child, the child's right to lead a normal life taking precedence over the mother's religious beliefs.[66] *Green* and *Sampson* appear to be in direct conflict, with the New York court allowing far less freedom of individual choice, at least where a child is involved. Thus, the *Sampson* decision is probably in line with the Supreme Court's reasoning in *Prince*,[67] but might not be upheld in light of the more recent cases of *Sherbert v. Verner*[68] and *Wisconsin v. Yoder*,[69]

Wallace v. Labrenz, 104 N.E.2d 769, 773 (Ill.), *cert. denied*, 344 U.S. 824 (1952) (failure to authorize transfusion held to be neglect, authorizing appointment of guardian); *accord*, State v. Perricone, 181 A.2d 751, 755 (N.J. 1962); Hoener v. Bertinato, 171 A.2d 140 (N.J. Juv. & Dom. Rel. Ct. 1961) (unborn child); Mitchell v. Davis, 205 S.W.2d 812, 819 (Tex. Civ. App. Ct. 1947).

65. 323 N.Y.S.2d 253 (App. Div. 1971), *aff'd sub nom.* Sampson v. Taylor, 278 N.E. 2d 918, 328 N.Y.S.2d 686 (1972). The mother objected only to the transfusion, not to the surgery thought necessary to enable the child to lead a normal life. The appellate court opinion, in affirming the order, stressed that the trial court had seen the boy (age 15) and taken his interests into account and that he was being declared "neglected" for this limited purpose only. *See* 77 DICKINSON L. REV. 693 (1973).

66. 323 N.Y.S.2d at 255; *see* 77 DICKINSON L. REV. 693 (1973) (discussing *Sampson* and *Green*).

67. 321 U.S. 158 (1944).

68. 374 U.S. 398 (1963). Mrs. Sherbert, a member of the Seventh-Day Adventist Church, was discharged by her employer because she followed the dictates of her religion by refusing to work on Saturday. She was denied unemployment compensation by the state of South Carolina on the ground that she would not "accept 'suitable work when offered.'" *Id.* at 401. The Supreme Court held that the state unemployment compensation act was unconstitutional as applied to her, since there was no "compelling state interest" which could justify such a "substantial infringement of appellant's First Amendment right." *Id.* at 406.

The *Sherbert* "compelling state interest" test does not rely on the action-belief dichotomy expressed in earlier cases such as Reynolds v. United States, 98 U.S. 145 (1879). See cases cited in note 33 *supra*. The test defined in *Sherbert* should make it more difficult for a state to infringe on religiously-motivated actions. This comment must be tempered with the notation that *Sherbert* did not directly raise issues of public health, safety or welfare, nor did it involve criminal activity.

69. 406 U.S. 205 (1972). The *Yoder* case represents the Supreme Court's application of the *Sherbert* "compelling state interest" test to a criminal case. Defendants were members of the Old Order Amish religion, which teaches avoidance of "worldly" influence. They were convicted of violating Wisconsin's compulsory school attendance law by refusing to send their children to school beyond the eighth grade. They sincerely believed that high school attendance would endanger the children's salvation. The Court held that, although the state did have a legitimate interest in enforcing school attendance, its interest must be balanced against the rights of the individual. The *Yoder* test makes it clear that the state must show either that it does not deny the free exercise of religion, or that there is a state interest of "sufficient magnitude to override the interest claiming protection" under the first amendment. *Id.* at 214. The state failed to carry its burden in the *Yoder* case. "[O]nly those interests of the highest order and

which allow for greater individual liberty where there is no substantial threat to society at large.[70] An example of "substantial threat" might well involve a child suffering from a highly contagious disease, and exceptions probably will continue to be made where immediate action, over parental objections, may actually save the child's life.

The United States Supreme Court has never specifically addressed this issue.[71] However, the *Yoder* case, while rejecting the older rationale that the state is free to regulate religiously-motivated actions, qualifies that statement by saying that such actions will remain subject to the states' "undoubted power to promote health, safety and general welfare."[72]

B. *The Case of the Adult Believer*

When an adult refuses medical treatment, the problem is somewhat different. The state does not profess to have as much authority over the behavior of adults as it does over that of children,[73] but the high value which American culture traditionally has placed on the individual human life may, under some circumstances, cause a court to intervene when it feels that an adult's life hangs in the balance.[74] As a general rule, a court will not order treatment of an apparently sane adult against his will.[75] In fact, it is difficult to find justification for judicial intervention in light of the established rule that a physician may incur tort liability for unauthorized treatment,[76] particularly in a non-emergency situation.[77] However, if the adult appears to be near death or *non*

those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Id.* at 215.

70. *See generally* 77 DICK. L. REV. 693 (1973).

71. Schneider, *supra* note 7, at 85.

72. 406 U.S. at 220, *citing* Prince v. Massachusetts, 321 U.S. 158 (1944), and Reynolds v. United States, 98 U.S. 145 (1879).

73. In Prince v. Massachusetts, 321 U.S. 158 (1944), the Court stated:

> 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.

Id. at 170.

74. The best examples are the blood transfusion cases, since they are the most likely to come to the courts' attention in time to make the choice. *E.g.*, Application of President & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964).

75. *See In re* Brooks' Estate, 205 N.E.2d 435 (Ill. 1965) (order vacated subsequent to transfusion; the patient lived); Erickson v. Dilgard, 252 N.Y.S.2d 705 (Sup. Ct. 1962) (the patient later died).

76. PROSSER, *supra* note 38, at 102.

77. *Unauthorized Rendition, supra* note 24, at 862. *See also* Kelly, *The Physician, the Patient, and Consent*, 8 KAN. L. REV. 405 (1960).

compos mentis,[78] a court might "imply" consent despite the patient's expressed denial of consent, refusing to accept evidence that the patient, on religious grounds, would not have consented.[79] In fact, the much-discussed "right to die"[80] seems not to exist under current law, except in the most limited of circumstances.[81] It certainly seems to be the case that once a person, adult or child, is under a doctor's care, the courts will be most reluctant to allow him to "demand mistreatment."[82]

What of the true believer who does not submit himself to medical care at all? If there were a consistent overriding social interest in favor of keeping people alive, one would expect to find legal sanctions for those faith healers who counsel others to refrain from medical treatment.[83] These tools do not exist, however, and in fact the policy of the law seems to be to the contrary. The Supreme Court has said that an adult is free to be a "martyr" if he so chooses.[84] Nevertheless, when

78. Application of President & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964) (to refuse to act, only to find later that the law required action, was a risk the court was unwilling to take); Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 201 A.2d 537 (N.J.), *cert. denied*, 377 U.S. 985 (1964) (pregnant woman; blood necessary to save both mother and child); Collins v. Davis, 254 N.Y.S.2d 666 (Sup. Ct. 1964) (patient comatose; doctors considered his wife's reason for refusal "medically unsound").

79. Application of President & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964). *But see* Winters v. Miller, 446 F.2d 65, 68-70 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971) ("a finding of 'mental illness' . . . does not cause even a presumption that the patient is 'incompetent' or unable adequately to manage his own affairs," distinguishing *Georgetown* on the basis that "extreme circumstances" were not present).

80. *See* Note, *The Dying Patient: A Qualified Right to Refuse Medical Treatment*, 7 J. FAMILY L. 644 (1968); *Unauthorized Rendition*, *supra* note 24; Comment, *The Right to Die*, 9 UTAH L. REV. 161 (1964) (discussing the possibility that a court could, on the proper occasion, simply wait until the patient is near death, declare him mentally incompetent, and order treatment without authorization).

81. Erickson v. Dilgard, 252 N.Y.S.2d 705, 706 (Sup. Ct. 1962) (uncertainties of medical prognostication allow the patient to make the ultimate decision to accept or reject blood).

82. United States v. George, 239 F. Supp. 752, 754 (D. Conn. 1965); *cf.* Application of President & Directors of Georgetown College, Inc., 331 F.2d 1000, 1008 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964) ("if . . . a parent has no power to forbid the saving of his child's life, *a fortiori* the husband of the patient here had no right to order the doctors to treat his wife in a way so that she would die").

83. An analogy is sometimes made to old laws against suicide. *Cf. Unauthorized Rendition*, *supra* note 24, at 869-72.

84. Prince v. Massachusetts, 321 U.S. 158, 170 (1944). Cawley, *supra* note 6, at 69, mentions two cases, both apparently widely-reported in the newspapers and magazines at the time (1952), in which adults were allowed to die, in accordance with their religious beliefs. Since the policy of the law is not to interfere, there are no prosecutions and hence no record of the frequency of this type of event.

an adult engages in an activity which the state feels empowered to regulate on the grounds of public health or safety, the individual's freedom to practice in accordance with his belief may be curtailed.[85]

Therefore, despite an apparent change in the policy of the law as reflected by *Sherbert* and *Yoder*, the actual working of the law in regard to believers is likely to remain the same. The health and safety of the community and child, and of adults in limited circumstances, are likely to remain "compelling state interests."[86]

III. THE FAITH HEALERS

A. What is a "Faith Healer"?

A strict definition of "faith healer" would include only those who attempt to heal by faith and prayer alone and who assist or counsel others in faith healing methods.[87] However, the various religions differ in their approaches to healing. The so-called Pentecostal sects[88] have

85. The "snake-handling" cases illustrate the willingness of the state to step in when it feels that a real threat to public safety exists. Certain sects of the so-called "Holiness Churches," Christian fundamentalists, believe that they are commanded by Jesus' words (*Mark* 16:17-18) to handle poisonous snakes. They believe that, as a form of evangelism, they must perform the ritual in public, to strengthen the faith of others. *See* Harden v. State, 216 S.W.2d 708, 709 (Tenn. 1948). Snake handling is a central tenet of their religion. They believe that, if their faith is strong enough, they will not be bitten, or, if they are, they will suffer no ill-effects. They also believe in faith healing. The snakes do present a real danger to the handlers, and also, at times, to the audience. *See* Hill v. State, 88 So. 2d 880 (Ala. Ct. App.), *cert. denied*, 88 So. 2d 887 (Ala. 1956). Between 1940 and 1955, when the movement was at its height, at least sixteen persons are known to have died from the effects of snake bites received at snake-handling meetings. The founder of the cult died of a rattlesnake bite in 1955. The cult still exists. W. LABARRE, THE GHOST DANCE 625-28 (Delta ed. 1972).

A number of states enacted laws forbidding the handling of snakes. The Tennessee statute is typical. It provides, in relevant part, that:

> It shall be unlawful for any person, or persons, to display, exhibit, handle, or use any poisonous or dangerous snake or reptile in such a manner as to endanger the life or health of any person.

TENN. CODE ANN. § 39-2208 (1955). These laws were clearly aimed at the snake cultists and were immediately challenged. The Tennessee statute passed the test of constitutionality in Harden v. State, 216 S.W.2d 708 (Tenn. 1956). Substantially similar laws were upheld in Alabama (Hill v. State, 88 So. 2d 880 (Ala. Ct. App.), *cert. denied*, 88 So. 2d 887 (Ala. 1956)) and North Carolina (State v. Massey, 51 S.E.2d 179 (N.C.), *appeal dismissed sub. nom.* Bunn v. North Carolina, 336 U.S. 942 (1949)). A Kentucky statute, which forbade handling of snakes at religious gatherings only and which was not limited to poisonous or dangerous reptiles, was upheld in Lawson v. Commonwealth, 164 S.W.2d 972 (Ky. Ct. App. 1942).

86. Wisconsin v. Yoder, 406 U.S. 205, 231-32 (1972) (dictum).

87. *See* note 4 *supra*.

88. *See generally* Pattison, *supra* note 4; Siegel, *supra* note 4.

some members who actively seek and encourage "divine intervention," but they do not ordinarily perform acts that are thought to "heal" a sick person. In this sense, there are no "healers"; the cure is thought to come directly from God. The term "healer"[89] should properly be reserved for a person who performs some act, or purports to have some special power, to attract divine attention.

A "healing" in the Pentecostal sense does not necessarily result in a change in symptomatology, either outwardly or in the patient's perception. In other words, the patient's belief in the reality of the "cure" is not affected by the fact that he may feel no immediate remission of symptoms, as he may believe that they will go away gradually. The results of at least one study indicate that a believer would be likely to try faith healing first and would consult a doctor only if faith did not produce an adequate cure.[90] Such situations may lead to a potentially lethal mistake of fact as to when medical attention is required.

An adult has considerable freedom to believe as he wishes and to act on those beliefs, so long as he is not endangering others[91] or breaking a law. However, if the faith healer counsels a believer in the breaking of any law, or violates a law himself, he may be subject to liability.[92] It may be difficult to determine if and when a law has been violated, since much may depend on the good faith of the parties.[93]

The crucial question is to what extent a court should be able to interfere with an adult's freedom to believe, even if he chooses to believe in what may seem to others to be a fraudulent scheme. Where children are involved the problem is less difficult,[94] especially since parents, when a child's life is involved, may be especially susceptible to persuasion by one who promises a "miraculous" cure—whether he be a "quack"[95] or a genuine believer in the efficacy of faith treatment.

Our hypothetical case[96] did not reveal the intentions of the faith healer, and money was not mentioned. These factors make a difference in several circumstances. If his intent is to defraud, the "healer"

89. For example, "spiritualists" who perform rituals to invoke spirit help. *See generally* Lubchansky, Egri & Stokes, *Puerto Rican Spiritualists View Mental Illness: The Faith Healer as a Paraprofessional*, 127 AM. J. PSYCHIATRY, Sept., 1970, at 312.

90. Siegel, *supra* note 4, at 89-103.

91. *See* Prince v. Massachusetts, 321 U.S. 158, 170 (1944) (*see* note 73 *supra*).

92. *See* Cawley, *supra* note 6.

93. United States v. Ballard, 322 U.S. 78 (1944).

94. *See* notes 39-69 *supra* and accompanying text.

95. *See* Note, *Quackery in California*, 11 STAN. L. REV. 265, 266 (1959) (defining "quack" as a medical fraud and discussing the problem).

96. See note 37 *supra* and accompanying text.

is clearly liable whether the "patient" is an adult or a child.[97] If the "healer" has done anything to resemble "practicing medicine," he may be liable for violation of the medical licensing statutes.[98] If he has counseled a parent to disobey the statute imposing a duty to provide medical care to a child, he may be subject to criminal liability as an accessory to the crime regardless of his intent.[99]

B. Liability Under the Licensing Statutes

California Business and Professions Code sections 2135-2148[100] provide for the licensing of practitioners of the "healing arts."[101] "Practicing medicine" includes holding oneself out as a medical professional,[102] whether or not one actually claims to be a physician.[103] Compensation is not a necessary element of practicing,[104] but ordinarily, giving simple gratuitous aid or advice would not be considered "practicing medi-

97. *See, e.g.*, People v. Phillips, 64 Cal. 2d 574, 414 P.2d 353, 51 Cal. Rptr. 225 (1966); note 130 *infra*.

98. *See* notes 101-48 *infra* and accompanying text.

99. Although the parents may be prosecuted, the faith healer appears to be free from liability of any kind in this situation. Cawley, *supra* note 6, at 70-74. In Canada, however, one who counsels his followers to rely on prayer and to deny medical aid to children, may be liable as an accessory before the fact (or possibly a principal). *Id.*, *citing* Regina v. Beer, 32 Can. L.J. 416 (1895) (acquitted); Rex v. Brooks, [1902] 9 B.C. 13 (convicted of aiding and abetting); Rex v. Elder, [1925] 35 Man. 161 (conviction reversed on other grounds); see CAL. PENAL CODE § 31 (West 1972) (providing that one who counsels the commission of crime by fraud is a principal). Cawley recommends such a position for United States law. Cawley, *supra* note 6, at 74. It is more difficult to be sympathetic to Cawley's position where adults are concerned. One would expect that a person who honestly believes that his method of healing is the most efficacious one would recommend it to adults and children alike, and, therefore, society would hesitate, on first amendment grounds, to interfere with this belief. *See* Wright, Book Review, 38 MINN. L. REV. 87, 88 (1953) (even more "irresponsible" than the parents' belief in faith healing is the court's interference with that belief).

100. CAL. BUS. & PROF. CODE ANN. § 2135 *et seq.* (West 1974).

101. So called "drugless practitioners" were once licensed in California. *See, e.g.*, ch. 354, § 10, [1913] Cal. Stats. 722, 728 (*repealed* ch. 233, § 3, [1949] Cal. Stat. 484.) Today, persons holding themselves out as "drugless practitioners" or "naturopaths" (drugless healers who use herbal medicinals) may not be licensed under existing law and may not practice without a license. That is, in order to practice they must be licensed either as physicians and surgeons or as chiropractors. Naturopathy has been defined as the use of "light, air, water, clay, heat, rest, diet, herbs, electricity, massage," etc. in curing. Oosterveen v. Board of Medical Examiners, 112 Cal. App. 2d 201, 205 n.1, 246 P.2d 136, 139 n.1 (1952).

102. Newhouse v. Board of Osteopathic Examiners, 159 Cal. App. 2d 728, 733, 324 P.2d 687, 691 (1958); People v. T. Wah Hing, 79 Cal. App. 286, 287-89, 249 P. 229, 233-35 (1926).

103. People v. Lucas, 198 N.Y.S. 846, 847-48 (Sup. Ct. 1923).

104. People v. Albrexstondare, 71 Cal. App. 339, 348-49, 235 P. 87, 90 (1925).

cine."[105] A person found to have been practicing medicine illegally may be liable for homicide if the "patient" dies.[106]

Diagnosis and treatment of disease without the proper license may be either a misdemeanor[107] or a felony[108] in California. However, the Code provides that "[n]othing in this chapter shall be construed so as to . . . regulate, prohibit or apply to any kind of treatment by prayer, nor interfere in any way with the practice of religion."[109] This provision is sometimes referred to as an "exemption" from the licensing statute;[110] however, it is apparent from the language of the statute that it was intended, not as an "exemption," but as a legislative expression that healing by prayer is not to be construed as coming within the scope of the definition of "medicine."[111] Good faith belief in the treatment is an essential element; the use of prayer may not be relied on as a "mere subterfuge" to validate otherwise unlawful activities.[112]

The California licensing provision is typical of a modern statutory approach to regulation of the practice of medicine.[113] It provides a clear indication that the true "faith healer" is not to be considered as engaging in medical practice. While there is some old case law in other jurisdictions holding that faith healers fall within the scope of the statutes,[114] this does not reflect the current legislative trend, which grants a broader

105. *Ex parte* Greenhall, 153 Cal. 767, 96 P. 804 (1908). *See generally* Rubenstein, *Criminal Aspects of Faith Healing*, 224 N. ENG. J. MED. 293 (1941) (for a similar definition of "practicing medicine").

106. People v. Nunn, 65 Cal. App. 2d 188, 194-95, 150 P.2d 476, 480 (1944). A licensed chiropractor, practicing surgery outside the scope of his license but under the supposed direction of a licensed osteopath, was convicted of conspiracy to violate the licensing statute and of manslaughter when two patients died.

107. CAL. BUS. & PROF. CODE ANN. § 2141 (West 1974).

108. *Id.* § 2141.5. This provision, enacted in 1967, covers willful practice without a license which endangers life or health. There are no reported cases construing section 2141.5, but it could be used in a variety of situations.

109. *Id.* § 2146.

110. People v. Jordan, 172 Cal. 391, 398, 156 P. 451, 454 (1916). *See also* Trescher & O'Neill, *supra* note 12, at 216.

111. People v. Jordan, 172 Cal. 391, 400, 156 P. 451, 453 (1916); *Ex parte* Bohannon, 14 Cal. App. 321, 322, 111 P. 1039 (1910). The statute does have several "exemptions," clearly labeled as such. CAL. BUS. & PROF. CODE ANN. § 2144 (West 1974) (emergency care); *id.* § 2145 (out-of-state practitioners as consultants); *id.* § 2145.1 (acupuncture or traditional Chinese medicine administered under supervision of licensed physician); *id.* § 2147 (medical students).

112. People v. Cosper, 76 Cal. App. 597, 600, 245 P. 466, 468 (1926). *See also* People v. Hickey, 283 N.Y.S. 968, 970, 972-73 (Ct. Spec. Sess. 1935) (defendant's "church" had a membership of twelve, including himself and his family; whether the healing was within the scope of religion was a question of fact for the jury).

113. *See* Annot., 93 A.L.R.2d 129 (1964).

114. *See, e.g.*, State v. Buswell, 58 N.W. 728 (Neb. 1894); State v. Marble, 73 N.E.

scope to the exercise of religious beliefs.[115]

Some states take a middle ground, construing all purported "healing" as coming within the statute, but granting an "exemption" for the Christian Science Church.[116] The constitutionality of these statutes may be subject to an equal protection attack as a similar exemption is not granted to other religions.[117] The statute may be additionally suspect given the generally broad scope now granted the free exercise clause,[118] as well as the prohibition of the establishment clause.[119]

The "practice of medicine" is illegal when done or attempted by one who is not legally licensed.[120] It is clear that the statutory prohibition includes holding oneself out as a healing professional or the equivalent, making a business of diagnosing and prescribing remedies.[121] It is

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1063 (Ohio 1905). Both *Marble* and *Buswell* involved Christian Science practitioners. Neither case is the law in this respect in its jurisdiction today. *See* NEB. REV. STAT. § 71-1,102 (1971); OHIO REV. CODE ANN. §§ 4731, 4731.34 (Anderson 1954).

115. *See* text accompanying note 113 *supra.*

116. *See* State v. Marble, 73 N.E. 1063 (Ohio 1905). *See also* John, *Recognition of Christian Science Treatment,* 1963 INS. L.J. 18 [hereinafter cited as John].

117. In Craig v. State, 155 A.2d 684 (Md. Ct. App. 1959), defendants, believers in a faith healing sect, claimed that they were denied equal protection under the fourteenth amendment by a statute which purported to "exempt" only Christian Scientists from the medical practice laws. *Id.* at 691. The statute provides that:

> Nothing in this subtitle [wherein practitioners of medicine and surgery are prohibited from treating human ailments without a license] . . . shall prevent any Christian Science Practitioner duly registered in the Christian Science Journal . . . from treating human ills in accordance with the tenets of Christian Science or from making an adequate charge for services performed.

Ch. 185, § 1, [1947] Md. Laws (as amended MD. CODE ANN. art. 43, § 136A (1957)). The court concluded, however, that the defendants were "not prosecuted because they prayed, but for their alleged negligent failure to provide medical care." 155 A.2d at 691. Christian Science is permitted, but is not made the "equivalent" of medical care. Christian Science parents could also be prosecuted for failure to provide their children with proper care. *Id.*

The court did not decide the constitutionality of singling out one religious sect for special statutory recognition. In fact, constitutionality may not be an issue under this particular statute. The wording suggests that it may be read to merely define a (non-exclusive) class which is not to be included with medical practitioners, and is not a legally operative "exemption."

118. Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

119. Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

120. CAL. BUS. & PROF. CODE ANN. §§ 2141, 2141.5 (West 1974); *see* Oosterveen v. Board of Medical Examiners, 112 Cal. App. 2d 201, 246 P.2d 136 (1952); People v. Nunn, 65 Cal. App. 2d 188, 150 P.2d 476 (1944); People v. T. Wah Hing, 79 Cal. App. 286, 249 P. 229 (1926).

121. People v. Vermillion, 30 Cal. App. 417, 418, 158 P. 504, 504 (1916) (pharmacist recommending vitamins held "prescribing"). *See also* State v. Karsunky, 84 P.2d 390, 393 (Wash. 1938) (for a definition of "practicing medicine").

equally clear that a true "faith healer" who does not touch the patient, prescribes no drugs or home remedies, and confines his activities strictly to prayer is not included.[122] The line is not so easily drawn, however, when a person not only claims to heal by "faith" but also performs some functions normally attributed to medical personnel.

The California Supreme Court, in *People v. Jordan*,[123] upheld the then-equivalent of the present licensing statutes,[124] including the provision placing treatment by prayer outside the scope of the licensing sections. The court held that the licensing law was intended to protect the public from the "dangers and evil" of treatment by one without adequate knowledge of his craft and that the exception for treatment by prayer alone is a rational one, grounded in the fact that the effectiveness of prayer is entirely independent of the knowledge of anatomy.[125] The court also stated that diagnosis is part of medical practice, not part of prayer treatment.[126] Thus, those attempting a medical diagnosis, as was Jordan, are "practicing medicine" within the meaning of the statute. The court reasoned that those who go to a practitioner who heals by prayer alone are actually relying on the power of God for a cure, and not the knowledge and skills of the "healer" as such.[127] However, those who hold themselves out as having special scientific knowledge, outside the realm of ordinary experience, must be subject to some regulation for the public's protection.[128]

The necessity for such regulation is revealed by *People v. Phillips*,[129]

122. People v. Jordan, 172 Cal. 391, 396-400, 156 P. 451, 453-54 (1916); CAL. BUS. & PROF. CODE ANN. § 2146 (West 1974).

123. 172 Cal. 391, 156 P. 451 (1916).

124. Ch. 354, § 22, [1913] Cal. Stat. 722, 736 (codified as amended at CAL. BUS. & PROF. CODE ANN. § 2146 (West 1974)).

125. 172 Cal. at 396, 156 P. at 453. The court stated:

> The scripture abounds with instances which, if accepted, tend to show that prayer in the treatment of disease was deemed efficacious and helpful. . . . To assume that treatment by prayer is less efficacious or more dangerous or harmful to the subject of the prayer by reason of the fact that the supplicant has failed to devote 260 hours to manipulative and mechanical therapy, or has neglected to study elementary bacteriology for a period of 60 hours, does violence to all legal or religious teaching.

Id. at 398, 156 P. at 454.

126. *Id.* at 398-400, 156 P. at 454.

127. *See, e.g.*, United States v. Ballard, 322 U.S. 78 (1944); text accompanying note 1 *supra*.

128. 172 Cal. at 400, 156 P. at 454-55; *see* State v. Karsunky, 84 P.2d 390, 394 (Wash. 1938). When a person undertakes to treat a disease, he is "bound to know the nature of the remedies" he prescribes. Thus, a person may be criminally negligent and guilty of manslaughter if he prescribes a scientifically incorrect method of treatment, regardless of whether or not he is licensed. *Id.* at 395; *see* Hampton v. State, 39 So. 421 (Fla. 1905).

129. 64 Cal. 2d 574, 414 P.2d 353, 51 Cal. Rptr. 225 (1966).

a relatively recent California Supreme Court case dealing with a "quack"[130] who purported to be able to cure cancer without surgery. The defendant was convicted of murder even though the victim (an eight-year-old girl) was no longer under his "care" when she died. Her parents subsequently sought to cure her with a Mexican herb and had visited a Christian Science practitioner.[131] Phillips had started the chain of events which resulted in the girl's being removed from medical care, and the supreme court, while reversing the conviction on other grounds,[132] agreed with the lower court's conclusion that the jury could properly have found that his conduct had been the proximate cause of death,[133] adding that he would have been unable to defend against a properly presented charge of involuntary manslaughter.[134]

In *People v. Vogelgesang*,[135] a leading case in this area of the law, the defendant was convicted of illegal practice of medicine after his "patient" died of heart disease, but homicide apparently was not charged.[136] He defended on religious grounds, claiming that he was a member of, and recognized healer in, a "spiritualist church," of which "spiritual healing" was allegedly a tenet.[137] Justice Cardozo, in delivering the opinion of the New York Court of Appeals, stated that "[i]f that is all he has done, he has acted within his rights. We think he has done more."[138] Here, "faith," combined with the prescription

130. The subject of "quackery" in general is beyond the scope of this Comment as it usually involves intent to defraud. *See* Comment, *Quackery in California,* 11 STAN. L. REV. 265 (1959).

131. There is no indication of any attempt to prosecute these healers, or to charge the parents with neglect.

132. 64 Cal. 2d at 582, 414 P.2d at 360, 51 Cal. Rptr. at 231 (the jury had been erroneously instructed on the "felony-murder rule").

133. *Id.* at 579, 414 P.2d at 358, 51 Cal. Rptr. at 230.

134. *Id.* at 585-86 n.10, 414 P.2d at 362 n.10, 51 Cal. Rptr. at 234 n.10. Phillips was convicted under a felony-murder instruction, the felony being grand theft. The supreme court held this instruction should not have been given, since theft is not an "inherently dangerous" felony and since the instruction relieved the jury of the responsibility of finding one of the elements necessary to murder (*i.e.*, malice). *Id.* at 584, 414 P.2d at 361, 51 Cal. Rptr. at 233.

Phillips was decided prior to the enactment in 1967 of section 2141.5 of the Business and Professions Code (CAL. BUS. & PROF. CODE ANN. § 2141.5 (West 1974)), which makes the unlicensed practice of medicine a possible felony when done willfully and at the risk of great bodily harm, illness, or death. This may well be an "inherently dangerous felony" within the meaning of the rule, making the violator subject to second-degree murder charges.

135. 116 N.E. 977 (N.Y. 1917).

136. *Id.* at 978.

137. *Id.*

138. *Id.* The court no doubt took into account the fact that the patient's wife claimed never to have heard "spiritualism" mentioned until after his death. *Id.* at 977.

of patent medicines (patented by Vogelgesang himself), was held sufficient to support the charge of illegal practice of medicine.[139] Justice Cardozo pointed out that "[t]he law, in its protection of believers, has other cures in mind"[140] and that Vogelgesang was attempting to compete with physicians on their own ground, without sufficient training.[141] The faith treatment must be strictly spiritual to qualify as legal.[142]

It thus appears that a self-styled "healer" who does any act within the meaning of the term "practicing medicine" may be liable under the statute and may be found guilty of homicide, most likely involuntary manslaughter, if the patient dies.[143] His motive is irrelevant. Suppose, as in the case of the diabetic child, that the healer's recommendations and behavior are purely "spiritual," with the exception that he recommends the patient stop taking medication.[144] The negative command could be judicially interpreted as a kind of prescription, because the healer is directing a course of action which could lead to serious results and because he holds himself out as having some expertise on which the patient may rely.[145] It is at this juncture that "intent" and "good faith" may become crucial.

If the physical actions of the healer are unclear and he has not actually "prescribed" anything in the positive sense, he may be able to defend unlawful practice of medicine or manslaughter charges on religious grounds. For example, if the tenets of his religion dictate that no medicine whatsoever be put into the body and if he tells this to his followers, the court may not inquire into the truth of these beliefs, although the good faith in which the beliefs are held may be an issue.[146] It should be left to the followers to accept or reject the beliefs, subject to the duty of parents to provide medical attention for minor children.

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139. *Id.* at 978.

140. *Id.*

141. *Id.*

142. *Id.*

143. Hampton v. State, 39 So. 421, 424 (Fla. 1905); State v. Karsunky, 84 P.2d 390, 394-95 (Wash. 1938); *see* note 134 *supra.*

144. It was not clear from the newspaper reports whether any such recommendations were made in the real-life case. Two cases, People v. Vogelgesang, 116 N.E. 977 (N.Y. 1917), and State v. Karsunky, 84 P.2d 390 (Wash. 1938), dealt with patients who died of pre-existing disease not properly treated, but in both cases the "healer" replaced the needed medication with nostrums of his own.

145. *See* People v. Jordan, 172 Cal. 391, 156 P. 451 (1916); People v. Vogelgesang, 116 N.E. 977 (N.Y. 1917). It is possible that a court would interpret this even more strictly where the life of a young child is involved, since the child could not be expected to have made a rational decision to rely on the "faith healer" as opposed to another cure.

146. United States v. Ballard, 322 U.S. 78, 86 (1944).

This, in fact, seems to be the basis on which many lower court decisions are reached—the parents may be liable for manslaughter and the faith healer, whom they believed, is free from liability.[147]

If and when a healer actually violates a licensing statute, motive may be an issue. The healer might do something which a court could construe as diagnosing or prescribing, such as recommending that the patient stop taking a prescribed medication. If he does this "willfully, under circumstances or conditions which cause or create a risk of great bodily harm, serious mental or physical illness, or death,"[148] section 2141.5 of the California Business and Professions Code would apply, making the act a felony. If the patient dies as a result of a faith-cure attempted under these circumstances, the statute could lay the foundation for a felony-murder charge.

A healer, even one who takes an active role, apparently has no legal duty comparable to the physician's duty to warn of known risks. The faith healer is not supposed to possess any particular degree of skill or knowledge in diagnosis or treatment.

C. *Other Criminal Liability*

Other potential criminal liabilities would include assault, battery, and homicide, if the "faith healer" has injured, or caused injury, to another, regardless of the licensing requirement. May a "good faith" healer who has "done" nothing, in the sense that he has committed no act in violation of the medical practice statutes, still be criminally liable?

He probably could not be found guilty of any form of murder, since he would not harbor the requisite malice.[149] He could be convicted of involuntary manslaughter only if it could be proved that his act was one likely to cause death and that he acted without due caution.[150] To demonstrate this it must first be shown that there was an "act," not simply an omission to provide care. This is a most difficult burden for

147. *See* Commonwealth v. Breth, 44 Pa. County Ct. 56 (1915); Commonwealth v. Hoffman, 29 Pa. County Ct. 65 (1903); cases discussed in note 48 *supra.*

148. CAL. BUS. & PROF. CODE ANN. § 2141.5 (West 1974).

149. CAL. PENAL CODE §§ 187-88 (West 1972). *But see* State v. House, 489 P.2d 381 (Ore. 1971) (upholding first degree murder indictment against parents who were alleged to have willfully and deliberately failed to provide cure for sick child (religion not in issue)). The possible felony-murder instruction would not be applicable unless a felony was committed. A true "quack" who fraudulently claimed to have extraordinary healing powers might arguably be said to have malice (express or implied) without necessity for the felony-murder instruction. *But see* People v. Phillips, 64 Cal. 2d 574, 584, 414 P.2d 313, 361, 51 Cal. Rptr. 225, 233 (1966).

150. CAL. PENAL CODE § 192 (West 1972).

the prosecution to sustain even in cases of parents charged with neglect under a specific statute.[151] One would expect it to be even more difficult where the responsibility of the healer, if any, is not spelled out by the law.

In *State v. Sandford*,[152] the leader of a religious community was charged with manslaughter in the death of a boy of the community. The case does not focus on the extent of the leader's duty, but implies that, because the whole community was under the "supervision, dominion [and] control" of Sandford, he had the responsibility for its welfare and should have used great care in dictating treatment.[153] The Maine Supreme Court reversed Sandford's conviction, however, on the ground of an erroneous jury instruction which required the jury to decide whether it believed in the efficacy of the prayer treatments.[154] The indecisive result of *Sandford*, plus the absence of recent appellate court decisions relating to the liabilities of the faith healer himself, seems to reinforce the view that the risk of conviction is not great if the healer acts in good faith and does not do anything amounting to the practice of medicine.[155]

Criminal conviction for assault requires an attempt coupled with present ability to commit a "violent injury,"[156] and battery requires the

151. Of particular interest is Craig v. State, 155 A.2d 684, 688-89 (Md. Ct. App. 1959), where the court held that failure to perform a legal duty, coupled with "gross and wanton negligence," would be grounds for a manslaughter conviction; however, the gross negligence must be the proximate cause of death. Thus, if parents fail to call in a physician when the child is not apparently seriously ill, then negligence is "ordinary." Later, when the child is obviously dying, then negligence becomes "gross and wanton." At that point, however, it is too late to save the child, so failure to treat him is not the proximate cause of death. *E.g.*, Bradley v. State, 84 So. 677 (Fla. 1920); State v. Chenoweth, 71 N.E. 197 (Ind. 1904); State v. Beach, 329 S.W.2d 712 (Mo. 1959); State v. Watson, 71 A. 1113 (N.J. 1909). *Bradley, Chenoweth,* and *Watson* suggest, although uniformly stating that religion is "no defense," that a conviction based on a finding of sufficient negligence to override religious convictions would be almost impossible to sustain on appeal. The courts' attitude toward parents may also extend to the healers—perhaps more so, since their duties, if any, are not as clear.

152. 59 A. 597 (Me. 1905).

153. *Id.* at 598. The report does not indicate whether the boy's parents were charged, but does state that his mother also lived in the community. *Id.*

154. The jury had been instructed in such a way that, if they believed that prayer would cure the sick and if they found that Sandford's prayers had been insufficient, he could have been convicted. *Id.* at 600.

155. Cawley argues forcefully for the idea that the healer may be liable, either as an accessory before the fact to involuntary manslaughter, or possibly as a principal, and states that such is the law in Canada. Cawley, *supra* note 6, at 72-73; *see* Rex v. Brooks, [1902] 9 B.C. 13. However, he has found no such case reaching the higher courts in the United States.

156. CAL. PENAL CODE § 240 (West 1972). "Violent injury" within the meaning of

use of "force or violence."[157] It seems quite unlikely, considering the state's burden of proof in a criminal case, that such a conviction could be sustained against a faith healer as the "touching" or "laying on of hands" is consented to and rarely violent.[158]

Refusal to submit to necessary medical treatment has sometimes been compared to suicide,[159] although the two are conceptually distinct. First, suicide involves an act, or malfeasance, while the failure to submit oneself to treatment involves mere nonfeasance.[160] Second, the suicide actually desires to die, whereas the person refusing treatment on religious grounds has no overt wish to die, but feels bound to follow a religious belief demanding a course of action that could be fatal. In fact, he may believe that a "miracle" will prevent his death. Although the motive and rationale may differ, the consequences remain the same—the individual has made a choice which could result in his own death.

If the individual, particularly the sane adult, is to have the right to determine what is done with his own life, should he not have this right in all circumstances? Despite the fact that suicide is not illegal in many states,[161] there seems to be no absolute "right," constitutional or otherwise, to choose death.[162] The courts may feel at times that injury to society may result from such a choice and that society has an overriding concern in preventing the death.[163]

It has been suggested[164] that the real reason for society's condemna-

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the statute is not synonymous with "bodily harm," but includes any wrongful act committed by physical force, even though no physical injury results. Ware v. Dunn, 80 Cal. App. 2d 936, 942, 183 P.2d 128, 132 (1947); People v. James, 9 Cal. App. 2d 162, 163, 48 P.2d 1011, 1012 (1935). Physical force is an essential element.

157. CAL. PENAL CODE § 242 (West 1972). A battery is simply a consummated assault. People v. Glover, 257 Cal. App. 2d 502, 506, 65 Cal. Rptr. 219, 221 (1967). A criminal battery cannot occur without an assault. People v. McCaffrey, 118 Cal. App. 2d 611, 618, 258 P.2d 557, 562 (1953). Again, physical force is essential.

158. The major health danger in the faith cure is the lack of medication and care which a doctor might provide, which is not within the ambit of these statutes. Tort liability for assault and battery would appear even less likely. *See generally Unauthorized Rendition, supra* note 24.

159. *See* John F. Kennedy Memorial Hosp. v. Heston, 279 A.2d 670 (N.J. 1971); Cawley, *supra* note 6, at 68-70; *Unauthorized Rendition, supra* note 24, at 869-75.

160. *See* notes 142-45 *supra.*

161. *See* Cawley, *supra* note 6, at 68.

162. Comment, *The Right to Die,* 9 UTAH L. REV. 161 (1964); *Unauthorized Rendition, supra* note 24.

163. Note, *The Dying Patient: A Qualified Right to Refuse Medical Treatment,* 7 J. FAMILY L. 644 (1968).

164. *Unauthorized Rendition, supra* note 24, at 870.

tion of the voluntary acceptance of death is not the act itself, but its motivation, which is highly antisocial.[165] Whatever the motives of the "victim," society may seek to reinforce its values by forbidding acts which seem destructive of "public health" and "general welfare," particularly where injury to more than one person could result.[166]

Although suicide is not illegal in California,[167] deliberately aiding and abetting a person in committing suicide is a felony.[168] Since some courts do consider refusal of specified medical treatment as analogous to suicide,[169] the faith healer could be charged under this statute. Such a charge, however, would have all the proof problems of a homicide charge,[170] with the additional difficulty that the prosecution would have to show that the death was really suicide and that the healer acted deliberately.

D. The Use of Drugs or Devices in Healing

Some religious sects dictate the use of drugs or devices which are regulated by law.[171] While not "faith healing" in the strict sense used here,[172] attempted diagnosis and cure in accordance with these religious beliefs[173] presents problems similar to those of faith healers.

165. "Suicide shows contempt for society. It is rude. . . ." H. FEEDEN, SUICIDE 42 (1938), *quoted in Unauthorized Rendition, supra* note 24, at 870. The theory that society sees its highest values rejected by those who choose death could apply equally well, from society's standpoint, where medical treatment is refused. However, the rationale of the "victim" is quite different. The suicide in fact rejects what society has to offer, whereas one who dies when a faith cure fails is making a good faith effort to be cured.

166. One commentator suggests that the desire of society to preserve an individual's life is connected to the idea of each person's "social worth," hence all persons should be treated equally. *Unauthorized Rendition, supra* note 24, at 872. In fact, when a court orders medical treatment against a patient's will, as in the blood transfusion cases, it balances a number of factors, of which "social worth" does not seem to be included. Factors recognized by the courts include dependents who may directly suffer from the patient's death, the fact that part of the treatment was voluntary, the necessity of the procedure being ordered, the patient's apparent attitude and rationality, and the court's estimation of the importance of preserving life. United States v. George, 239 F. Supp. 752, 753 (D. Conn. 1965).

167. Tate v. Canonica, 180 Cal. App. 898, 903, 5 Cal. Rptr. 28, 33 (1960) (dictum).

168. CAL. PENAL CODE § 401 (West 1972).

169. *See, e.g.*, John F. Kennedy Memorial Hosp. v. Heston, 279 A.2d 670 (N.J. 1971) (a Jehovah's Witness/blood transfusion case). A more difficult problem would be posed if the dying person did not believe in the morality of medical treatment at all, but such a case rarely, if ever, comes to the attention of authorities until after the fact.

170. *See* notes 149-51 *supra* and accompanying text.

171. *E.g.*, The "Pure Food and Drug" laws, 21 U.S.C. § 301 *et seq.* (1970). California laws, similar to the federal, are found at CAL. HEALTH & SAFETY CODE ANN. § 26200 *et seq.* (West 1974).

172. *See* notes 6-9 *supra* and accompanying text.

173. The Scientology Church sometimes makes use of electronic devices for "diagnos-

In addition, some "quacks" use electronic devices to give the appearance of scientific validity to their "diagnoses."[174]

In general, devices which are alleged to have diagnostic value may be regulated, even though used in accordance with a religion.[175] Where there is no scientific basis for belief in the purported diagnostic or healing power of the device, it must display a warning to that effect.[176] This policy could possibly be expanded to require faith healers to warn followers of the possible health dangers and risks of criminal liability that may stem from failure to seek medical attention. Since there is a duty on the part of the user of such a device, the duty could be expanded to require the faith healer to warn of the lack of a scientific basis for his art.[177] It may be difficult to construct such a duty, however, because the healer is unlikely to take credit for the results, preferring to be considered a mere conduit for God.[178]

Ordinarily, the use of legally restricted drugs for non-medical purposes is not permitted, even under the claim that their use is mandated by religion.[179] However, in recent years a major exception to this rule has been made for the ceremonial use of peyote,[180] particularly by

tic" purposes and has been regulated. Church of Scientology v. Richardson, 437 F.2d 214 (9th Cir. 1971); Founding Church of Scientology v. United States, 409 F.2d 1146 (D.C. Cir. 1969); United States v. Article or Device . . . "Hubbard Electrometer," 333 F. Supp. 357 (D.D.C. 1971).

174. *See, e.g.*, Drown v. United States, 198 F.2d 999 (9th Cir. 1952), *cert. denied*, 344 U.S. 920 (1953); People v. Handzik, 102 N.E.2d 340 (Ill. 1951).

175. United States v. Article or Device . . . "Hubbard Electrometer," 333 F. Supp. 357, 362 (D.D.C. 1971); *see* 21 U.S.C. § 352(a) (1970).

176. United States v. Article or Device . . . "Hubbard Electrometer," 333 F. Supp. 357, 362 (D.D.C. 1971). This may not disturb a believer who does not require a scientific basis for religious belief. Science, in fact, might detract from the mystical qualities associated with the unexplained.

177. *See* note 4 *supra* and accompanying text.

178. *See, e.g.*, K. KUHLMAN, GOD CAN DO IT AGAIN 9 (1969).

179. Leary v. United States, 383 F.2d 851, 860 (5th Cir. 1967), *rev'd on other grounds*, 392 U.S. 903 (1968); State v. Big Sheep, 243 P. 1067, 1073 (Mont. 1926); State v. Bullard, 148 S.E.2d 565, 568-69 (N.C. 1966). The reported cases do not deal with the issue of the sincerity of the individual's belief. That is a question of fact, which may dispose of many drug cases conclusively at the trial level. *See Drug Religions, supra* note 19. Inquiry into the truth of the belief violates the first amendment. United States v. Ballard, 322 U.S. 78, 86 (1944); Leary v. United States, 383 F.2d 851, 861 (5th Cir. 1967), *rev'd on other grounds*, 392 U.S. 903 (1968).

180. State v. Whittingham, 504 P.2d 950, 952 (Ariz. Ct. App. 1973); People v. Woody, 61 Cal. 2d 716, 720-22, 394 P.2d 813, 816-18, 40 Cal. Rptr. 69, 72-74 (1964); *In re* Grady, 61 Cal. 2d 887, 888, 394 P.2d 728, 729, 39 Cal. Rptr. 912, 913 (1964). The states of Iowa and New Mexico, by statute, exempt sacramental use of peyote from their drug abuse laws. IOWA CODE § 204A.2(12) (1969) (applying only to the Native American Church); N.M. STAT. ANN. § 54-5-16 (1953) (any bona fide religious organization).

members of the well-established Native American Church.[181] The criteria used by the courts in a balancing test to determine the permissibility of the drug use include whether the use of the substance is central to the practice of the religion[182] and whether the substance is used in a manner not dangerous to public health, safety and morals.[183] This reasoning is likely to be followed and carried over to other freedom of religion cases as well.

IV. THE BELIEVERS' DEFENSE: PUBLIC ACCEPTANCE AND RELIGIOUS FREEDOM

The issue of "faith healing" occasionally comes up in other contexts, when life or death is not immediately at issue. Examples include filing an insurance claim,[184] or exemption from some government regulation, such as vaccination,[185] school classes in health education,[186] or other public health activity.[187] A brief examination of these cases

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Interestingly, the Indian nations themselves may prohibit the ritual use of drugs, and freedom of religion may not be allowed as a defense. *But see* 25 U.S.C. 1302 (1970) ("[n]o Indian tribe in exercising powers of self-government shall . . . make or enforce any law prohibiting the free exercise of religion"). The first amendment, as made applicable to the states through the fourteenth amendment, does not apply on the Indian reservations, whose tribal authority is said to be "higher" than that of the states. *See* Native American Church of North America v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959).

181. *See* note 200 *infra*. A "meeting" of the Native American Church lasts from sunset to sunrise and is characterized by prayer, singing, and ritual music. The central event is the use and ingestion of the peyote plant, which is considered a divine substance. "A bona fide ceremony cannot take place without the presence of peyote." State v. Whittingham, 504 P.2d 950, 951 (Ariz. Ct. App. 1973).

Two recent cases upholding the ritual use of peyote, State v. Whittingham, 504 P.2d 950 (Ariz. Ct. App. 1973), and People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964), discuss at length the conflict between the state's interest in preserving its citizens' health, safety and welfare, and the citizens' rights to the free exercise of religion. Both cases rejected the state's claim that peyote use should be prohibited as hazardous to the user's health. 504 P.2d at 952-53; 61 Cal. 2d at 722, 394 P.2d at 818, 40 Cal. Rptr. at 74. They also rejected the argument that the state's interest in the health and safety of its citizens and its interest in law enforcement are so "compelling" as to override the defendants' freedom to practice a central tenet of their religion. 504 P.2d at 953-54; 61 Cal. 2d at 727, 394 P.2d at 821, 40 Cal. Rptr. at 77.

182. People v. Woody, 61 Cal. 2d 716, 722, 394 P.2d 813, 818, 40 Cal. Rptr. 69, 74 (1964).

183. State v. Whittingham, 504 P.2d 950, 952 (Ariz. Ct. App. 1973); *see* Annot., 35 A.L.R.3d 939 (1970).

184. *E.g.*, Christiansen v. Hollings, 44 Cal. App. 2d 332, 112 P.2d 723 (1941); Lange v. Hoyt, 159 A. 575 (Conn. 1932).

185. *See* note 13 *supra*.

186. *See* Schneider, *supra* note 7, at 86-87.

187. *See, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (re-

serves to shed some light on the attitudes of the courts toward faith healing generally—attitudes that, today, are divided.

One study[188] discusses a number of these exemptions, some expressly for Christian Scientists in Pennsylvania, suggesting that such exemptions represent growing public acceptance of faith healing beliefs.[189] Included are statutory exemptions from required medical and dental examinations for school children,[190] exemption from the medical examination requirement for marriage licenses,[191] recognition of Christian Science by insurance companies,[192] and deductibility of Christian Science care from federal income tax.[193]

Insurance recovery may not be allowed where the patient relied on faith healing to the exclusion of medical treatment, if medical treatment is a condition of coverage, and it is shown the treatment would have been necessary and beneficial under the circumstances.[194] Insurance payments may, however, be allowed, particularly where negligence is not proven, and reimbursement for Christian Science practitioners, nurses and sanitariums may be allowed.[195] Some Christian Scientists have recovered on personal injury claims,[196] but in these cases the patients also received some medical attention and contributory negligence was not shown.[197]

A significant proportion of these insurance exemptions, tort recov-

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ligious exemption from flag salute); Hardwick v. Board of School Trustees, 54 Cal. App. 696, 205 P. 49 (1921) (religious exemption from dancing class). Although not involving faith healing, these cases are indicative of a policy of noninterference with religious beliefs.

188. Trescher & O'Neill, *supra* note 12.

189. *Id.* at 212-17.

190. *Id.* at 215; *see* PA. STAT. ANN. tit. 24, § 1419 (1962). The exemption does not apply in cases where abstinence would constitute a "menace" to other persons. California has no such requirements. *See* note 15 *supra.*

191. Trescher & O'Neill, *supra* note 12, at 216.

192. *Id.*

193. *Id.* The pay scale of Christian Science practitioners is apparently similar to that of medical doctors treating the same illness. *See* Schneider, *supra* note 7, at 81-82. The constitutionality of such provisions may be in doubt where the Christian Science religion alone qualifies for such an exemption. *See* John, *supra* note 116.

194. Rubenstein, *Claim Cases by Christian Scientists,* MEDICAL TRIAL TECHNIQUE Q. 31, 33 (1963), *citing* Taylor v. Westland Distribution Co., 12 Cal. Ind. Acc. Comm'n Dec. 118 (1925), and Ash v. Barker, 2 Cal. Ind. Acc. Comm'n Dec. 40 (1915). Note that these are both relatively old cases; a modern court might be more lenient.

195. John, *supra* note 116, at 20-21. Many insurance companies apparently recognize Christian Science treatment. *Id.* at 21.

196. Christiansen v. Hollings, 44 Cal. App. 2d 332, 112 P.2d 723 (1941); Lange v. Hoyt, 159 A. 575 (Conn. 1932); Adams v. Carlo, 101 S.W.2d 753 (Mo. Ct. App. 1937).

197. *See* cases cited in note 196 *supra.*

eries, and statutory exemptions from other requirements[198] deal specifically with Christian Science, a long-established faith practiced by a "large number of reasonable and intelligent people."[199] Such exemptions, when coupled with the peyote precedent of the relatively large and well-known Native American Church,[200] seem to indicate that there is strength in numbers. The government might not necessarily grant the small-time faith healer, or believer in some little-known sect, the same sort of recognition.

California law shows a consistent pattern of legislative recognition of healing by spiritual means. In addition to the provision of the Business and Professions Code,[201] all California code provisions which provide for medical examinations or treatment have specific provisions exempting those who believe in healing by prayer.[202] Although some of these

198. *See* OHIO REV. CODE ANN. § 4371.09 *et seq.* (Anderson 1954) (discussed in note 114 *supra*).

199. Christiansen v. Hollings, 44 Cal. App. 2d 332, 346, 112 P.2d 723, 730 (1941). Christian Science, "discovered" in 1866 by Mrs. Mary Baker Eddy, is now known and practiced throughout the world. The Church publishes "testimonies" of those who believe they have been healed by the Church's methods; some forty-five thousand were on file in 1966. CHRISTIAN SCIENCE PUBLISHING CO., A CENTURY OF CHRISTIAN SCIENCE HEALING ix (1966). Christian Science, like other forms of faith healing, does not require that a "cure" be manifested by spontaneous relief of the physical symptoms. *Id.* at 239. The Church maintains two sanitariums of its own and certifies other private institutions to care for the sick without medication. It also accredits Christian Science nurses, who must complete a three-year training course. *Id.* at 242. The official text setting forth Christian Science health beliefs is M.B. EDDY, SCIENCE AND HEALTH WITH KEY TO THE SCRIPTURES (1875).

200. State v. Whittingham, 504 P.2d 950 (Ariz. Ct. App. 1973); People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964). According to the court in *Woody*, estimates of membership in the Native American Church in 1964 ranged from 30,000 to 250,000, depending on the definition of membership. 61 Cal. 2d at 720, 394 P.2d at 817, 40 Cal. Rptr. at 73. The membership is probably greater today. The California Supreme Court, in *In re* Grady, 61 Cal. 2d 887, 888, 394 P.2d 728, 729, 39 Cal. Rptr. 912, 913 (1964), made clear that the California exemption will apply to all bona fide ritual use of peyote, regardless of specific church membership.

201. CAL. BUS. & PROF. CODE ANN. § 2146 (West 1974); *see* note 12 *supra* and accompanying text.

202. *See* note 13 *supra* and accompanying text. Business and Professions Code section 2863 makes it clear that treatment by prayer shall not be construed as practicing nursing without a license, and section 2884 exempts faith healing religions from the requirement of accreditation for nursing schools. CAL BUS. & PROF. CODE ANN. §§ 2863, 2884 (West 1974). Many other exemptions exist. *E.g.*, CAL. EDUC. CODE ANN. § 11708 (West 1969) (mandatory tuberculosis examinations for school district employees); *id.* § 11825 (visual accuity examination for school children); CAL. GOV'T CODE ANN. § 19261 (West 1963) (standards of health and safety for state employees); CAL. HEALTH & SAFETY CODE ANN. § 1709 (West 1974) (regulation of cancer treatment); *id.* § 3199 (required treatment of venereal disease); *id.* § 3286 (tuberculosis regulation); *id.* § 3384 (polio vaccine); *id.* § 3404 (measles vaccine); CAL. INS. CODE ANN. § 2709

provisions refer specifically to members of a "well-recognized" religious sect,[203] the proper test should be the good faith of the belief, not the popularity of the creed.[204] In keeping with the constitutional guarantees of freedom of religion, equal tolerance must be accorded all sects to practice their beliefs.

V. CONCLUSION

The belief in faith healing is not an isolated segment of the life of the believer, but is part of his total religious orientation and "life-style," although it may not necessarily exclude the use of modern medicine.[205] This belief, and the life-style that goes with it, certainly comes within the scope of the Supreme Court's definition, in *Wisconsin v. Yoder*,[206] of a religious interest worthy of protection under the first amendment.[207] There are instances, however, when this freedom must come directly into conflict with what has been, and no doubt will continue to be, considered a "compelling state interest," that of the health and safety of its citizens.

The older decisions, *Reynolds v. United States*[208] for example, defined the state's ability to regulate actions fairly broadly. Recent decisions, however, have begun to curtail the state's power to restrict religiously motivated actions.[209]

The right of an adult to believe as he wishes and to act on those beliefs, so long as others are not endangered, should be protected by the first amendment. Some cases stop short of allowing an individual

(West 1972) (medical examination for claiming disability benefits); CAL. WELF. & INST'NS CODE ANN. § 5006 (West 1972) (Lanterman-Petris-Short Act providing for civil commitment and treatment for mental illness); *id.* § 6300.1 (mentally disordered sex offender commitment); *id.* § 7104 (county psychiatric hospital treatment); *id.* § 12006 (no questions about religion may be asked in determining old age benefits); *id.* § 13506 (aid to needy disabled); *id.* § 14059 (Medical); *id.* § 16508 (Child Protective Services Act).

203. CAL. EDUC. CODE ANN. §§ 11708, 11825 (West 1969); CAL. HEALTH & SAFETY CODE ANN. §§ 3199, 3286 (West 1974); CAL. WELF. & INST'NS CODE ANN. §§ 6300.1, 7104, 16508 (West 1972).

204. *Cf.* United States v. Ballard, 322 U.S. 78 (1944).

205. Pattison, *supra* note 4, at 397 (study based on American "fundamentalist and pentecostal" sects in California).

206. 406 U.S. 205, 217 (1972).

207. *Id.* at 222.

208. 98 U.S. 145 (1879).

209. Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963); People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964). Justice Douglas, in his partially dissenting opinion in *Yoder*, predicts that *Reynolds* will be overruled on this point. 406 U.S. at 247.

to choose death, for any reason.[210] Indeed, many cases which define the scope of religious freedom state that the freedom would not permit human sacrifice or ritual suicide.[211] It is certainly arguable that a person should be free to die for his religious beliefs. Other cultures, including the predecessors of our own, would have some difficulty in comprehending the rationale which prevents it.[212] However, when a third person, particularly a child, is involved, the problem becomes quite different. Then the courts should be, and are, quite cautious.

The faith healer, so long as he confines his activities strictly to prayer, is not regulated. The "faith" is, and should be, unrestricted. The "healing," however, may be regulated as soon as it takes on any appearance of medical practice.

If a "healer" is involved, he is generally not subject to criminal liability, as long as he has not violated the medical practice laws. These laws were not intended to regulate religious beliefs, but to protect the public from the harm that can result from an uninformed choice of medical practitioners. Any counsel or advice in the guise of medical practice is strictly regulated and may now be prosecuted as a felony in California.

Cases such as the hypothetical presented, when they come to public attention, are matters of grave concern. Such a case is likely to be the subject of divided public opinion. On the one hand, the parents may be thought of as cruel or insensitive for allowing an innocent child to die, when the death is seen, by the majority of society, as wholly preventable. On the other hand, the parents themselves, out of genuine devotion to their child and their faith, acted in what they believed to be the child's best interest. The law draws the line short of allowing an innocent person to die (although the child's wishes are not generally taken into account, as he is not considered "responsible"[213]). If the child is dying, he may be treated without parental consent. The parents may be prosecuted for failure to provide medical care for the child, whether or not he dies.

The general judicial approach reflects conflict between the right to life and the freedom of religion guaranteed to all Americans by the Constitution. Although religion is not an excuse for violation of the

210. See cases cited in note 78 *supra.*

211. Sherbert v. Verner, 374 U.S. 398 (1963); Reynolds v. United States, 98 U.S. 145 (1879).

212. *See* note 2 *supra.*

213. *But cf.* Wisconsin v. Yoder, 406 U.S. 205, 241 (1972) (Douglas, J., dissenting in part).

law, the cases indicate a policy of judicial leniency where bona fide religious belief is the motive for an illegal act.[214]

There is a danger of allowing the emotional impact of the "faith healing" cases to obscure the issues, or to permit encroachment on constitutional rights. Perhaps the present policy of leniency is best. As one commentator has written:

> Those of us who belong to churches which are rich and respectable quite properly condemn the snake handlers, the floggers, the faith healers. But under a constitutional scheme which allows the state no religious favoritism, even these extremist groups must be as free to follow their conscience as the rest of us are.[215]

Whatever choices are made, however, both the policy and the letter of the law should be clear and clearly stated, so that those who believe in healing by prayer rather than medical treatment are aware of the potential liabilities they may incur.

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214. There are some exceptions, *e.g.*, the snake handling cases (see note 85 *supra*), where the law was clearly intended to attack a particular religious sect which not only was unpopular, but also was felt to be a genuine threat to public safety.

215. Wright, Book Review, 38 MINN. L. REV. 87, 89-90 (1953).