

1987

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Recommended Citation

(1987) ""Suffer the Little Children ...": Toward a Judicial Recognition of a Duty of Reasonable Care Owed Children by Religious Faith Healers," *Hofstra Law Review*: Vol. 16: Iss. 1, Article 7.

Available at: <http://scholarlycommons.law.hofstra.edu/hlr/vol16/iss1/7>

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NOTES

"SUFFER THE LITTLE CHILDREN . . .":¹ TOWARD A JUDICIAL RECOGNITION OF A DUTY OF REASONABLE CARE OWED CHILDREN BY RELIGIOUS FAITH HEALERS

An increasing number of religious sects,² including well recognized religions such as The First Church of Christ Scientist³ and Jehovah's Witnesses,⁴ continue to shun traditional medical care in favor of healing solely by prayer.⁵ Reports appear to indicate that sixty-three followers of one of these sects, The Faith Assembly, have perished since 1976, forty-three of whom were children.⁶

1. *Mark* 10:14 (King James).

2. Several churches that claim to cure illness solely by prayer have reportedly been involved in the tragic death of children for want of medical care. These churches include: The First Church of Christ Scientist; Jesus through Jon and Judy; Faith Temple Doctoral Church of Christ in God; Christ Assembly; Jehovah's Witnesses; Christ Miracle Healing Center; The Source; The Church of God of the Union Assembly; The Faith Tabernacle; and The Church of the First Born. For a discussion of the facts of these cases, see Brief for Appellant at 16, 28-30, *Brown v. Laitner*, No. 73903 (Mich. Ct. App. filed June 13, 1986).

3. See Swan, *The advantages of Christian Science healing*, 104 *CHRISTIAN SCI. J.* 569, 570 (1986). Christian Scientists believe that illness is a result of lack of faith. They believe that illness and injury can, and should be cured exclusively by prayer and reaffirmation of faith. As stated by the founder of the religion, Mary Baker Eddy, "[a] scientific mental method is more sanitary than the use of drugs, and such a mental method produces permanent health . . ." *Id.* at 570. Presently, there are 2,200 Christian Science churches in the United States. See Dobbin, *When a state takes aim at faith healing*, *U.S. NEWS & WORLD REP.*, Mar. 24, 1986, at 22.

4. See Sacks & Koppes, *Blood transfusion and Jehovah's Witnesses: Medical and legal issues in obstetrics and gynecology*, 154 *AM. J. OB. & GYN.* 483 (1986). There are 650,000 Jehovah's Witnesses in the United States. Their objection to traditional medical treatment is limited to a prohibition against blood transfusions. *Id.* at 485. See generally Hirsch & Phifer, *The Interface Of Medicine, Religion and the Law: Religious Objections to Medical Treatment*, 4 *MED. & L.* 121, 123 (1985) (analyzing the refusal of medical treatment for religious reasons).

5. See Hirsh & Phifer, *supra* note 4, at 123; Ostling, *Matters of Faith and Death*, *TIME*, Apr. 16, 1984, at 42.

6. Ostling, *supra* note 5, at 42 (describing the death of a one-year-old child of an adult member of the Faith Assembly, due to untreated first and second degree burns sustained when scalding tea spilled on her); see also *Faith Assembly faces suit in federal court*, *Fort Wayne News Sentinel*, Feb. 3, 1984, at 1, col. 1 (chronicling the case of *Oleson v. Freeman*, No. F-84-55 (N.D. Ind. filed February 3, 1984)), wherein a United States district judge denied defend-

Faith healers fall into a convenient crack in the law that enables them to engage in tortious conduct which is protected by the first amendment.⁷ In actions alleging church negligence,⁸ often the plain-

ant's motion for summary judgment on First Amendment grounds and inquired as to how the practice of religion is related to negligence and other injuries cited in the complaint); *Judge refuses to dismiss suit against sect*, Fort Wayne Journal-Gazette, Oct. 24, 1984, at 11, col. 1 (describing a judge's refusal to dismiss a complaint based on first amendment protection, since the practice of religion is not related to negligence or any of the other acts the complaint alleges).

7. See U.S. CONST. amend. I. The first amendment to the United States Constitution provides, in part: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . ." These two clauses are "cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." *Walz v. Tax Comm'n*, 397 U.S. 664, 668-69 (1970). This potential conflict necessitates a continual balancing of competing interests. There is no absolute method to complete separation between church and state. Indeed, the very existence of the religious clauses gives rise to an involvement of sorts. See U.S. COMMISSION ON CIVIL RIGHTS, *RELIGION IN THE CONSTITUTION: A DELICATE BALANCE* 18 (Sept. 1983).

8. In recent years, the tort of "clergy malpractice" has been the subject of much legal commentary. The typical clergy malpractice action alleges conduct such as improper pastoral counseling, intentional infliction of emotional distress, inadequate teaching or intentional interference with contractual relations. The plaintiffs sue as representatives of the deceased or injured child, or in the case of adults, plaintiffs are surviving family members. See, e.g., *Nally v. Grace Community Church*, 157 Cal. App. 3d 912, 204 Cal. Rptr. 303 (1984), *remanded*, No. 67200, slip op. (Super. Ct. May 16, 1985), *rev'd*, 194 Cal. App. 3d 1147, 240 Cal. Rptr. 215 (Ct. App. 1987). In a second examination of the issues in the protracted *Nally* litigation, the California Court of Appeals reversed the trial court's nonsuit of negligence and outrageous conduct allegations against a church and its counselors which arose out of a failure to aid in the prevention of a counselee's suicide. The court held that the first amendment does not immunize a church-affiliated counselor from liability for breach of the standard of care of a non-therapist counselor. The decision extends the recognized duty of psychotherapists toward their suicidal patients and is now broad enough to encompass non-therapist counselors regardless of whether or not they possess a religious orientation. The court held that a special relationship voluntarily undertaken by the counselor which is reinforced by the church's advertising its counselors as skilled in the treatment of emotional disorders, which leads to counselee dependence on his competence to treat emotional problems, gave rise to the duty to take precautions in the event of suicidal manifestations. The significance of this holding lies in the recognition that the duty of care imposed on one who undertakes treatment of emotionally disturbed individuals transcends the counselor's religious affiliation or lack thereof; the significance is *not* in the re-characterization of the obligations from "clergy malpractice" to "negligent failure to prevent suicide" and "intentional or reckless infliction of emotional injury causing suicide." See *Baumgartner v. First Church of Christ, Scientist*, 141 Ill. App. 3d 898, 490 N.E.2d 1319, *cert. denied*, 107 S. Ct. 317 (1986); *Zafrani v. First Church of Christ Scientist*, No. 822639 (Super. Ct. of Cal., San Francisco County, filed April 11, 1984) (wrongful death action brought by husband alleges that decedent relied on fraudulent misrepresentations made by defendants as to their ability to cure her high blood pressure). See also Esbeck, *Tort Claims Against Churches and Ecclesiastical Officers: The First Amendment Considerations*, 89 W. VA. L. REV. 1, 78-84 (1986); *infra* notes 11-15, 32 and accompanying text. See generally McMenam, *Clergy Malpractice*, CASE & COMMENT, 3-6 (Sept.-Oct. 1985) (attempting to place liability on church organizations regardless of the constitutional limitation of separation between church and state).

tiffs are unable to proceed with their litigation because of the constitutionally protected nature of church conduct under both the United States⁹ and state¹⁰ constitutions. Although the controversy would be justiciable if the defendants were private individuals, churches have been absolved from civil litigation by virtue of the doctrine of separation of church and state.¹¹

Generally, courts are well justified in adhering strictly to the doctrine of separation of church and state. They are concerned that adjudication of a civil lawsuit would subject the courts to a flood¹² of clergy malpractice lawsuits.¹³ Such lawsuits could also lead to a chilling effect on religious freedom, especially for smaller churches which could ill afford the costs of litigation.¹⁴ Accordingly, in litiga-

9. U.S. CONST. amend. I.

10. See, e.g., ILL. CONST. art. VI, § 5; MISS. CONST. art. 3, § 18; OR. CONST. art. I, § 3.

11. See, e.g., Baumgartner v. First Church of Christ, Scientist, 141 Ill. App. 3d 898, 906, 490 N.E.2d 1319, 1324, cert. denied, 107 S.Ct. 317 (1986) For a discussion of clergy malpractice and an analysis of *Nally*, see Note, *Intentional Infliction of Emotional Distress by Spiritual Counselors: Can Outrageous Conduct be "Free Exercise?"*, 84 MICH. L. REV. 1296 (1986); see also Esbeck, *supra* note 8, at 94-97 (citing several cases which outline the justiciability of the question of when a church can be held liable).

12. In other contexts the "floodgates argument," has been criticized by several courts. In *Borer v. American Airlines*, 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977), an action brought by children for loss of parental consortium, Judge Mosk wrote in his dissent: "I agree that [a line must be drawn], but I cannot subscribe to the majority's ad terrorem argument for determining the proper place to draw such a line . . ." *Id.* at 460, 563 P.2d at 870, 138 Cal. Rptr. at 314 (Mosk, J., dissenting). See *Berger v. Weber*, 82 Mich. App. 199, 204, 267 N.W.2d 124, 129 (1978) (stating "The rights of a new class of tort plaintiffs should be forthrightly judged on their own merits, rather than engaging in gloomy speculation as to where it will all end.") (citing *Borer*, 19 Cal. 3d at 460, 563 P.2d at 870, 138 Cal. Rptr. at 314 (Mosk, J., dissenting)). See also *Norwest v. Presbyterian Intercommunity Hosp.*, 52 Or. App. 853, 631 P.2d 1377 (1981) (Roberts, J., dissenting) (stating that it was possible for a child to prove that negligent medical treatment caused his mother to suffer brain damage).

13. See, e.g., *Nally v. Grace Community Church*, 194 Cal. App. 3d 1147, 240 Cal. Rptr. 215 (1987); *Handley v. Richards*, No. 85-840 (D. Ala. Sept. 4, 1987) (LEXIS, Genfed library, Dist. file) (affirming the trial court's dismissal of a complaint against a minister which alleged clergy malpractice and outrageous conduct).

14. See *Nally v. Grace Community Church*, No. 67200, slip op. at 3 (Super. Ct. May 16, 1985), *rev'd*, 194 Cal. App. 3d 1147, 240 Cal. Rptr. 215 (Ct. App. 1987). Courts have not been deterred from imposing tort liability on non-clergy defendants, however, despite the possibility that inhibiting effects on segments of society might have ensued. See, e.g., *Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (finding liability on the part of a therapist, because of a duty to the foreseeable victim of a patient, despite the inhibiting effect that such a duty would have on the patient/therapist relationship); *Kelly v. Gwinnell*, 96 N.J. 538, 476 A.2d 1219 (1984) (imposing a duty on the social host, to victims of his guest's driving while intoxicated stating that the chilling effect on private socializing was overridden by the societal need to prevent the tragedy of drunk driving). See generally Note, *Clergy Malpractice: Making Clergy Accountable to a Lower Power*, 14 PEPPERDINE L. REV. 137 (1986) (advocating imposition of civil accountability upon members of

tion which embraces clergy defendants, courts have found no duty¹⁵ on the part of the defendant churches, thereby protecting their religious freedom.

The modern trend in deciding whether a civil court may adjudicate a controversy involving clergy as defendants has been to weigh the competing state interest to be advanced by the determination of a particular controversy against the possible infringement on defendants' first amendment rights.¹⁶ Where the court finds the state interest compelling enough to warrant the investigation of the charges, jurisdiction will be assumed by a civil court.¹⁷ The great weight of legal authority in the United States suggests that protection of the health and welfare of children is most prominent among those state interests adjudged to be compelling.¹⁸

This Note will illustrate that the policy which supports the judicial rule of preventing adjudication of a negligence action against a religious organization should not serve to insulate faith healers from liability by preventing legal recourse to families of children being sacrificed in the name of religion.

Part I of this Note focuses on the plight of children whose parents embrace spiritual healing, and the protected nature of this healing.¹⁹ Part II examines the doctrine of church immunity, focusing

the clergy engaged in religious counseling). The potential damper on religious faith healing activity as a result of the imposition of a similar duty to act reasonably in the care of children, is consistent with the state's role as *parens patriae*, when balanced against society's interest in the protection of children. See *infra* note 25.

15. *Baumgartner v. First Church of Christ Scientist*, 141 Ill. App. 3d 898, 902-03, 490 N.E.2d 1319, 1322, *cert. denied*, 107 S. Ct. 317 (1986). The court affirmed the dismissal of a negligence action against the Christian Science Church. The court held that in order to proceed with a cause of action in negligence, the plaintiff must allege existence of a duty of reasonable care owed plaintiff by defendant, breach of that duty, and injury proximately caused by the breach. The Illinois Court of Appeals was unwilling to recognize the existence of such a duty. "In deciding whether a duty exists, the court is to consider the reasonable foreseeability of the injury, public policy, and social requirements, the magnitude of the burden of guarding against injury and the consequences of placing that burden upon defendant." *Id.* at 907, 490 N.E.2d at 1325 (citing *Morgan v. Dalton Mgmt. Co.*, 117 Ill. App. 3d 815, 454 N.E.2d 57 (1983)).

16. See *infra* notes 76-79 and accompanying text.

17. See, e.g., *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986) (holding that religious schools are not immune to regulations and defendant's constitutional rights are not violated by mere inquiry into the circumstances of an allegedly improper termination of a teacher). See generally *Wolman, Separation Anxiety: Free Exercise Versus Equal Protection*, 47 OHIO ST. L.J. 453, 469 (1986) (stating that a key factor in determining whether special treatment should be afforded to religious groups depends upon the nature of the institutions involved). See also *infra* notes 76-79 and accompanying text.

18. See *infra* notes 63-66 and accompanying text; see also cases cited *infra* note 79.

19. See *infra* notes 29-35 and accompanying text.

upon the distinction between religious conduct and religious belief and the resultant doctrine that conduct affecting children may be exempt from first amendment protection.²⁰ Courts uphold first amendment protection, however, even in the face of arguments that the church's actions constitute secular "conduct" that can be regulated, as opposed to "belief" which is absolutely protected.²¹

Churches are not immune from civil liability in other areas of the law.²² Part III addresses the reasonable person standard as a natural principle of tort law, and whether it can constitutionally be applied to an inquiry into a faith healer's conduct as such conduct affects children.²³

Such an inquiry must focus on whether the regulation is furthering a compelling state interest through the least restrictive means. The justifications for infringing upon a church's free exercise rights are reviewed in Part III together with an analysis of the applicable state interest standards.²⁴ Part III illustrates that church exposure to civil liability is the least restrictive means to advance the state's purpose of protection of its youth, a long recognized vital state interest exemplified by the doctrine of *parens patriae*.²⁵

Civil liability is also the most effective way to protect the youth. Part III also discusses the conclusion that adjudication of a common law negligence action against faith healers and the resultant imposition of civil liability will influence the conduct of future wrongdoers;²⁶ this will offer some protection for the ailing child whose care

20. See *infra* notes 54-66 and accompanying text.

21. See *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940).

22. See *infra* notes 36-53 and accompanying text.

23. See *infra* notes 67-75 and accompanying text.

24. See *infra* notes 76-99 and accompanying text.

25. "'*Parens Patriae*,' literally 'parent of the country' refers traditionally to role of state as sovereign and guardian of persons under legal disability." BLACK'S LAW DICTIONARY 1003 (5th ed. 1979). See, e.g., *In re Hamilton*, 657 S.W.2d 425, 429 (Tenn. Ct. App. 1983). "[T]he state, as *parens patriae*, has a special duty to protect minors and, if necessary, make vital decisions as to whether to submit a minor to necessary treatment where the condition is life threatening . . ." *Id.*

For an overview of the Doctrine of *Parens Patrie* 42 AM. JUR. 2D *Infants* § 14 (1969); Annotation, *Power of Court or Other Public Agency to Order Medical Treatment Over Parental Religious Objections For Child Whose Life is Not Immediately Endangered*, 52 A.L.R.3D 1118 (1973); Annotation, *Supreme Court Cases Involving Establishment and Freedom of Religion Clauses of Federal Constitution*, 37 L. ED. 2D 1147, 1176-77 (1974). See also *infra* notes 87-116 and accompanying text.

26. The 'prophylactic' factor of preventing future harm has been quite important in the field of torts. The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer. When the decisions of the courts become known, and defendants realize that they may be held liable, there [will be] a

has been entrusted to the faith healer.²⁷

Finally, in Part IV a suggested basis for jurisdiction over defendant faith healers will be provided; there is a line of cases stating that the secular nature of church activities, and in one instance, federal funding, gives rise to civil court jurisdiction.²⁸

This Note concludes that the state's strong interest in the protection of children is sufficient enough to subject religious faith healers to judicial inquiry and this interest overrides any accompanying free exercise infringements.

I. CHILDREN AS VICTIMS OF PROTECTED RELIGIOUS CONDUCT

Traditionally, courts have intervened and ordered medical treatment to protect the well-being of a dangerously ill child, as *parens patriae*.²⁹ The courts, however, have been unwilling to adjudicate a negligence action based upon withholding of medical treatment and substitution of treatment by prayer.³⁰ As a result, innocent children suffer profoundly for the intractable beliefs of parents who insist that prayer is an adequate substitute for scientific medical treatment. In many cases, these children are denied medical treatment for illnesses which are no longer fatal or crippling, but which may become so when left untreated.³¹ In these situations, the plaintiffs sue in their

strong incentive to prevent the occurrence of the harm. Not infrequently one reason for imposing liability is the deliberate purpose of providing that incentive.

W. PROSSER & W. KEETON, *THE LAW OF TORTS* § 4, at 25 (5th ed. 1984).

27. See *infra* notes 116-21 and accompanying text.

28. See *infra* notes 117-30 and accompanying text.

29. See *supra* note 25.

30. See Brief for Appellant at 8-9, *Brown v. Laitner*, No. 73903 (Mich. Ct. App. 1985). For a discussion of the charges alleged, see Plaintiff-Appellant's Reply Brief at 3, *Brown v. Laitner*, No. 73903 (Mich. Ct. App. filed June 13, 1986). Cf. *Baumgartner v. First Church of Christ, Scientist*, 141 Ill. App. 3d 898, 904, 490 N.E.2d 1319, 1323 (holding that a determination of a breach of any duty would require a searching inquiry into Christian Science beliefs and the validity of those beliefs), *cert. denied*, 107 S. Ct. 317 (1986).

31. For a recent discussion of the harms resulting from the inaction of faith healers, and their defense of the right to worship, see Dobbin, *When a state takes aim at faith healing*, U.S. NEWS & WORLD REP., Mar. 24, 1986, at 22; Zlatos, *A Child's Death: An Act of God or Homocide*, Nat'l L.J., Sept. 17, 1984, at 6 (describing a 26 day old baby's death which could have been avoided with three dollars worth of antibiotics); CHILD, Spring, 1986, at 3 (citing three deaths of Ohio children whose parents belong to an offshoot sect of Faith Assembly); Mortimer, *State Should Stop Needless Deaths*, Cleveland Plain Dealer, Oct. 27, 1986 at 9-A, col. 1 (documenting the death, due to untreated pneumonia, of a thirteen-month-old child of a member of the Christ Assembly); CHILD, Fall, 1986, at 1 (detailing the death of a seven-year-old child due to diabetes, left untreated pursuant to the religious beliefs of parents). See generally Swan, *Christian Science, Faith Healing & the Law*, 309 FREE INQUIRY, Spring 1984, at 4 (discussing a former Christian Science Church member's statement of how the church prevented her from getting medical treatment for her fifteen-month-old son who ultimately died

capacity as representatives of the deceased or injured child.³²

Who may these children depend upon for protection? Certainly not their devout parents. In most states, parents are exempt from prosecution for neglect if they are providing their children with spiritual healing in lieu of needed medical care.³³ Courts, however, have recently struck down some of these statutes as unconstitutional and in violation of the establishment clause,³⁴ or have interpreted them in a way that circumvents their purpose.³⁵

II. CHURCH IMMUNITY

A. Generally

Churches are not above the law.³⁶ The first amendment does not grant immunity to churches for their tortious conduct.³⁷ Churches

from advanced meningitis).

32. See, e.g., Reply Brief for Appellant, *Brown v. Laitner*, No. 73903 (Mich. Ct. App. filed June 13, 1986) (alleging negligence and misrepresentation in the death of a fifteen month old child in an action against First Church of Christ Scientist and its agents).

33. See, e.g., COLO. REV. STAT. § 19-1-114 (1986), which provides:

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

Id. See also Note, *Faith Healing Exemptions to Child Protection Laws: Keeping the Faith Versus Medical Care For Children*, 12 J. LEGIS. 243 (1985) (documenting the devastating effects on children which result from religious exemptions in child neglect laws in over 40 states and the present public outcry for legislatures to repeal these exemptions). *Contra* Comment, *Parental Failure to Provide Child with Medical Assistance Based on Religious Beliefs Causing Child's Death—Involuntary Manslaughter in Pennsylvania*, 90 DICK. L. REV. 861 (1986) (advocating spiritual healing exemptions for parents who practice religious faith healing and concluding that the inequity which results from punishing parents by imprisonment is not outweighed by the benefit to society).

34. See, e.g., *State v. Miskimens*, 22 Ohio Misc. 2d 43, 44-46, 490 N.E.2d 931, 933-35 (Ct. C.P. 1984) (holding statute proscribing child endangerment which exempted parents who treat illness by prayer alone violated the establishment clause by involving the state in determinations of questions not the business of the government and application of the statute would result in excessive government entanglement).

35. See *People ex rel. D.L.E.*, 645 P.2d 271 (Colo. 1982). The Supreme Court of Colorado adjudicated the case of a dependent child whose life was in imminent danger due to lack of medical treatment, despite language in the statute which precluded such a finding if the child was being treated in good faith by spiritual means for that reason alone. The court interpreted "for that reason alone" to mean that if there were other reasons for a finding of dependency, such as deprivation of medical care to the point of life endangerment, the child may be adjudicated dependent and neglected under the law. *Id.* at 274-75.

36. See *infra* notes 37-39, 43 and accompanying text.

37. See, e.g., *Van Schaick v. Church of Scientology, Inc.*, 535 F. Supp. 1125, 1134 (D. Mass. 1982) (noting that "even if [the defendant] were to [be a] religious institution, the free exercise clause would not immunize it from all common law causes of action alleging tortious

may be subject to civil liability for breach of contract³⁸ and misrepresentation³⁹ with the caveat that the court may not, in so doing, determine the validity of a particular religious belief,⁴⁰ decide ecclesiastical questions,⁴¹ or settle matters involving internal church procedure.⁴² In fact, a cause of action based upon proscribed conduct

activity") (citing *Turner v. Unification Church*, 473 F. Supp. 367, 371 (D.R.I. 1978), *aff'd*, 602 F.2d 458 (1st Cir. 1979)); *Nally v. Grace Community Church*, 194 Cal. App. 3d 1147, 240 Cal. Rptr. 215 (1987) (refusing to create a defense of "clergy immunity" for church affiliated counselors who are treating mentally disturbed, suicidal people rejecting the defense . . . out of a profound reverence for . . . constitutional values . . . and for the value of human life); *Alberts v. Devine*, 395 Mass. 59, 479 N.E.2d 113 (1985) (holding that judicial inquiry is appropriate where a controversy exists as to breach of physician's duty of confidentiality allegedly induced by church superior), *cert. denied*, 474 U.S. 1014 (1985); *Bear v. Reformed Mennonite Church*, 462 Pa. 330, 341 A.2d 105 (1975) (noting that courts may adjudicate disputes alleging shunning practices resulting in alienation of affections and tortious interference with business relationships).

38. See *VanLoock v. Curran*, 489 So. 2d 525 (Ala. 1986) (holding that a civil court has jurisdiction to adjudicate regardless of whether the plaintiff bringing action for breach of contract and misrepresentation, was improperly expelled from school); *Gipson v. Brown*, 288 Ark. 422, 428, 706 S.W.2d 369, 373 (1986) (holding that although civil courts lack jurisdiction to decide religious questions, it does not follow that they may not assume jurisdiction over religious entities). See also *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985) (stating that "churches are not—and should not be—above the law . . . Like any other person or organization, they may be held liable for their torts and upon their valid contracts."), *cert. denied*, 106 S. Ct. 3333 (1986).

39. See, e.g., *Christofferson v. Church of Scientology*, 57 Or. App. 203, 241, 644 P.2d 577, 601 (1982) (stating "It is clear that a religious organization, merely because it is such, is not shielded by the First Amendment from all liability for fraud"), *cert. denied*, 459 U.S. 1227 (1983).

40. *United States v. Ballard*, 322 U.S. 78 (1944) (holding an inquiry into truth or falsity of religious beliefs constitutionally impermissible in a prosecution for mail fraud and misrepresentation against the leader of the "I Am" movement). For an exhaustive examination of *Ballard*, see Weiss, *Privilege, Posture and Protection: "Religion" in the Law*, 73 YALE L.J. 593, 593-608 (1964).

41. *Pfeifer v. Christian Science Comm. on Publications*, 31 Ill. App. 3d 845, 334 N.E.2d 876 (1975) (holding that the civil court lacks jurisdiction to decide whether a religious doctrine departs from the standards of the church); *Patterson v. Bethel Baptist Church*, 389 N.W.2d 729, 732-33 (Minn. 1986) (holding that the first amendment prohibits civil courts from settling church doctrinal disputes).

42. See, e.g., *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981) (holding that "[c]ourts are not arbiters of scriptural interpretation"); *Serbian Eastern Orthodox Diocese v. Milivojevic*, 426 U.S. 696 (1976) (holding that civil courts must accept the decisions of the governing body of a hierarchical church in areas of discipline, faith, internal structure, and ecclesiastical doctrines); *Hutchison v. Thomas*, 789 F.2d 392 (6th Cir.) (affirming the dismissal of minister's claim of, defamation, intentional infliction of emotional distress and breach of contract resulting from his forced retirement), *cert. denied*, 107 S. Ct. 277 (1986); *Kaufmann v. Sheehan*, 707 F.2d 355, 358-59 (8th Cir. 1983) (affirming the dismissal of defamation, conspiracy and violation of due process charges where the dispute involved internal procedures of the archdiocese); *First Baptist Church of Glen Este v. Ohio*, 591 F. Supp. 676, 683 (S.D. Ohio 1983) (stating that barring severe civil rights violations or fraud, a civil court may not

may withstand a motion to dismiss despite the fact that the defendant is acting pursuant to religious beliefs or operates for a religious purpose.⁴³

In recent years courts have recognized that the first amendment does not insulate defendants from liability for intentional tortious conduct⁴⁴ or involuntary servitude⁴⁵ by virtue of their having achieved status as a religious organization. Although courts have considered the inhibiting effect on religious expression which results from imposing tort liability on clergy, when liability is ultimately imposed, the state's interests are of sufficient magnitude to override the free exercise rights involved.⁴⁶

The adjudication of a common law negligence action does not involve the constitutionally prohibited inquiry into religious doctrine, or a determination of the veracity or falsity of religious beliefs;⁴⁷ nor does it necessitate deference to church tribunals pursuant to provisions of their individual constitutions.⁴⁸ Accordingly, the first amendment should not bar resolution of the objective secular evaluation of the reasonableness of faith healers' conduct, much the same as it has

inquire into internal church disciplinary matters); *Madsen v. Irwin*, 395 Mass. 715, 481 N.E.2d 1160 (1985) (following *Serbian*, holding that civil courts must accept the decisions of church tribunals in case of alleged improper termination for sexual preference).

43. See *Van Schaick v. Church of Scientology*, 535 F. Supp. 1125, 1134-35 (D. Mass. 1982) (refusing to resolve counts alleging intentional infliction of emotional distress and fraudulent inducement by misrepresentation).

44. *Alberts v. Devine*, 395 Mass. 59, 479 N.E.2d 113 (holding a minister's civil action against his church superior for inducing a physician to breach his duty of confidentiality, was not barred by the first amendment), *cert. denied*, 106 S. Ct. 546 (1985). See *Esbeck*, *supra* note 8, at 96-97; see generally *Young & Tigges, Into the Religious Thicket—Constitutional Limits on Civil Court Jurisdiction over Ecclesiastical Disputes*, 47 OHIO ST. L.J. 475 (1986).

45. See *Turner v. Unification Church*, 473 F. Supp. 367 (D.R.I. 1978) (stating in dicta that a free exercise claim does not immunize a defendant from actions which allege involuntary servitude or intentional tortious activity), *aff'd*, 602 F.2d 458 (1st Cir. 1979).

46. *Alberts*, 395 Mass. at 60-61, 479 N.E.2d at 123 (stating the importance of a physician's duty to respect the confidentiality while involved in a physician/patient relationship gives rise to a tort action when that duty is breached notwithstanding the circumstances of defendants being church superiors).

47. See *supra* note 40.

48. *Jones v. Wolf*, 443 U.S. 595 (1979) (stating that the state has an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively); *First Baptist Church of Glen Este v. Ohio*, 591 F. Supp. 676 (S.D. Ohio 1983); *Piletich v. Deretich*, 328 N.W.2d 696, 701 (Minn. 1982) (holding that Minnesota courts will apply the neutral principles of law test announced in *Jones*, to determine whether a dispute involving a religious organization may be resolved in a civil court).

The state interest in protecting its youth is at least as compelling as the interest in the peaceful resolution of property disputes. See also *infra* notes 76-79 and accompanying text.

not protected a religious organization from the adjudication of a cause of action alleging misrepresentation.⁴⁹

The application of “neutral principles of law,”⁵⁰ which are employed in the adjudication of church-involved property disputes,⁵¹ can be utilized to determine liability by exercise of general principles of tort law.⁵² It is important to observe that a common law negligence action is not a cleverly constructed “handle” which functions to permit adjudication of an underlying doctrinal issue.⁵³ The issue is simply the negligent conduct of the faith healer.

B. *Religious Conduct Versus Religious Belief*

Although intervention in disputes centering on church doctrinal matters, policy, or discipline is not constitutionally permissible,⁵⁴ religious conduct is not immune from regulation by, and the jurisdiction of, the civil courts.⁵⁵ This belief/action distinction was first announced by the Supreme Court in *Reynolds v. United States*,⁵⁶ in which a conviction for bigamy was affirmed notwithstanding the defendant’s religious beliefs, which dictated that he be polygamous.

Although the faith healer’s conduct may be motivated by religious beliefs, since *Reynolds* it is well settled law that while the first amendment insures that freedom to believe is absolute, conduct, albeit religiously motivated, may be subject to limitations for the wel-

49. *Christofferson v. Church of Scientology*, 57 Or. App. 203, 644 P.2d 577 (1982) (holding that if the statements do not concern the beliefs and practices of the religion, they do not merit first amendment protection).

50. *Jones*, 443 U.S. at 603-04. The Court stated that:

The primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization The method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity and practice.

Id. at 603

51. See *Jones*, 443 U.S. at 602; *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969).

52. See *infra* notes 67-68 and accompanying text.

53. *But cf.* *Patterson v. Bethel Baptist Church*, 389 N.W.2d 729, 733 (Minn. 1986) (holding that the presence of a claimed property right in a church doctrinal dispute does not remove the bar on a civil court’s jurisdiction of such a dispute).

54. See, e.g., *Jones*, 443 U.S. at 602 (1979); *Serbian E. Orthodox Diocese v. Milivojevic*, 426 U.S. 696, 709 (1976); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969).

55. *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940).

56. 98 U.S. 145 (1878).

fare of society.⁵⁷ Thus, the first amendment embraces two separate concepts:⁵⁸ religious beliefs are protected by the first amendment when they are in the realm of pure belief, and the amount of protection decreases when religious action has public manifestations.⁵⁹ Action which affects others in ways not limited to their beliefs triggers public interests. The ramifications of subjecting children to spiritual treatment in lieu of needed medical care goes beyond the realm of pure belief. Even if spiritual healing is regarded as religious belief, rendering it as an expression entitled to absolute protection, its effect on children removes it from that protection.⁶⁰

The state has the authority to regulate conduct which interferes in areas of high state interest, even in light of the establishment⁶¹ and free exercise⁶² clauses of the first amendment. In *Prince v. Massachusetts*,⁶³ and its progeny,⁶⁴ the Supreme Court developed

57. See *Cantwell*, 310 U.S. at 303-04.

58. *Id.* at 303.

59. See *Weiss*, *supra* note 40, at 608 (noting that a traditional feeling about the world of law and the world of religion is that the state may not interfere in the world of religion but that when a man participates in the world of public life he must meet its secular and legal standards).

60. See T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970). Emerson states: It is necessary to define the "system" to which the foregoing principles are applicable. For reasons peculiar to each case, certain sectors of social conduct, though involving "expression" within the definition here used, must be deemed to fall outside the system with which we are now concerned. The areas which must be excluded embrace certain aspects of . . . the *activities of children* This does not mean that the First Amendment has no application in these sectors. It simply recognizes that the functions of expression and the principles needed to protect expression in such areas are different from those in the main system, and that different legal rules may therefore be required.

Id. at 19-20 (emphasis added). See also *Pepper, Reynolds, Yoder, and Beyond: Alternatives for the Free Exercise Clause*, 1981 UTAH L. REV. 309, 370-72. In postulating a broad interpretation of the free exercise clause, a brake on this interpretation is that it cannot operate to impose substantial harm to non-consenting third parties. Although children fall into this category, the denial of freedom to impose one's beliefs on one's children would amount to a hollow freedom of religion from the parental point of view. Accordingly, for freedom of religion to be absolute, children are presumed to consent to all practices but those "that so clearly, permanently, and seriously injure a child as to be intolerable to a substantial majority of the population." *Id.* at 372.

61. U.S. CONST. amend. I.

62. *Id.*

63. 321 U.S. 158 (1944). State child labor law did not unduly infringe upon religious freedom of a Jehovah's Witness, convicted for allowing her niece to hand out religious literature on a street corner. Although the distribution was a religious duty of this sect and application of the law resulted in restricting religious free exercise rights, the Court nevertheless held that "[t]he right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health . . ." *Id.* at 166-67. Although "[p]arents may be free to become martyrs themselves . . . it does not follow they are free, in

the principle that free exercise and parental rights must yield when it is necessary to advance the state's profound interest in children.⁶⁵ Free exercise rights may prevail over secular matters affecting adults, however, those rights must be restricted when the well-being of a child is at stake.⁶⁶

III. INFRINGING FREE EXERCISE RIGHTS OF FAITH HEALERS

A. *Imposing a Duty of Reasonable Care*

Faith healers should be treated no differently than other alternative health care providers. A civil court should hold faith healers to a standard of reasonable care in the deliverance of their services.⁶⁷ The application of the common law reasonable person standard⁶⁸ can

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. *See also* *People v. Pierson*, 176 N.Y. 201, 68 N.E. 243 (1903).

64. *See, e.g.,* *Jehovah's Witnesses v. King County Hosp.*, 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd*, 390 U.S. 598 (1968) (per curiam) (holding that a parent has no legal right to deny a child proper medical treatment, even though it violates the religious belief of the parent); *In re Georgetown College, Inc.*, 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964); *People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 104 N.E.2d 769, *cert. denied*, 344 U.S. 824 (1952).

65. *Prince*, 321 U.S. at 164-71.

66. *Id.* at 168-70. *See* *Wisconsin v. Yoder*, 406 U.S. 205 (1972). (holding that state did not show a compelling interest and that free exercise rights were violated by application of a compulsory attendance education statute to members of Amish sect); *see also* *Braunfeld v. Brown*, 366 U.S. 599 (1961) (holding Sunday closing does not prohibit religious conduct but merely has the effect of rendering the practice of the affected religion more expensive which is not determinative of whether or not the statute violates free exercise of religion); *Catholic High School Ass'n v. Culvert*, 753 F.2d 1161 (2d Cir. 1985) (holding that the first amendment does not prohibit the SLRB from exercising jurisdiction between parochial schools and lay teachers).

67. *See Nally v. Grace Community Church*, 194 Cal. App. 3d 1147, 240 Cal. Rptr. 215 (1987) (holding a pastoral counselor to the minimal standard of due care of a non-therapist counselor, notwithstanding the counselor's religious affiliation).

Negligence has been defined as "conduct which involves an unreasonably great risk of causing damage, or, more fully, conduct 'which falls below the standard established by law for the protection of others against unreasonably great risks of harm.'" W. PROSSER & W. KEETON, *supra* note 26, § 31, at 169.

68. The reasonable person standard represents the standard of conduct which the community demands. It is an external and objective standard, rather than subjective and individual, since the law must operate neutrally. It is also adjusted to take into consideration the risk apparent to the actor, his ability to meet it, and the circumstances of the conduct. "[N]egligence is a failure to do what the reasonable person would do 'under the same or similar circumstances.'" W. PROSSER & W. KEETON, *supra* note 26, § 32, at 175. For example, in *May v. Laitner*, No. 80-004-605 (Mich. Cir. Court, Sept. 24, 1980), the church was charged as negligent in failing to act reasonably by, *inter alia*:

(a) failing to sufficiently educate and train practitioners and nurses in their treatment with and of small children;

be accomplished without delving into the constitutionally protected area of church doctrine and internal regulations.

The course of conduct followed by spiritual healers of the Christian Science Church, for example, gives rise to a duty to act as a reasonable alternative health care provider would, and permits an inquiry by a civil court as to deviation from that standard.⁶⁹ This particular church enjoys a host of secular benefits such as reimbursement from private health insurance companies,⁷⁰ federal funding from Medicare,⁷¹ and recognition as a health care provider from the

(b) failing to instruct practitioners in the rudiments of communicable notifiable disease so that reporting obligations could be carried out;

(c) failing to adequately monitor and supervise the activities of practitioners and nurses in their treating of minor children.

Id. at 9-10.

The circuit court held that plaintiffs may maintain a cause of action for negligent acts where the church violated a common law standard of care, as opposed to an internal doctrinally-based standard of care. Subsequently, the Michigan Court of Appeals ruled that the reasonable person standard does not provide a sufficiently secular standard. *Brown v. Laitner*, No. 73903, slip op. at 12 (Mich. Ct. App. Dec. 17, 1986). The court hypothesized that had the defendants been negligent per se, i.e. in violation of a statute enacted to protect children, a different result might be required. *Id.*

69. For example, insurance companies throughout the industry currently recognize Christian Science treatment. Christian Science members are instructed that practitioners are authorized to certify sick leave and disability claims for federal employees and railroad employees. See, e.g., *LEGAL RIGHTS AND OBLIGATIONS OF CHRISTIAN SCIENTISTS IN WASHINGTON* (Spring 1978); *LEGAL RIGHTS AND OBLIGATIONS OF CHRISTIAN SCIENTISTS IN CALIFORNIA* (1984).

70. See Lynch, *A Church in Crisis: Christian Science Sect Has Hope and Charity, But Faith is Declining*, Wall St. J., Feb. 27, 1979, at 1, col. 1 (noting that Blue Cross and Blue Shield in 14 states, as well as the 15 largest life insurance companies and 300 casualty companies cover Christian Science care). Christian Science treatment is also recognized under Civilian Health and Medical Program of the Uniformed Services (CHAMPUS), a supplemental program to the Uniformed Services direct medical care system. Like a private medical insurance program, CHAMPUS is designed to assist its beneficiaries in obtaining certain prescribed medical care from civilian services. See 32 C.F.R. § 199.12 (1985). The service provided is of "an extra-medical nature" and, consequently, licensing and monitoring requirements are not deemed applicable. *Id.* Christian Science nurses and practitioners must be accredited by the First Church of Christ, Scientist, Boston, Mass., and listed in a Christian Science Journal at the time the service is provided. 32 C.F.R. § 199.8 (1985).

71. See 42 U.S.C. § 1395x(y) (1983) Social Security Amendments of 1965, § 1861(y) (defining skilled nursing facility to include a Christian Science sanatorium operated or listed and certified by the First Church of Christ Scientist); 42 U.S.C. § 1395x(e)(9) (1983) (providing that hospital insurance benefits may be paid for the services of a Christian Science sanatorium). These institutions participate as hospitals and are subject to the regular coverage and exclusions of inpatient hospital care. For example, benefits are payable for services of a Christian Science nurse unless her duties are those of a private duty nurse. Benefits, however, will not be paid for services of a Christian Science practitioner, because he is the equivalent of a physician and the plan does not cover physician's services. In general, items and services which are analogous to those for which benefits can be paid to a hospital will be paid. See also

Internal Revenue Service⁷² which authorizes deductions for amounts paid to church practitioners, nurses and sanatoria as medical expenses. Such an established course of conduct encourages direct detrimental reliance on the part of parents who depend upon the spiritual healers to cure their sick children.⁷³

Healers of less recognized sects⁷⁴ also have the duty to act reasonably, because of the protective relationship that exists between healer and patient. The faith healer, when he undertakes treatment, deprives a child of other opportunities for the care and protection of his life.⁷⁵

B. *The Compelling State Interest Standard*

The Supreme Court has recognized that justification for an infringement on first amendment rights exists only in those instances where the religious practice creates a substantial threat to public safety, peace, or order.⁷⁶ In other words, the state's interest must be

MEDICARE & MEDICAID GUIDE (CCH) 1983 Transfer binder § 1245, at 847 (describing inpatient Christian Science treatment in a Christian Science sanatorium in its capacity as a hospital).

72. See 26 U.S.C. § 213 (1982); I.R.S. PUBLICATION 17, YOUR FEDERAL INCOME TAX 119 (1985); Fed. Tax Coordinator 2d (RIA) § k-2100, at 32,056; *supra* note 71.

73. Cf. *Florence v. Goldberg*, 44 N.Y.2d 189, 375 N.E.2d 763, 404 N.Y.S.2d 583 (1978) (holding the city of New York liable where police department had voluntarily assumed duty to provide a crossing guard causing reliance by the parent and resulting in the child being struck by the car in the absence of the guard).

74. See *supra* notes 2, 5-6 and accompanying text.

75. See RESTATEMENT (SECOND) OF TORTS § 324 (1965) which provides in pertinent part:

One who, being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for any bodily harm caused to him by (a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge

Id. § 324, at 139. The drafters of this section state in the comments that the rule is applicable in circumstances where the actor takes charge of one who is ill or too young to care for himself. *Id.* § 324, at 140, comment b. See also *Farwell v. Keaton*, 396 Mich. 281, 240 N.W.2d 217 (1976) (holding that a mere social relationship gave rise to a duty to act with reasonable care in a situation where one friend took charge of another who was unable to take care of himself). A fortiori, where a sick child is surrendered to the care of a faith healer, the resultant relationship should trigger a duty to act reasonably.

76. *Hobbie v. Unemployment Appeals Comm'n*, 107 S. Ct. 1046 (1987) (holding that Florida's denial of unemployment insurance benefits to a Seventh-Day Adventist due to her religious beliefs violated the free exercise clause refusing to follow the lesser rational basis standard articulated in *Bowen v. Roy*, 476 U.S. 693 (1986)); *Sherbert v. Verner*, 374 U.S. 398 (1963) (holding that South Carolina could not deny unemployment insurance benefits to a Seventh-Day Adventist, discharged from employment because of her religious objection to working on Saturdays and inability to find employment for the same religious motivation). See generally *Pepper*, *supra* note 60.

compelling.

Courts will weigh the competing interests in ruling on a free exercise claim.⁷⁷ The protection of the health and welfare of children is a state interest that has been held sufficient to warrant infringement of free exercise rights.⁷⁸ Additionally, many interests have been held to be of sufficient weight so as to justify infringement of free exercise rights.⁷⁹

Where courts have determined that the burden imposed on one claiming a violation of free exercise rights exceeds the state's interest in enforcing a regulation or subjecting a defendant to the jurisdiction of a civil court, the interests of the state are clearly of a less urgent

77. See, e.g., *Nally v. Grace Community Church*, 194 Cal. App. 3d 1147, 240 Cal. Rptr. 215 (1987) (holding that California has a compelling state interest in preventing suicide, and may promote this interest by the imposition of a standard of care which requires the referral of suicidal individuals to institutions and professionals equipped to administer the necessary treatment and medication); *State v. Sports & Health Club, Inc.*, 370 N.W.2d 844 (Minn. 1985); see also *United States v. Middleton*, 690 F.2d 820 (11th Cir. 1982) (finding that the United States' interest in controlling the use of marijuana was sufficiently compelling to outweigh defendant's free exercise right to use marijuana in connection with religious practices), *cert. denied*, 460 U.S. 1051 (1983). See generally Comment, *Balancing the Free Religious Exercise Right Against Government Interests: State v. Sports & Health Club, Inc.*, 370 N.W.2d 844 (Minn. 1985), 9 HAMLINE L. REV. 649 (1986) (analyzing the court's ruling that the government has a compelling interest in preventing employment discrimination which warranted infringement of defendant's free exercise rights to employ and promote only members of his sect).

78. See *supra* notes 63-66 and accompanying text.

79. See, e.g., *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986) (preventing sex discrimination in employment); *Bowen v. Roy*, 476 U.S. 693 (1986) (prevention of Social Security fraud); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (preventing racial discrimination in education); *Gillette v. United States*, 401 U.S. 437 (1971) (insuring the ability to raise an army); *Cox v. New Hampshire*, 312 U.S. 569 (1941) (assuring the safety of individuals using public highways); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (prevention of communicable diseases); *Reynolds v. United States*, 98 U.S. 145 (1878) (prevention of polygamy); *United States v. Snowden*, 770 F.2d 393 (4th Cir. 1985) (prevention of mail fraud); *United States v. Rush*, 738 F.2d 497 (1st Cir. 1984), *cert. denied*, 470 U.S. 1004 (1985) (controlling of dangerous drugs); *United States v. Middleton*, 690 F.2d 820 (11th Cir. 1982); *Forest Hills Early Learning Center, Inc. v. Lukhard*, 661 F.Supp. 300, 310 (E.D. Va. 1987) (controlling operation of day care centers); *United States v. Little*, 638 F. Supp. 337 (D. Mont. 1986) (preservation of forest resources); *Potter v. Murray City*, 585 F. Supp. 1126 (D. Utah 1984) (prevention of polygamy); *Candy H. v. Redemption Ranch, Inc.*, 563 F. Supp. 505 (M.D. Ala. 1983) (protecting the right to travel); *Koolau Baptist Church v. Dep't. of Labor & Indus. Rel.*, 718 P.2d 267 (Haw. 1986) (maintenance of a state unemployment insurance program); *Dep't of Social Servs. v. Emmanuel Baptist Pre-School*, 150 Mich. App. 254, 388 N.W.2d 326 (1986) (controlling operation of day care centers); *State ex rel. Pringle v. Heritage Baptist Temple, Inc.*, 693 P.2d 1163 (Kan. 1985) (controlling operation of day care centers); *State ex rel. Swann v. Pack*, 527 S.W.2d 99 (Tenn. 1975), *cert. denied*, 424 U.S. 954 (1976) (prohibiting the use of snakes and strychnine in presence of children); *State v. Corpus Christi People's Baptist Church, Inc.*, 683 S.W.2d 692 (Tex. 1984) (controlling operation of day care centers).

character and are readily distinguishable from the critical child protection interest.⁸⁰

C. *The Rational Relationship Standard*

The state must demonstrate more than the mere existence of a rational relationship between the conduct curtailed and the state's interest to be sufficient enough to justify infringement of free exercise rights.⁸¹

This lesser standard, however, was recently applied by the Supreme Court in *Bowen v. Roy*,⁸² and subsequently adhered to by a lower federal court.⁸³ These cases presented two very similar situations in which the interests burdened by the state's regulation were the plaintiffs' free exercise of religion. In both cases the challenged regulations were facially neutral, uniformly applied, and represented a reasonable means of promoting a legitimate state interest.⁸⁴ Arguably, the Supreme Court ratification of infringement on free exercise rights for the purpose of maintaining efficient functioning of a governmental program, which is clearly of a less urgent character than the protection of children, signals a more intrusive stance by the Court. Accordingly, the imposition of judicial inquiry into the

80. See, e.g., *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985) (holding that the first amendment bars a Title VII action brought by plaintiff who was denied employment as pastor), *cert. denied*, 106 S. Ct. 3333 (1986); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.) (finding that Title VII is not applicable to defendant church), *cert. denied*, 409 U.S. 896 (1972); *Molko v. Holy Spirit Ass'n. for the Unification of World Christianity*, 179 Cal. App. 3d 450, 224 Cal. Rptr. 817 (1986) (holding that the effect of church recruiting practices on a healthy adult did not pose a threat to public, health, safety or order and were not subject to judicial inquiry); *Meroni v. Holy Spirit Ass'n for the Unification of World Christianity*, 119 A.D.2d 200, 506 N.Y.S.2d 174 (1986) (dismissing plaintiff's cause of action for intentional infliction of emotional distress and noting that plaintiff's son was not severely disabled and therefore, could independently determine whether or not to associate himself with defendant church).

81. See, e.g., *Hobbie v. Unemployment Appeals Comm'n*, 107 S. Ct. 1046 (1987) (holding that a refusal to grant unemployment benefits due to religiously motivated actions may not be justified by a determination under the rational relationship standard); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (noting that "[I]t is basic that no showing merely of a rational relationship to some colorable state interest would suffice").

82. 476 U.S. 693 (1986) (holding not violative of free exercise rights a federal statute requiring issuance of a social security number as a condition precedent for participation in the Aid to Families with Dependent Children program (AFDC) because the statute is facially neutral and promotes a vital state interest: the prevention of fraud in a benefits program).

83. *Leahy v. District of Columbia*, 646 F. Supp. 1372, 1378 (D.D.C. 1986) (holding Motor Vehicle Department regulation requiring agency usage of plaintiff's social security number as a requirement for the issuance of a driver's license not violative of plaintiff's free exercise rights).

84. See *supra* note 79 and accompanying text.

conduct of religious faith healers could be sustained on the rational basis standard.

Bowen held that the mandatory assignment of a social security number to a child who receives benefits from the federal government, does not constitute a claim for a free exercise violation, even though assigning it may be against the parent's religious beliefs. The Court reasoned that enforcement of the statutory requirement promotes efficiency and prevention of fraud in the Social Security Program and is a reasonable means to achieve that end.⁸⁵ Similarly, judicial inquiry into the spiritual treatment of children is a reasonable means of achieving the ultimate goal of protection of children, which is, at the very least, an equally important state interest.⁸⁶

D. *Civil Liability as the Least Restrictive Means to Achieve the State's Compelling Interest in the Protection of the Welfare of Children*

1. Minimal Intrusion.— The Supreme Court has held that an infringement on free exercise rights may be justified by a showing that there exists no less restrictive means of advancing a particular compelling state interest.⁸⁷ Thus, the state's use of the least restrictive means to achieve its goal, will render a regulation which burdens a free exercise interest constitutional.⁸⁸

A civil negligence action may be the least restrictive means of advancing the state's compelling interest in protecting the welfare of children, since it does not involve the continuous surveillance,⁸⁹ in-

85. The court held that "the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest." *Bowen*, 476 U.S. at 701-08.

86. See *infra* notes 100-19 and accompanying text.

87. See *Thomas v. Review Bd.*, 450 U.S. 707, 718-19 (1981) (holding the policy underlying an Indiana unemployment statute denying petitioner benefits, did not sufficiently rise to the level of a compelling interest to justify burdening his free exercise rights, stating that religious liberty may be curtailed if the state can demonstrate that there exists no less restrictive means of achieving a compelling state interest).

88. See, e.g., *United States v. Lee*, 455 U.S. 252, 257-58 (1982) (stating that "[n]ot all burdens on religion are unconstitutional . . . The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest."); see also *Rushton v. Nebraska Pub. Power Dist.*, 653 F. Supp. 1510 (D. Neb. 1987) (holding that the state's compelling interest in the health, safety, and welfare of the public overcame nuclear power plant employees' free exercise rights to refuse to submit to an alcohol rehabilitation program and was the least restrictive means to advance the compelling state interest in assuring that nuclear power plant workers were fit for duty).

89. The Supreme Judicial Court of Massachusetts, in deciding a dispute concerning clergy defendants, has recently held that civil litigation is not barred by the first amendment

vestigation,⁹⁰ promulgation, and enforcement of regulations⁹¹ aimed at churches engaged in spiritual healing which could arguably give rise to a claim of violation of the establishment clause of the first amendment.⁹²

Recently, in first amendment challenges by defendant churches, state courts have affirmed the application of regulations to church-run child care facilities.⁹³ These regulations necessarily involve sur-

since it "in no sense involves repetitious inquiry or continuing surveillance that would amount to the excessive entanglement between government and religion that the First Amendment prohibits." *Alberts v. Devine*, 395 Mass. 59, 75, 479 N.E.2d 113, 123, *cert. denied sub nom. Carroll v. Alberts*, 474 U.S. 1013 (1985). *Cf. Archbishop of Roman Catholic Apostolic Archdiocese v. Guardiola*, 628 F. Supp. 1173 (D.P.R. 1985) (holding that adherence to minimum wage laws and production of wage rates for lay employees was constitutionally sound, however, the government compelling a church to produce extensive data would amount to continuing surveillance in violation of the establishment clause).

90. See *Surinach v. Pesquera de Busquets*, 604 F.2d 73 (1st Cir. 1979) (holding that the Department of Consumer Affairs' investigation into the rising costs of private education which included parochial schools was not constitutionally permissible because it led to continuing surveillance and entanglement between the church and state in violation of the first amendment) (citing *Walz v. Tax Comm'n*, 397 U.S. 664, 667 (1970)).

91. See *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 305 (1985) (holding The Fair Labor Standards Act applicable to a religious foundation since it was not overly intrusive into religious affairs, observing that "[t]he Establishment clause does not exempt religious organizations from such secular governmental activity as fire inspections and building and zoning regulations").

92. See *supra* note 7. The Supreme Court, in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) set forth a three part test to determine whether governmental action is violative of the establishment clause: (1) the statute must have a secular legislative purpose; (2) the statute's primary effect must not advance nor inhibit religion; and (3) the statute must not foster excessive governmental entanglement. Church reliance on an establishment clause argument to exempt church-run child care facilities from regulation has been held invalid because entanglement between church and state is not excessive. Carried to its logical conclusion, this analysis runs afoul of the second prong of the *Lemon* test; the result would be to advance a religious facility over a secular child care facility which must comply with regulations. See *State v. Corpus Christi People's Baptist Church*, 683 S.W.2d 692, 695 (Tex. 1984), *appeal dismissed*, 474 U.S. 801 (1985).

93. For examples of court validation of regulations applying to church-run child care facility regarding faculty educational restrictions, curriculum, and prohibition against corporal punishment, see *Forest Hills Learning Center, Inc. v. Lukhard*, 661 F. Supp. 300 (E.D. Va. 1987); *State ex rel. Pringle v. Heritage Baptist Temple, Inc.*, 693 P.2d 1163 (Kan. 1985); *Dep't of Social Servs. v. Emmanuel Baptist Pre-School*, 150 Mich. App. 254, 388 N.W.2d 326 (1986). See also *State v. Corpus Christi People's Baptist Church*, 683 S.W.2d 692, 695 (Tex. 1984) (holding that a church-run child care facility must comply with state licensure requirements which fulfill the states's compelling interest of protecting children in child care facilities from mental and physical harm and that the licensing requirements are the least restrictive means to achieve that end), *appeal dismissed*, 474 U.S. 801 (1985).

The *Corpus Christi* court observed that the children are completely dependant upon these church-run homes for their care and safety. Without the regulations, the state would be rendered powerless to intervene if children in these homes "became the victims of neglect, cruelty or degradation in the name of spiritual regeneration." *Id.* at 696; see also *State ex rel. Pringle*

veillance and intrusion but are sustained due to the compelling state interest being advanced.⁹⁴ The judicial system has recognized the grave danger to children⁹⁵ which could ensue if defendant churches are permitted to opt out of a statutory system⁹⁶ designed to protect children⁹⁷ and which applies to all other similarly situated organizations which lack the protective shield of religious affiliation.

By subjecting churches to judicial inquiry into their allegedly negligent conduct in the treatment of children, the state may achieve its vital goal of protecting the welfare of children⁹⁸ in a manner which is the least restrictive means. A civil suit will also serve to safeguard the welfare of children who may be harmed subsequently due to the negligent omission of medical care by faith healers.⁹⁹

There is considerable precedent to support the state's authority, as *parens patriae*,¹⁰⁰ to impose civil liability on faith healers in order

v. Heritage Baptist Temple, Inc., 236 Kan. 544, 693 P.2d 1163 (1985) (holding that a church operated day care center must abide by state licensing requirements notwithstanding the religious instruction that was offered in the program).

94. See *supra* note 92 and accompanying text. The Michigan Court of Appeals has taken this position one step further. The court affirmed an order enjoining a fundamentalist church from operating an unlicensed day care center, but reversed the lower court's grant of exemptions from the licensure scheme to the church. The regulations demanded educational requirements for the program director, required that a program foster a positive self-concept in children, prohibition against corporal punishment, and inspection of the financial records of child care organizations by the Department of Social Services. *Department of Social Servs. v. Emmanuel Baptist Pre-School*, 150 Mich. App. 254, 388 N.W.2d 326 (1986), *appeal granted*, 428 Mich. 909, 409 N.W.2d 199 (1987).

On the issue of prohibition of corporal punishment within a church-operated facility, the court held:

The state's interest is clear and compelling. The rule protects very young children from physical harm by prohibiting potentially abusive forms of discipline. . . . Thus, although the prohibition against spanking with a ping pong paddle burdens the church's free exercise of its religious beliefs, the state's interest in protecting the very young outweighs the burden. . . . [W]e recognize that some *practices rooted in religious principle may be dangerous to the health and welfare of certain members of society* . . . *It is not beyond the power of government to prevent such practices through regulation.*

Id. at 271, 388 N.W.2d at 334 (emphasis added).

95. *Corpus Christi*, 683 S.W.2d at 692.

96. Michigan's Child Care Organization Act protects through licensing and regulation of child care organizations. To operate a child care center, an entity must apply for a license. The statute authorizes the Dep't. of Social Services to develop rules for the care and protection of children in covered organizations. *Emmanuel Baptist*, 150 Mich. App. at 254, 388 N.W.2d at 326.

97. See *supra* notes 93-95 and accompanying text.

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

99. See *supra* note 26 for a discussion of the prophylactic effect of civil liability.

100. See *supra* note 25 and accompanying text.

to protect living children presently at risk due to their parents' religious practices.¹⁰¹ Alternatives exist which may foster the goal of child protection, but each tend to promote constitutionally impermissible entanglement between church and state in violation of the establishment clause.¹⁰² The alternatives include supervision of faith healers through licensing requirements, secular educational requirements, and imposition of record-keeping regulations.¹⁰³

Despite the concern over potential entanglement, surveillance has been upheld where the protection of children is the state's goal.¹⁰⁴ Additionally, the adjudication of a civil negligence action is not a continuous investigation and surveillance which has been held to be violative of the first amendment in other circumstances.¹⁰⁵ A simple imposition of a duty to act reasonably in the treatment of children would be less burdensome on the church than detailed regulations which have nonetheless been upheld on first amendment challenges.¹⁰⁶

2. The *Parens Patriae* Role of the State.— Courts have uniformly held that the first amendment protects the right of a competent adult to refuse necessary medical treatment in accordance with his or her religious beliefs.¹⁰⁷ In accordance with that principle, courts have not allowed a plaintiff to state a cause of action for neg-

101. See *supra* notes 63-66 and accompanying text.

102. See *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979) (holding that the NLRB exercise of jurisdiction over diocesan schools in determining whether an unfair labor practice existed fostered excessive entanglement between church and state). See generally Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981).

103. See, e.g., *Surinach v. Pesquera de Busquets*, 604 F.2d 73, 78 (1st Cir. 1979) (citing *Walz v. Tax Comm'n*, 397 U.S. 675 (1970)).

104. See *supra* notes 93-95.

105. See *Alberts v. Devine*, 295 Mass. 59, 75, 479 N.E.2d 113, 123, cert. denied sub nom. 474 U.S. 1013 (1985). Civil litigation is far less intrusive for the Christian Science Church than the present government entanglement fostered pursuant to governmental regulations. See generally 42 U.S.C. § 1395x(y) (1983); 32 C.F.R. §§ 199.8, 199.12 (1985).

106. See *supra* notes 93-95.

107. See, e.g., *In re Osborne*, 294 A.2d 372 (D.C. 1972) (holding that no compelling state interest existed to interfere with competent adult's decision to refuse blood transfusion); *St. Mary's Hosp. v. Ramsey*, 465 So. 2d 666 (Fla. Dist. Ct. App. 1985) (holding that a mentally competent patient suffering from kidney disease could refuse blood transfusion); *In re Brooks' Estate*, 32 Ill. 2d 361, 373-74, 205 N.E.2d 435, 442 (1965) (holding that the state has no vital countervailing interest to warrant interference so as to prevent a competent adult from deciding to forego medical treatment). Cf. *In re Brown*, 478 So. 2d 1033 (Miss. 1985) (stating that the state's interest in keeping an eyewitness alive to testify at a murder trial is not of sufficient magnitude to override an individual adult's right to refuse a blood transfusion consistent with free exercise of religion).

ligence on behalf of a competent adult when the choice to follow the tenets of a particular faith is independently made.¹⁰⁸ Children, however, present a more difficult problem.

The state has traditionally acted in its role as *parens patriae* to protect a child whose life is in imminent danger.¹⁰⁹ In light of situations which have precipitated this state role, the logical extension of the *parens patriae* doctrine is the imposition of civil liability as the least restrictive means¹¹⁰ of advancing the state's compelling interest in the protection of children.¹¹¹

The circumstances giving rise to judicial intervention usually involve either a hospital seeking a court order to administer necessary medical treatment to a child over the objections of parents whose religious beliefs prohibit such procedures,¹¹² or a social agency bringing an action to have a child declared neglected and dependent so that needed treatment may be ordered.¹¹³ Judicial intervention has been invoked where the patient is not a child, but rather the mother of a minor whose welfare depends upon the mother's survival.¹¹⁴ Likewise, courts have intruded upon free exercise rights to protect

108. *Baumgartner v. First Church of Christ, Scientist*, 141 Ill. App. 3d 898, 907-08, 490 N.E.2d 1319, 1325-26, *cert. denied*, 107 S. Ct. 317 (1986).

109. *See supra* notes 25, 29-35 and accompanying text.

110. *See Thomas v. Review Bd.*, 450 U.S. 707 (1981); *see also Jehovah's Witnesses v. King County Hosp.*, 278 F. Supp. 488 (W.D. Wash. 1967) (holding that a "dependant child" statute, and the requiring of Jehovah's Witnesses to sustain blood transfusions was constitutionally valid in view of the strong state interest involved), *aff'd*, 390 U.S. 598 (1968); *Muhlenberg Hosp. v. Patterson*, 128 N.J. Super. 498, 320 A.2d 518 (1974) (stating that the court has authority to order a blood transfusion where denial presents a danger of irreparable brain damage to an infant). *See generally* Comment, *Roy v. Cohen: Social Security Numbers and the Free Exercise Clause*, 36 AM. U.L. REV. 217, 218 (1986).

111. *See supra* note 87.

112. *Jehovah's Witnesses v. King County Hosp.*, 390 U.S. 598 (1968); *Muhlenberg Hosp. v. Patterson*, 128 N.J. Super. 498, 320 A.2d 518 (1974).

113. *People ex rel. D.L.E.*, 645 P.2d 271, 276 (Colo. 1982); *See also In re Hamilton*, 657 S.W.2d 425, 426 (Tenn. Ct. App. 1983) (affirming the lower court's holding that a child afflicted with cancer was dependent and neglected when the parents, members of a sect that eschewed medical care, refused to allow the administration of pain relief and treatment). *See generally* Comment, *Praying for Relief From Parens Patriae: Should a Child be Allowed to Refuse Life-Saving Medical Treatment on Religious Grounds?*, 2 J.L. ETHICS & PUB. POL'Y 673 (1986).

114. *See, e.g., In re Georgetown College, Inc.*, 331 F.2d 1000 (D.C. Cir.) (holding that the state, as *parens patriae*, has a compelling interest in sustaining the life of a mother of a dependent child), *cert. denied*, 377 U.S. 978 (1964). *But cf. In re Osborne*, 294 A.2d 372 (D.C. 1972) (stating that there was no compelling state interest to override a 34 year old father's refusal to accept a blood transfusion given the fact that the care and support of his minor children were provided for in the event of his death).

the life of a viable fetus.¹¹⁵

Judicial intervention is not limited exclusively to those situations where a child's life is threatened because of parental adherence to religious beliefs. Courts have intervened when the quality of life rather than life itself is jeopardized if medical treatment is not administered to a child.¹¹⁶

3. Mootness.— The state's paramount interest in child protection is not rendered moot when a particular child has already died or has been severely injured. Harm to children because of negligent treatment by faith healers is, unfortunately, likely to occur repeatedly given the recent growth of religious sects that oppose medical treatment.¹¹⁷ A judicial decision on the merits and resolution of the liability issue would benefit the public interest¹¹⁸ by assisting liti-

115. See, e.g., *Jefferson v. Griffin Spalding County Hosp. Auth.*, 247 Ga. 86, 274 S.E.2d 457 (1981) (sustaining an order requiring a pregnant woman to undergo medical procedures to protect the life of her unborn child and holding that the state's interest in sustaining the life of a viable fetus outweighed the mother's right to free exercise of religion, right to refuse medical care, and right to parental autonomy); *Crouse Irving Memorial Hosp., Inc. v. Paddock*, 127 Misc. 2d 101, 485 N.Y.S.2d 443 (1985) (holding that blood transfusions may be administered to a mother carrying a fetus, despite the mother's religious objections, since first amendment protections must yield to the state's interest in protecting the health and welfare of its youth); *In re Jamaica Hosp.*, 128 Misc. 2d 1006, 491 N.Y.S.2d 898 (1985) (holding that patient's interest in practice of religious beliefs was not sufficient to supercede state's interest in protecting the life of her fetus).

116. See, e.g., *In re Sampson*, 29 N.Y.2d 900, 278 N.E.2d 918, 328 N.Y.S.2d 686 (1972) (affirming per curiam the family court decision to order surgery to correct the function and appearance of a disfiguring condition without placing the burden of decision on the boy); *In re Jensen*, 54 Or. App. 1, 633 P.2d 1302 (1981) (affirming a court order for the placement of the child with children's services where the child needed treatment for hydrocephalus, an abnormal amount of fluid in the brain, which causes head enlargement and often severe mental and physical problems, holding that the burden on the child, created by denial of treatment in the name of religion, exceeded the permissible free exercise and family rights of the parents); see also *In re Gregory S.*, 85 Misc. 2d 846, 380 N.Y.S.2d 620 (Fam. Ct. 1976). But see *In re Green*, 448 Pa. 338, 292 A.2d 387 (1972) (holding that the state's interest was not of sufficient magnitude to warrant a limitation on the parents' free exercise rights when the child's life was not in imminent danger). The *Green* dissent agreed with *Sampson*, and observed that *Wisconsin v. Yoder* is limited by *Prince v. Massachusetts*, 321 U.S. 158 (1944), and is inapplicable where a parental decision poses a threat to the health or safety of the child. *Green*, 448 Pa. at 338, 292 A.2d at 387.

117. See *supra* notes 4-5 and accompanying text.

118. See *Roe v. Wade*, 410 U.S. 113 (1973). The Supreme Court held that pregnancy is an example of an activity which is not rendered moot, though it terminated three years prior to the litigation. It is "capable of repetition, yet evading review." *Id.* at 127 (citing *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911)). Accordingly, the Court held that plaintiff had brought forth a justiciable controversy. *Id.* at 124.

Courts have recognized that although a case may be clearly moot, when there exists an urgency to prescribe a rule of future conduct on a matter of public concern, an appellate court should decide the issues. See, e.g., *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115 (1974);

gants and trial courts while also educating faith healers as to their duty to act reasonably when they assume the treatment of children.¹¹⁹

The state's interest when dealing with faith healers is even more compelling than in the hospital or social agency cases¹²⁰ because the authorities are denied the opportunity to intervene on behalf of the welfare of the child at the time the life threatening crisis occurs.¹²¹ Although the injury or death has already occurred by the time the controversy comes before the court, the issue is not moot since the situation prevented the state from acting in its role as *parens patriae*. Therefore, the plaintiffs are seeking accountability from defendants who would have been subject to the intervention of the court, had the court been aware of the threat at the critical time.

IV. CIVIL COURT JURISDICTION THROUGH RECOGNITION OF THE SECULAR NATURE OF FAITH HEALING ACTIVITIES AS HEALTH CARE

Civil court jurisdiction is permissible when a church is engaged in spiritual healing of an ill child rather than engaged in religious instruction or indoctrination. Recently, in response to defendants' assertions that the first amendment precludes the exercise of National Labor Relations Board (NLRB) jurisdiction over their church-run facilities, several circuit courts¹²² have upheld the exercise of juris-

Jones v. State, 302 Md. 153, 158, 486 A.2d 184, 187 (1985); *see also* John F. Kennedy Memorial Hosp. v. Heston, 58 N.J. 576, 279 A.2d 670 (1971) (holding that public interest in the resolution of a controversy regarding a blood transfusion administered, and now moot, demanded a decision). *But cf.* Comment, *supra* note 33, at 885 (stating "it should be pointed out that the state's interest in protecting the interest of the child evaporates with the death of the child").

119. *See* W. PROSSER & W. KEETON, *supra* note 26, § 4, at 23.

120. *See supra* notes 110-12 and accompanying text.

121. *See supra* note 31 and accompanying text.

122. NLRB v. Salvation Army, 763 F.2d 1 (1st Cir. 1985) (holding that the NLRB had jurisdiction over a church-operated day care center whose primary purpose was to provide secular day care for children rather than teach religious doctrine); Volunteers of Am. Bar None Boys Ranch v. NLRB, 752 F.2d 345 (8th Cir.) (holding that the NLRB had jurisdiction over a treatment facility serving children and did not pose a significant risk of entanglement), *cert. denied*, 472 U.S. 1028 (1985); Volunteers of Am. v. NLRB, 777 F.2d 1386 (9th Cir. 1985) (holding that the NLRB had jurisdiction over labor disputes in a church's alcohol rehabilitation program, because the program was conducted in a secular manner under contract with the county, and funded mainly through federal block grants); Denver Post v. NLRB, 732 F.2d 769 (10th Cir. 1984) (holding that the NLRB had jurisdiction over church-operated facilities which provide temporary shelter and care for women and children); St. Elizabeth Hosp. v. NLRB, 715 F.2d 1193 (7th Cir. 1983) (holding that the NLRB had sufficient jurisdiction over a religiously affiliated hospital to require collective bargaining with union);

diction in labor disputes. Upon examination of the central objective of each particular program, the courts concluded that the NLRB's jurisdiction over the religious organizations did not present the risk of noncompliance with the first amendment inherent in jurisdiction over educational institutions.¹²³ The church-operated programs at issue were held not to be educational in nature even though the purpose of the organization had a religious character.

The same reasoning can be applied to support the exercise of civil court jurisdiction over church-affiliated faith healers. In performing the secular task of healing as alternative health care providers, the faith healer's purpose is not to convert the parent or child to a particular faith nor teach religious doctrine, which would bar civil court jurisdiction.¹²⁴ A defendant faith healer does not state a valid first amendment jurisdictional defense where the purpose of his acts is to cure the child's physical condition, not to educate or indoctrinate the child.

In *Volunteers of America v. NLRB*,¹²⁵ the Ninth Circuit held that the NLRB properly asserted jurisdiction over a church-run alcoholism recovery program. The decision was based in part on the fact that the operation in question was almost wholly funded with federal block grants.¹²⁶ Such federal grants would preclude the dissemination of religious doctrine and thus distinguish the case from the educational setting of *NLRB v. Catholic Bishop*,¹²⁷ in which NLRB jurisdiction was held not within the intent of Congress.

Volunteers of America is directly applicable to the Christian Science Church, whose facilities receive federal funding,¹²⁸ and

Tressler Lutheran Home for Children v. NLRB, 677 F.2d 302 (3d Cir. 1982) (holding that the NLRB had jurisdiction over a church-run nursing home was proper).

123. See *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979). *But cf.* *Catholic High School Ass'n v. Culvert*, 753 F.2d 1161, 1171 (2d Cir. 1985) (holding that jurisdiction may be exercised by the State Labor Relations Board in a dispute between lay teachers and religious school managers, noting that "[s]tate labor laws are essential to the preservation of industrial peace and sound economic order"). See generally Case Comment, *Universidad Central de Bayamon v. NLRB: Jurisdiction over Religious Colleges and Universities—The Need For Substantive Constitutional Analysis*, 62 NOTRE DAME L. REV. 255 (1987).

124. *NLRB v. Salvation Army*, 763 F.2d 1, 3 (1st Cir. 1985).

125. 777 F.2d 1386 (9th Cir. 1985).

126. *Id.* at 1390. Federal block grants, established in 1981, were designed to afford states more discretion over the funding and administration of certain federal programs. Varon, *Passing The Bucks: Procedural Protections Under Federal Block Grants*, 18 HARV. C.R.-C.L. L. REV. 231 (1983).

127. 440 U.S. 490 (1979). See *Denver Post v. NLRB*, 732 F.2d 769, 772 (10th Cir. 1984). See generally, Laycock, *supra* note 102, at 1373.

128. See *supra* note 71 and accompanying text.

which could be subject to civil court jurisdiction on the same theory.¹²⁹ The church should not be able to assert the first amendment as a defense to jurisdiction and inquiry by a civil court while it is the recipient of federal funding for services which are analogous to secular health care.¹³⁰ The prohibition against propagation of religious doctrine which accompanies receipt of federal funds removes the facility from the educational institution category and therefore jurisdiction does not give rise to the same risk of a first amendment violation.

V. CONCLUSION

Imposition of tort liability for negligent conduct in the faith healing treatment of children is the least restrictive means toward fulfilling the state's compelling interest of safeguarding the health and welfare of its youth.¹³¹ States have long recognized this vital interest as exemplified by their role as *parens patriae*.¹³² Where the circumstances are such that the state, acting through judicial intervention, was deprived of the opportunity to assume that role to protect a child's life, a civil court can extend the *parens patriae* role of the state and adjudicate the matter without delving into religious doctrine or becoming involved in a long term surveillance of ongoing religious activities.¹³³

The precedential import of an inquiry into conduct as opposed to a judicial dismissal on no-duty grounds¹³⁴ will protect future chil-

129. Although the aforementioned federally funded programs are not directed at the treatment of children, the Ninth Circuit held that the secular nature of the services provided to children and adults allowed NLRB supervision. *Volunteers*, 777 F.2d at 1390.

130. In enacting the Social Security Amendments of 1965, Congress explicitly provided: Christian Science sanatoriums that are operated or listed and certified by the First Church of Christ, Scientist, in Boston, could participate in the program as 'hospitals' . . . In general, however, the committee intends . . . these sanatorium services to be a substitute for, and not an addition to, medical services that might be furnished to a person if his religious beliefs were not contrary to the use of usual facilities.

H.R. REP. NO. 213, 89th Cong., 1st Sess. 27, reprinted in 1965 U.S. CODE CONG. & ADMIN. NEWS 1943, 1971.

131. See *supra* notes 25, 63 and accompanying text.

132. See *supra* notes 25, 63-66 and accompanying text.

133. See *supra* notes 109-11 and accompanying text.

134. See *supra* notes 12-15 and accompanying text. For an illustration of a court which usurps the province of the jury, deciding questions of fact concurrently with issues of law by refusing to recognize a duty, see *Baumgartner v. First Church of Christ, Scientist*, 441 Ill. App. 3d 898, 490 N.E.2d 1319, cert. denied, 107 S. Ct. 317 (1986). See generally *Green, Duties, Risks, Causation Doctrines*, 41 TEX. L. REV. 42 (1962). The determination of the duty issue is based on general policy considerations such as "morality, the economic good of the group, practical administration of the law, justice as between the parties, and other considera-

dren from injury or death at the hands of religious faith healers. The pairing of first amendment protection and "faith healing" could encourage affirmative treatment which would be potentially more dangerous than the garden variety spiritual healing which consists of merely the absence of medical treatment.¹³⁵

tions relative to the environment out of which the case arose." *Id.* at 45. Courts have balanced policy considerations, however, and have concluded that the benefits to society can outweigh the burdens of a judicial imposition of a duty. *See supra* note 12.

135. *See State v. Miskimens*, 22 Ohio Misc. 2d 43, 46, 490 N.E.2d 931, 935 (1984).