Spring 1990

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RELIGIOUS ACCOMMODATION AND CRIMINAL LIABILITY

Christine A. Clark*

Florida's religious accommodation statute leads some parents to believe that they are free to rely on spiritual healing in lieu of medical treatment for their ill children. However, the statute fails to protect these parents in a criminal prosecution arising from their children's deaths. The author of this Article describes the various types of accommodation statutes, analyzes a recent prosecution, and concludes that such prosecutions are unconstitutional. The author also proposes revisions to Florida's law designed to eliminate ambiguities about what protections it provides.

Amy Hermanson was seven years old when she died at her home from complications related to juvenile diabetes on September 30, 1986. At the time of her death, she was receiving treatment from a Christian Science practitioner and nursing care from a Christian Science nurse in accordance with the family's religious beliefs. Her parents, Bill and Christine Hermanson, were relying on another belief as well—the belief that Florida law protected their choice of spiritual treatment. Despite the apparent protection offered by the

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1. Fla. Stat. § 415.503(9)(f) (1989). The statute, numbered section 415.503(8)(f) at the time of the trial, provides in part that:

(9) "Harm" to a child's health or welfare can occur when the parent or other person responsible for the child's welfare:

. . . .

(f) Fails to supply the child with adequate food, clothing, shelter, or health care, although financially able to do so or although offered financial or other means to do so; however, a parent or other person responsible for the child's welfare legitimately practicing his religious beliefs, who by reason thereof does not provide specified medical treatment for a child, may not be considered abusive or neglectful for that reason alone, but such an exception does not:

1. Eliminate the requirement that such a case be reported to the department [of

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statute, on November 4, 1986, Bill and Christine Hermanson were charged with felony child abuse and felony third degree murder.\(^2\)

The Hermansons were not alone in their misplaced reliance on such a statute. Five other prosecutions against parents who relied on spiritual healing have been brought recently in California, Massachusetts, and Arizona.\(^3\) In each of these cases, the defendants relied on state statutes accommodating spiritual healing in statutory definitions of child abuse, neglect, or endangerment. Prosecutors, however, have imposed unwritten limitations on these "religious accommodation statutes" and have brought serious criminal charges, even while acknowledging that the parents had been practicing their religious beliefs within the statutory definitions.\(^4\)

Florida is one of forty-three jurisdictions\(^5\) that have enacted statu-

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Health and Rehabilitative Services; 
2. Prevent the department from investigating such a case; or 
3. Preclude a court from ordering, when the health of the child requires it, the provision of medical services by a physician, as defined herein, or treatment by a duly accredited practitioner who relies solely on spiritual means for healing in accordance with the tenets and practices of a well-recognized church or religious organization. 
4. For example, for purposes of the Motion to Dismiss, the State of Florida stipulated that the Hermansons had "at all times material to the facts in this case, followed the religious teachings of their church and relied upon Christian Science healing . . . ." Petition for Writ of Prohibition and for Writ of Certiorari in Complete Exercise of Jurisdiction at 8, State v. Hermanson, No. 86-3231 (Fla. 12th Cir. Ct. 1987) \textit{[hereinafter Petition for Writ of Prohibition].} 
   
Several commentators have speculated that these prosecutions are motivated by religious persecution and publicity-seeking, rather than by the ends of justice. In 1967, one defense attorney suggested that a parent who simply did not recognize life-threatening symptoms would not be criminally prosecuted, implying religious persecution. See Transcript of Trial at 359, Commonwealth v. Sheridan, No. 26307 (Mass. Super. Ct., Nov. 9, 1967). One newspaper columnist, speculating that the prosecutor wanted to add a dramatic story to a book scheduled for publication, described the prosecution of the defendants as a "legally dubious, high-profile witchhunt against Christian Scientists." Boston Globe, June 10, 1988, at 25, col. 2. 
tory accommodations6 for the practice of spiritual healing. Although differing in language and effect, the statutes express a common goal of accommodating the treatment of illness through spiritual means.

This Article examines the criminal liability of parents who rely on these statutes and proposes statutory revisions to eliminate ambiguities about what protection these statutes afford. The Article analyzes Florida’s religious accommodation statute, its origins, and its recent construction and application in the Hermansons’ trial. It also discusses the different types of religious accommodation statutes nationwide, with an emphasis on those states where prosecutions have been brought. The constitutional issues raised by the application of these statutes are also considered. Finally, this Article offers suggestions to clarify the potential criminal liability of parents practicing their religious beliefs in Florida.

This Article concludes that the prosecution of parents who choose spiritual care in compliance with these statutes violates due process because the statutes fail to give fair warning that such conduct will result in criminal liability. Indeed, one of the prospective jurors at the Hermansons’ trial expressed confusion about the effect of Florida’s

6. The phrase “statutory accommodation” is used in lieu of the more common “exemption” to distinguish the nature of these statutes. “Exemption” could suggest that this practice constitutes a form of child abuse permitted by the Legislature. “Accommodation” better expresses the legislative intent that the withholding of medical treatment does not constitute child neglect when spiritual care is provided.
statute by asking: if the statute creates an accommodation for religious practice and the Hermansons were practicing Christian Science, "then why are we here?" The answer to this question is that prosecutors and courts have read a limitation into the religious accommodation statutes by requiring that, at some point in the progression of an illness, parents abandon their choice of spiritual care and seek medical treatment. The constitutional danger inherent in applying this limitation arises when juries are asked to determine whether state-authorized spiritual healing constitutes criminal negligence. This hindsight determination of reasonableness not only fails to give fair warning of criminal liability, but also violates the right of free exercise of religion.

I. HISTORICAL BACKGROUND

The law has not always imposed a legal duty on parents to provide their children with medical care. The first law creating such a duty was enacted in England in 1868. This law stated in part that "[w]hen any Parent shall wilfully neglect to provide adequate Food, Clothing, Medical Aid, or Lodging for his Child . . . whereby the Health of such Child shall have been . . . injured, he shall be guilty of an Offence . . . ." Reference to medical care was deleted in 1894 when Parliament substituted the Prevention of Cruelty to Children Act, which prohibited willful neglect resulting in "injury to [the child's] health."

In the United States, while some states in the early part of the century had statutes requiring parents to provide medical care for their children, as late as 1968 one state's child neglect statute made no

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7. Many of the references to events occurring during the course of the Hermanson trial are based on the author's personal observations. Trial references not accompanied by footnotes are drawn from the author's notes, which are on file at the Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.
11. Id.
12. 57 & 58 Vict., ch. 41.
13. Id. § 1.
reference to medical care. As a result, a prosecution for failure to obtain medical attention was dismissed by that state's supreme court. However, in states with statutes requiring the provision of medical care, several parents relying on spiritual healing were convicted during the first half of the century. The courts generally rejected defenses to criminal charges based on first amendment free exercise rights.

Two cases brought in 1967 received widespread publicity. In Barnstable, Massachusetts, Dorothy Sheridan was charged with manslaughter for not seeking medical care for her daughter, Lisa, who died of pneumonia. The Wall Street Journal featured the case in a front-page article, calling it a "legal landmark" because it concerned constitutional guarantees of religious freedom. Sheridan had been a member of the Christian Science church, headquartered in Massachusetts, for three years when her daughter developed a high fever and a cough in early 1967. Although the fever eventually broke and the cough abated, Sheridan nevertheless consulted a Christian Science practitioner because she felt that Lisa's convalescence was taking too long. After three weeks of illness, Lisa died. A jury found Sheridan guilty of manslaughter, and she was given five years probation. The case was not appealed.

15. See Mich. Comp. Laws Ann. § 750.136 (West 1968) ("Any parent... under whose protection any child may be, who... unlawfully punishes, or wilfully, unlawfully or negligently deprives of necessary food, clothing or shelter, a child under 16 years of age, shall, upon conviction, be deemed guilty of a felony.").
21. Nathan Talbot, Manager of the Committee on Publications for the First Church of Christ, Scientist, in Boston (the Mother Church) states that:

Mrs. Sheridan decided not to appeal because she did not want to experience a second trial, in the event that the appeal was successful. In addition, even more important from Mrs. Sheridan's standpoint, was that there was a serious legal question of whether or not she could appeal since she was neither sentenced nor fined. The question on the right to appeal would have had to go to the Massachusetts Supreme Judicial Court for determination. Some of the best attorneys in Massachusetts doubted whether Mrs. Sheridan could take an appeal since she may not have been "convicted" because she was neither sentenced nor fined.

In California, a misdemeanor-manslaughter prosecution was brought against Florence Ada Arnold, who relied on prayer to heal her daughter Sandra.\textsuperscript{22} Arnold was a member of the Church of the First Born, a religious group which believes in faith healing.\textsuperscript{23} The manslaughter charge brought against Arnold was based on section 270, California Penal Code, which defines child neglect.\textsuperscript{24} Arnold argued that the phrase "or other remedial care" following the requirement to provide necessary medical attendance authorized her to rely exclusively on the spiritual healing practice of her denomination. The California Supreme Court rejected this argument, finding that the phrase did not authorize unorthodox substitutes for medical treatment.\textsuperscript{25} Arnold's conviction, however, was later overturned because of an evidentiary error.\textsuperscript{26}

When the California Legislature amended section 270 in 1976 to expressly accommodate the choice of spiritual healing,\textsuperscript{27} some viewed it as a response to \textit{Arnold} and believed that parents thereafter would be spared prosecution if their actions complied with the statute. In 1988, the California Supreme Court overruled \textit{Arnold}'s interpretation of the phrase "other remedial care," holding that it encompasses Christian Science healing pursuant to the 1976 amendment.\textsuperscript{28}

Several states enacted accommodation statutes during the 1960s as part of their child abuse reporting schemes. A major impetus for the legislative accommodations came from the federal Child Abuse Prevention and Treatment Act, passed in 1974.\textsuperscript{29} The Act authorizes matching funds to states enacting child abuse reporting statutes in accordance with federal guidelines.\textsuperscript{30} In 1973, the United States House

\begin{itemize}
  \item \textsuperscript{22} People v. Arnold, 66 Cal. 2d 438, 426 P.2d 515, 58 Cal. Rptr. 115 (1967).
  \item \textsuperscript{24} This section provided:
    A father of . . . a . . . minor child who willfully omits without lawful excuse to furnish necessary clothing, food, shelter or medical attendance or other remedial care for his child is guilty of a misdemeanor. . . .
    In the event that the father . . . is dead . . . the mother shall become liable.
  \item \textsuperscript{25} \textit{Arnold}, 66 Cal. 2d at 443 n.2, 426 P.2d at 517 n.2, 58 Cal. Rptr. at 117-18 n.2.
  \item \textsuperscript{26} \textit{Id.} at 452, 426 P.2d at 524, 58 Cal. Rptr. at 124.
  \item \textsuperscript{27} \textit{Id.} at 450, 426 P.2d at 522, 58 Cal. Rptr. at 122.
  \item \textsuperscript{28} See ch. 673, § 1, 1976 Cal. Stat. 1661 (amending \textit{CAL. PENAL CODE} § 270 to specify that "[i]f a parent provides a minor with treatment by spiritual means through prayer alone in accordance with the tenets and practices of a recognized church or religious denomination, by a duly accredited practitioner thereof, such treatment shall constitute 'other remedial care', as used in this section.").
  \item \textsuperscript{30} \textit{Id.} 5101 (1982 & Supp. 1987).
\end{itemize}
of Representatives' Committee on Education and Labor reported that:

[I]t is not the intent of the Committee that a parent or guardian legitimately practicing his religious beliefs who thereby does not provide specific medical treatment for a child is for that reason alone considered to be a negligent parent. To clarify further, no parent or guardian who in good faith is providing to a child treatment by spiritual means—such as prayer—according to the tenets and practices of a recognized church through a duly accredited practitioner shall for that reason alone be considered to have neglected the child.31

The Act authorizes the Secretary of the Department of Health, Education, and Welfare (HEW) to promulgate regulations, including statutory guidelines, for implementation of the Act.32 The original HEW guidelines, announced on December 19, 1974, included a model religious accommodation provision:

"Harm or threatened harm to a child's health or welfare" can occur through: Non-accidental physical or mental injury; sexual abuse, as defined by State law; or negligent treatment or maltreatment, including the failure to provide adequate food, clothing, or shelter. Provided, however, that a parent or guardian legitimately practicing his religious beliefs who thereby does not provide specified medical treatment for a child, for that reason alone shall not be considered a negligent parent or guardian; However, such an exception shall not preclude a court from ordering that medical services be provided to the child, where his health requires it.33

While the regulations do not require states to adopt the identical language of the guidelines defining "child abuse and neglect," they do oblige the states to provide a definition with the same substance.34 The original guidelines' definition of harm included the failure to provide food, clothing or shelter, but not medical care.35 Although some states included language defining neglect as failure to provide medical or health care,36 the guidelines did not require this provision

34. Id. § 1340.3-3.
35. Id. § 1340.1-2(b)(1).
for eligibility under the Act.\textsuperscript{37} After soliciting comments on the inclusion of medical care, in 1987 the Department of Health and Human Services revised the definition of neglect to include the failure to provide medical care.\textsuperscript{38} The guidelines were also revised to delete the requirement that states provide an accommodation for religion.\textsuperscript{39} The guidelines require, however, that if the State does provide a religious accommodation, the reporting scheme must "not limit the administrative or judicial authority of the State to ensure that medical services are provided to the child when his health requires it."\textsuperscript{40}

II. Florida's Religious Accommodation Statute

Section 415.503(3), Florida Statutes, defines "child abuse or neglect" as "harm or threatened harm to a child's physical or mental health or welfare by the acts or omissions of the parent or other person responsible for the child's welfare."\textsuperscript{41} The nature of "harm" constituting child abuse is described as the failure "to supply the child with . . . health care . . . ."\textsuperscript{42} The statute further provides that "harm" does not arise when spiritual care is provided in lieu of medical treatment: "a parent or other person responsible for the child's welfare legitimately practicing his religious beliefs, who by reason thereof does not provide specified medical treatment for a child, may not be considered abusive or neglectful for that reason alone . . . ."\textsuperscript{43}

While spiritual healing in lieu of medical care is not labeled as abuse under the statute, the statute requires that such cases be reported to Florida's Department of Health and Rehabilitative Services (HRS).\textsuperscript{44} HRS may investigate any case so reported, and when the health of the child requires it, a court may order the provision of either medical services or "treatment by a duly accredited practitioner who relies solely on spiritual means for healing in accordance with the tenets and practices of a well-recognized church or religious organization."\textsuperscript{45} Hypothetically, the statute authorizes the courts to order Christian Science care "by a duly accredited practitioner."

\textsuperscript{39} Id.
\textsuperscript{40} Id. § 1340.2(d)(2)(ii).
\textsuperscript{41} FLA. STAT. § 415.503(3) (1989).
\textsuperscript{42} Id. § 415.503(9)(f). For the text of the statute, see supra note 1.
\textsuperscript{44} Id. § 415.504 (requiring Christian Science practitioners to report incidents of child abuse, and therefore arguably requiring reporting of all cases where parents rely on spiritual treatment in accordance with section 415.503(9)(f)).
\textsuperscript{45} Id. § 415.503(9)(f)(3).
A. Legislative History

In 1975, the Florida Senate and House of Representatives passed the religious accommodation provision of section 415.503, Florida Statutes, by a unanimous vote.\textsuperscript{46} Speaking before the Senate Judiciary-Criminal Committee, Senator Richard Deeb\textsuperscript{47} described the religious accommodation bill\textsuperscript{48} as "providing a defense for parents who decline medical treatment because [of their] religion."\textsuperscript{49} The section also was amended to require immediate notification to the State Attorney’s office of all reports of physical abuse.\textsuperscript{50} By adopting a notification requirement, the Committee intended primarily to comply with the federal guidelines promulgated pursuant to the Child Abuse Prevention and Treatment Act,\textsuperscript{51} thereby ensuring Florida’s receipt of federal matching dollars. The accommodation provision apparently was uncontroversial, as it drew no comment in the hearings.\textsuperscript{52}

In 1988 the Legislature heightened the protection of the accommodation statute through the amendment of section 415.511, entitled "Immunity from liability in cases of child abuse or neglect."

\begin{enumerate}
\item \textit{(a)} Any person, official, or institution participating in good faith in any act authorized or required by ss. 415.502-415.514 shall be immune from any civil or criminal liability which might otherwise result by reason of such action.
\item \textit{(b)} Except as provided in s. 415.503(8)(f) [renumbered as 415.503(9)(f)], nothing contained in this section shall be deemed to grant immunity, civil or criminal, to any person suspected of having abused or neglected a child, or committed any illegal act upon or against a child.\textsuperscript{53}
\end{enumerate}

\textsuperscript{46} Fla. S. Jour. 440 (Reg. Sess. 1975).
\textsuperscript{47} Repub., St. Petersburg, 1966-76.
\textsuperscript{48} Fla. SB 332 (1978).
\textsuperscript{49} Fla. S., Comm. on Judiciary-Crim., tape recording of proceedings (May 26, 1975) (available at Fla. Dep’t of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.).
\textsuperscript{50} Ch. 75-185, § 1, 1975 Fla. Laws 354, 355-56.
\textsuperscript{52} See Fla. S., Comm. on Judiciary-Crim., tape recording of proceedings (May 26, 1975); see also Fla. S., Comm. on HRS, tape recording of proceedings (May 9, 1975 & May 13, 1975) (available at Fla. Dep’t of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.).
\textsuperscript{53} Ch. 88-337, § 27, 1988 Fla. Laws 1781 (adding italicized language) (codified as amended at FLA. STAT. § 415.511 (1989)). Subsection (a) provides civil and criminal immunity for persons whose acts are authorized or required under the statute. It primarily protects teachers, physicians and all others reporting abuse from legal retaliation for their actions.
The 1988 amendment adding the italicized language clarifies the original provision by expressly including section 415.503(9)(f) in the authorized acts entitled to immunity from criminal liability. This provision ensures that a child abuser cannot be protected by performing some act authorized by the statute, such as reporting a case of child abuse to HRS. By specifically naming the religious accommodation provision in the amendment, the Legislature signified its intent that this provision offers not merely a defense, but immunity from prosecution for those whose conduct falls under section 415.503(9)(f).

B. Application of the Statute in the Hermansons' Trial

Although the plain language of the accommodation statute strongly suggests that the Hermansons' choice of treatment was statutorily protected, Bill and Christine Hermanson were tried for felony child abuse\(^55\) and felony third degree murder\(^56\) after Amy died in 1986.

As Christian Scientists, the Hermansons study and follow the teachings of Christian Science's founder, Mary Baker Eddy. In 1875, Eddy published the first edition of the Christian Science textbook\(^57\) *Science and Health with Key to the Scriptures*,\(^58\) which contains her own interpretation of Biblical truth and testimonial accounts by individuals who attribute their own healings to Christian Science.

At the heart of Christian Science doctrine is the belief that disease is a false sense of reality—thought externalized.\(^59\) Christian Science di-

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\(^54\) The Florida Legislature has enacted a variety of statutory grants of immunity. See, e.g., Fla. Stat. § 817.564(6) (1989) (granting immunity to any person operating in accordance with the Florida Comprehensive Drug Abuse Prevention and Control Act who manufactures, dispenses, sells, gives, or distributes an imitation controlled substance for use as a placebo by a licensed practitioner); id. § 765.10 (withholding or withdrawal of life-prolonging procedures from a patient with terminal conditions). Immunity provides a much greater protection than a defense. A defendant must proceed to trial before raising a defense. Immunity, however, bars the prosecution altogether. See, e.g., State v. Cloud, 248 La. 125, 176 So. 2d 620, 622 (1965).

\(^55\) Id. § 827.04 (1989) ("Whoever, willfully or by culpable negligence, deprives a child of ... necessary food, clothing, shelter, or medical treatment, or who, knowingly or by culpable negligence, permits physical or mental injury to the child, and in so doing causes great bodily harm ... to such child, shall be guilty of a felony of the third degree ... ".)

\(^56\) Id. § 782.04(4) (deeming unlawful the "killing of a human being, when perpetrated without any design to effect death, by a person engaged in the perpetration of [felony child abuse]"). The original charge also contained a count of manslaughter, which was dismissed in light of Bradley v. State, 79 Fla. 651, 84 So. 677 (1920), where the failure of a parent to provide medical attention to a severely burned child was not manslaughter. Id. Section 782.07, Florida Statutes, defines manslaughter as "[t]he killing of a human being by the act, procurement, or culpable negligence of another." (emphasis added).

\(^57\) *Encyclopedia Britannica* 700-01 (14th ed. 1967).

\(^58\) M. Eddy, *Science and Health with Key to the Scriptures* (1971).

\(^59\) Id. at 411.
verges from the traditional Christian understanding that God created the material world by viewing creation as wholly spiritual. In Christian Science cosmology, matter is viewed not as created by God, but as a limited mode of human perception.

Christian Scientists believe that spiritual power, or the power of the Spirit, can be concretely experienced and rationally understood—that it is literally present to dissolve the limited views of human beings and the fears proceeding from them, which, they believe, engender and are objectified as disease. This obviously constitutes a radically different approach to healing from that which underlies medical practice, and neither from the standpoint of Christian Science nor from that of medicine is it in the best interests of the patient to try to combine them.60

Christian Science practitioners function as both pastor and physician, allaying patients' sense of fear and helping them to understand Christian Science thought. Practitioners are church members who receive intensive training in Christian Science thought. The Mother Church—the First Church of Christ, Scientist, in Boston—certifies practitioners, listing their names monthly in church literature.61

The Hermansons brought in a practitioner and a Christian Science nurse to help Amy. The prosecution charged that despite the Hermansons' apparent compliance with the religious accommodation statute, the Hermansons were criminally liable, either because the statute itself was unconstitutional, or because it did not provide a defense to criminal prosecution.62

1. Pre-Trial Motions

The State stipulated that the Hermansons were "at all times material to the facts in this case, follow[ing] the religious teachings of their church and rel[yi]ng] upon Christian Science healing in the care and treatment of Amy Hermanson."63 For the purpose of the Motion to Dismiss, the Hermansons therefore argued that section 415.503(8)(f)

61. See, e.g., 107 THE CHRISTIAN SCI. J. at directory 42-70 (Dec. 1989). Applicants must demonstrate Christian character and verification of successful healings. Practitioners are paid by the patients and are required to devote their full time to healing work.
62. See generally Memorandum of Law in Support of the State's Demurrer and Motion to Declare Florida Statute 415.503(8)(f) Unconstitutional, State v. Hermanson, No. 86-3231 (Fla. 12th Cir. Ct. 1987) [hereinafter Memorandum of Law in Support of the State's Demurrer].
63. Petition for Writ of Prohibition, supra note 4 (restating stipulation of facts for Motion to Dismiss).
(renumbered as section 415.503(9)(f)) should preclude their prosecution altogether. They argued that the statute exempted their actions from the definition of child abuse by providing that such behavior "may not be considered abusive or neglectful for that reason alone . . .." Because the stipulated facts did not suggest any reason other than religious practice for their withholding medical treatment, the Hermansons argued that the statute should protect them from prosecution.

The State contended that the phrase "for that reason alone" should be interpreted to defeat the Hermansons’ defense. Other state courts have interpreted the phrase "for that reason alone" to mean that, at a certain point in the progression of an illness, such as when the illness becomes life-threatening, another "reason" is created that removes the protection of the accommodation. In Walker v. Superior Court, for example, the California Supreme Court held that the


65. Petition for Writ of Prohibition, supra note 4, at 12 (restating stipulation of facts for Motion to Dismiss).


67. See, e.g., People ex rel D.L.E., 645 P.2d 271, 274-75 (Colo. 1982) ("a child who is treated solely by spiritual means is not, for that reason alone, . . . neglected, but if there is an additional reason, such as where the child is deprived of medical care necessary to prevent a life-endangering condition, the child may be adjudicated . . . neglected").

phrase "for that reason alone" in section 11165.2, California Penal Code,\textsuperscript{69} meant that treatment by prayer alone is not neglect except when coupled with a sufficiently grave or life-threatening health condition.\textsuperscript{70} By contrast, the judge presiding over the \textit{Hermanson} trial held that the phrase "for that reason alone" in the Florida statute refers not to the severity of the illness, but to additional reasons for the deprivation of medical attention.\textsuperscript{71} 

The State also contended in the \textit{Hermanson} trial that the accommodation provision violates the establishment clause of the first amendment. The State argued that the statute impermissibly favors one religion over another and entangles the court with religion through determinations of which practice is "legitimate," whether a religion is "well-recognized," and other issues outside the court's proper jurisdiction.\textsuperscript{72} In the alternative, the State contended that the statute does not provide a criminal defense, but was intended only to apply to the reporting section in which it appears.\textsuperscript{73} In his order of June 16, 1988, Judge Steven Dakan expressly recognized the statutory accommodation as a defense\textsuperscript{74} and, without elaboration, rejected the State's

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\item \textsuperscript{69} \textit{CAL. PENAL CODE} § 11165.2(b) (West Supp. 1989); see also \textit{CAL. WELF. & INST. CODE} § 18950.5 (West 1980), \textit{id.} § 16509.1 (West Supp. 1989).
\item \textsuperscript{70} \textit{Walker}, 47 Cal. 3d at ___, 763 P.2d at 863-66, 253 Cal. Rptr. at 12-15. On February 21, 1984, four-year-old Shauntay Walker became ill with flu-like symptoms and within four days had developed a stiff neck. She died on March 9 of acute purulent meningitis. Shauntay had been treated by an accredited practitioner of Christian Science in lieu of medical care. Her mother, Laurie Walker, was subsequently charged with involuntary manslaughter and felony child endangerment. After losing her motion to dismiss in the trial court, Laurie petitioned the court of appeal for a writ of prohibition and a stay, which were summarily denied. \textit{Walker v. Superior Court}, 194 Cal. App. 3d 1090, 222 Cal. Rptr. 87 (Ct. App. 1986), \textit{review granted}, 715 P.2d 260, 224 Cal. Rptr 340 (1986) (granting petition for review and remanding to the court of appeal with directions to issue an alternative writ of prohibition), \textit{aff'd}, 47 Cal. 3d 112, 763 P.2d 852, 253 Cal. Rptr. 1 (1988) (granting second petition for review and concluding that Mrs. Walker could be prosecuted as charged), \textit{cert. denied}, 109 S. Ct. 3186 (1989).
\item \textsuperscript{71} Judge Dakan ruled during oral argument on the defendants' motion for Judgment of Acquittal that the phrase "for that reason alone" meant another reason constituting child abuse. Another reason for withholding medical attention could be willful disregard for the health of the child or to prevent medical authorities from discovering signs of physical abuse of the child. The Christian Science Church originally proposed inclusion of the phrase "for that reason alone" to clarify that the accommodation would not be available in cases where children were refused food, clothing, shelter, or were subjected to physical abuse. Telephone interview with Nathan A. Talbot, Manager, Christian Science Committee on Publication (Sept. 5, 1989).
\item \textsuperscript{72} \textit{Memorandum of Law in Support of the State's Demurrer}, supra note 62, at 11-16.
\item \textsuperscript{73} \textit{Id.}
\item \textsuperscript{74} \textit{See Order on Motion to Dismiss at 4, State v. Hermanson, No. 86-3231 (Fla. 12th Cir. Ct. 1987)} [hereinafter Order on Motion to Dismiss]. \textit{But see Walker}, where the court found as a matter of statutory construction that while the exemption in section 270 provides a defense to the withholding of medical care proscribed in that section, it does not constitute a defense to sections 273(a) (child endangerment) and 192(b) (manslaughter). "Conduct that is legal in one statutory context . . . may be actionable under separate statutes created for different legislative
motion to declare the statute unconstitutional.\textsuperscript{75}

After the Florida Legislature passed the amendment to section 415.511 in May 1988,\textsuperscript{76} creating the grant of criminal immunity, the Hermansons filed a supplemental motion to dismiss, arguing that the amendment entitled them to immunity and dismissal of the charges as a matter of law. This motion also was denied.\textsuperscript{77}

2. The Evidence at Trial

Following a four-month continuance granted because of extensive pre-trial publicity,\textsuperscript{78} the Hermansons' case went to trial on April 10, 1989, in Sarasota, Florida. The State's case focused on Amy's appearance during September 1986 and on the hours just before she died. The evidence showed that several of Amy's teachers had become concerned early in September because she seemed listless and thinner. The Hermansons also were concerned during this time, believing that Amy's problem was emotional and related to her discontent with a new school routine.

On the day Amy died, a Christian Science practitioner and a Christian Science nurse came to Amy's home to care for her. The nurse testified that Amy was unresponsive from the time of the nurse's arrival, and that when Amy began vomiting and her condition worsened,
the nurse called for an ambulance. The medical examiner testified that Amy died from ketoacidosis, a complication of juvenile diabetes, although some evidence suggested that Amy might have died from aspirating vomit.

Finally, the testimony showed that the Hermansons' treatment of Amy was based on their practice of Christian Science. Christine Hermanson's sister-in-law, Leslie Morton, testified that she had called the Department of Health and Rehabilitative Services (HRS) on September 29, the day before Amy died, because she knew that the Hermansons—in accordance with their religious beliefs—would not take Amy to a doctor. The State did not introduce any expert evidence concerning the tenets of Christian Science other than a statement from the Christian Science nurse that she had received no training in the medical treatment of disease while studying in Boston because the Christian Science Church teaches spiritual, not medical, treatment.

3. Closing Argument

In his closing argument, the State Attorney argued that the Hermansons' continued reliance on spiritual healing in the face of Amy's worsening condition constituted culpable negligence. Essentially, he told the jury to ignore the religious defense, and to begin their analysis without taking into account the Hermansons' religious beliefs. This approach was derived from Judge Dakan's June 16, 1988 Order which stated that "[i]f the State can prove a prima facie case, then Defendants may present evidence that their actions fell within the defenses provided for them by the law." Therefore, the prosecutor first argued that from an objective, non-religious viewpoint, the Hermansons' actions constituted culpable negligence.

In response to the Hermanson's affirmative defense based on the accommodation statute, the State Attorney stressed that the jury had to decide if the Hermansons had been "legitimately" practicing their religious beliefs—not sincerely or conscientiously, but "legitimately." This foundation prepared the jury for the State Attorney's remarkable assertion that Christian Science "allowed" the use of

80. Id. at 2-3.
81. Id. at 10-17, Apr. 18, 1989 (closing arguments).
82. Id.
83. Order on Motion to Dismiss, supra note 74, at 4.
84. Transcript of Trial at 10-17, Apr. 18, 1989, Hermanson, No. 86-3231 (closing arguments).
85. Id. at 21.
medical treatment. He based this inference on the nurse's call for an ambulance. Offering no direct testimony about how the nurse's making the call related to Christian Science doctrine, he told the jury that Christian Science includes the use of medicine. He suggested that since a Christian Science nurse had called an ambulance when Amy began to vomit, the Hermansons could have called for medical care at an earlier time and still have been "legitimately" practicing their religious beliefs. According to the State Attorney,

these experts in the Church, Mrs. Sellers and Mr. Hillier, recognized the need for medical attention. And it shows that medical attention would be allowed and is also recognized in this Church, because these two people are the ones who recommended it. What it shows is that the Church does recognize medical help. These two experts say, "The Church says it's okay to call a doctor." But the Defendants didn't do it. They could have called for medical help is what that shows, ladies and gentlemen. They could have called for medical help Monday night when that child was delirious and vomiting. They could have called for help Sunday night. They could have called for help Tuesday. That is not legitimately practicing one's religious beliefs. That is culpable negligence. What I'm saying to you, contend to you, is that the Defendants, because they could have called a doctor and didn't, were not legitimately practicing their religious beliefs; and therefore are not entitled to the defense that they claim. [The] Christian Science Church allows medical attention.

Thus, without introducing evidence as to whether Christian Science teaches belief in medical attention, or to Christian Science's view of turning to medical treatment, the State Attorney posited that "Christian Science allows medical attention." If this assertion was supported by the evidence, the argument that certain actions did not

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86. Id. at 23.
87. Id. at 23-25.
88. Id.
89. Id. at 24-25. The falsity of the prosecutor's argument is underscored by Rita Swan, an embittered former Christian Scientist who lost her son in 1977 to bacterial meningitis and who now actively campaigns to eliminate the protection of the accommodation statutes. After the judge instructed the jury that they were not to decide if the Hermansons had correctly interpreted Christian Science, but only whether they held a sincere belief that Christian Science authorized their actions, Swan observed that "[i]t's farcical to give this case to a jury with those instructions. The case should have been thrown out a year ago if the only question was if they were sincere about their religion." Dolnick, Murder by Faith, 41 IN HEALTH 58, 65 (Jan.-Feb. 1990).
constitute the “legitimate” practice of religion might be dispositive under many states’ statutes limiting the accommodation to parents practicing the tenets of a “recognized church or denomination.” Florida’s statute, however, does not limit its protection to “recognized” denominations. The plain language of the statute simply authorizes the practice of “religious beliefs.” Florida’s statute does not require the accommodation of religious beliefs only if to act otherwise would be considered sin or would result in some kind of excommunication. Nor does it require that every member of a religious faith act or believe in precisely the same manner. It does not even require that


92. See id. In Walker, the California Supreme Court noted that “resort to medicine does not constitute ‘sin’ for a Christian Scientist . . ., does not subject a church member to stigmatization . . ., does not result in divine retribution . . ., and, according to the Church’s amicus curiae brief, is not a matter of church compulsion.” Walker v. Superior Court, 47 Cal. 3d 112, 19, 111 Cal. Rptr. 1, 19 (1988), cert. denied, 109 S. Ct. 3186 (1989) (citing Schneider, Christian Science and the Law: Room for Compromise?, 1 Colum. J.L. & Soc. Probs. 80, 87-88 (1965); Talbot, The Position of the Christian Science Church, 309 New Eng. J. Med. 1641, 1642 (1983)).

the parent be a member of a church, in accordance with United States Supreme Court holdings concerning free exercise of religion. 94

The State Attorney's argument in Hermanson eviscerated any meaning in the religious accommodation statute. Regardless of the actual tenets of a church, anyone can choose to act inconsistently with their religious beliefs at any time. Thus, a Christian Scientist can disregard church teaching and seek medical attention. But, if the statute protects anyone, it must protect those who remain constant to their own religious convictions. To suggest that because one Christian Scientist seeks medical help, all Christian Scientists must do so would render the statute meaningless. Individuals can abandon their faith, but if abandonment of faith becomes the standard to avoid criminal liability, then the accommodation statute applies to no one.

4. The Jury Questions

After one and one-half hours of deliberation, the jury requested answers to the following three questions: (1) Does the practice of Christian Science "allow" its believers to go to doctors; (2) Must Christian Scientists obtain permission from the Mother Church in Boston before seeking medical attention; and (3) Does Christian Science "allow" its believers to seek medical treatment at a certain point in the progression of disease. 95 These questions demonstrate the jury's uncertainty about whether the evidence actually supported the State Attorney's assertion. They also demonstrate that the jury made the kind of inquiry into orthodoxy forbidden by the United States Supreme Court. 96 The jurors' questions reveal their reliance on the State's argument that because Christian Science "allows" medical treatment, the Hermansons were culpably negligent in not calling in a doctor, notwithstanding the fact that they were providing spiritual treatment in accordance with the statute. This reasoning requires that at some point in the progression of a disease, "reasonable" people will aban-

94. See Thomas, 450 U.S. 707 (holding that proper interpretation of religious beliefs not within the judicial function); United States v. Ballard, 322 U.S. 78 (1944) (holding that jury may not question reasonableness of defendant's beliefs); cf. Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969) (holding that courts cannot resolve disputes that necessarily require the civil courts to weigh the significance and meaning of religious doctrines).

95. See Transcript of Trial at 2, Apr. 18, 1989, State v. Hermanson (No. 86-3231) (Fla. 12th Cir. Ct. 1987) (questions from jury). With the assent of the parties, the court responded that the jury must look to the evidence presented during the trial to find the answers. See id. at 2-6.

96. See infra notes 98-110 and accompanying text.
don their religious beliefs, especially when other members of the same faith can be shown to have abandoned their beliefs under similar circumstances.

III. CONSTITUTIONAL ISSUES

The accommodation of free exercise of religion raises constitutional questions concerning the proper scope of judicial inquiry into the "reasonableness" or uniformity of religious belief, the possibility that accommodations of the free exercise of religion violate the establishment clause, and the failure of statutory accommodations to provide fair warning of criminal liability.

A. Ballard Analysis

If the jury decided that the Hermansons unreasonably persisted in their faith, their decision violates the Hermansons' right to free exercise of religion as defined by the United States Supreme Court in United States v. Ballard. The defendants in Ballard were accused of defrauding people by claiming to have special messages or visions from God. The Supreme Court held that the jury could not decide whether certain beliefs were themselves unreasonable. The jury could, however, determine whether the defendants sincerely believed what they professed. In other words, the jury could not decide if the beliefs were "true," but only whether the defendants truly believed them. Accordingly, the Hermansons' jury could consider the Hermansons' religious beliefs only to determine whether the defendants were sincerely practicing their faith.

The Supreme Court expanded Ballard's protection of free exercise rights in Thomas v. Review Board of the Indiana Employment Secu-

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98. 322 U.S. 78 (1944).
99. Id. at 79-80.
100. Id. at 86.
101. Id. Justice Jackson dissented from the majority's holding that the jury instructions had sufficiently prevented the forbidden inquiry. He found that a jury's consideration of what is believable necessarily focuses on the perceived truth or falsity of the claimed beliefs. See id. at 92-93 (Jackson, J., dissenting).
102. Professor Laurence Tribe characterizes the question left for the jury to decide in Walker as "whether it was unreasonable for [the defendant] to leave her faith in God and to persist in relying on prayer alone, pursuant to the express authorization in California Penal Code section 270, when her daughter remained sick." See Tribe Petition, supra note 8, at 4. Tribe argues that such an inquiry is unconstitutional under the free exercise clause of the first amendment. See id.
Different members of Thomas' sect disagreed whether their religion made it sinful to work in a munitions factory. To invoke the free exercise clause, the Court required only that Thomas show an "honest conviction that such work was forbidden by his religion." The Court held that judicial tribunals may not decide whether a person's religious beliefs are acceptable, logical, consistent or comprehensible. The guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether a petitioner . . . more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.

In Frazee v. Illinois Department of Employment Security, the Supreme Court further refined Ballard. Frazee was denied unemployment benefits because he refused to take a job which would require him to work on Sundays. The Department of Employment Security's Board of Review denied his claim because Frazee was not a member of a religious group and his conviction was not based on the "tenets or dogma accepted by the individual of some church, sect, or denomination," but rather was purely personal. The Supreme Court rejected this position.

Undoubtedly, membership in an organized religious denomination, especially one with a specific tenet forbidding members to work on Sunday, would simplify the problem of identifying sincerely held religious beliefs, but we reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization.

The lesson of Thomas and Frazee is that the states may not grant religious accommodation by narrowly defining orthodox faith.

104. Id. at 710.
105. U.S. Const. amend. I.
106. Thomas, 450 U.S. at 716.
107. Id. at 714-16; see also Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969) (holding that courts may not weigh the significance and meaning of religious doctrines).
109. Id. at 1516.
110. Id. at 1517.
In *Hermanson*, the prosecutor framed the jury question with the accommodation statute's own wording: "Were the Hermansons 'legitimately' practicing Christian Science?" Because the Christian Science nurse called for the ambulance, the jury may have determined that the "legitimate" practice of Christian Science allows the use of medicine; or that the Hermanson's were not "legitimately" practicing Christian Science. Yet no evidence introduced at trial refuted the Hermansons' claim that they were *sincerely* practicing Christian Science. The evidence merely showed that one member of their religion, on one occasion, called for an ambulance. Moreover, this one person, in three years of Christian Science nursing training in Boston, did not receive any "medical" instruction. This evidence does not even rise to the level of a disagreement over "legitimate" church doctrine. However, even if it did, the free exercise clause does not permit judicial preference for one interpretation of faith over another, judicial determination that a particular interpretation of faith is more "legitimate" than another, or judicial inquiry into the "reasonableness" of a religious belief or practice.

**B. Mandatory Accommodation**

Although the right to freedom of belief is absolute, the government may impose restrictions on "religious" conduct. For example, in *Reynolds v. United States*, the right of free exercise of religion was held not to be a defense to polygamy. Subsequent cases have held that religious beliefs do not constitute a blanket defense to criminal prosecution.

However, the states *must* accommodate the free exercise of religion in some instances. In *Wisconsin v. Yoder*, the Court required Wisconsin to accommodate the free exercise rights of the Amish by allowing them to remove their children from public school when they

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112. *Id.* at 21, Apr. 14, 1989 (nurse's testimony).
116. 98 U.S. 145 (1878).
117. *Id.* at 167.
complete the eighth grade. Wisconsin argued that such an accommodation would conflict with the first amendment guarantee that "Congress shall make no law respecting an establishment of religion." The Court acknowledged that granting the Amish an exception to state school attendance laws might violate the establishment clause by implicitly approving their religious choice to take their children out of school after the eighth grade. However, the Court concluded that the danger of violating the establishment clause "cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise."

When a state wishes to serve a compelling state interest by burdening freedom of religion, it must do so in the least restrictive manner possible. Given the State's compelling interest in preventing child abuse and preserving family life, the relevant question becomes whether the state's approach is the least restrictive possible. The State's present approach, embodied in section 415.503(9), Florida Statutes, requires that spiritual healing cases accommodated under the statute be reported to HRS. This approach allows for judicial intervention and complies with federal guidelines. Although court-ordered medical care would interfere significantly with parental rights to make major family decisions, and would burden the family's religious practice, it imposes a far lighter burden than the threat of criminal prosecution. It thus constitutes a less restrictive alternative to serve the State's interest.

The California Supreme Court's conclusion to the contrary is puzzling. In Walker, the court found that the imposition of criminal penalties on parents providing spiritual care for their children would be less intrusive than loss of custody. "[I]t is not clear that parents would prefer to lose custody of their children pursuant to a disruptive and invasive judicial inquiry than to face privately the prospect of criminal liability." Even the temporary loss of custody appears significantly less severe from the family's standpoint than criminal prose-

120. Id. at 234.
121. U.S. Const. amend. I.
122. Yoder, 406 U.S. at 221.
123. Id. at 214.
126. See Pierce v. Society of the Sisters, 268 U.S. 510, 518 (1925) ("It is not seriously debatable that the parental right to guide one's child intellectually and religiously is a most substantial part of the liberty and freedom of the parent").
128. Id. at —, 763 P.2d at 871, 253 Cal. Rptr. at 19.
conflict. Florida’s statute and the federal guidelines do not impose a loss of custody, but rather impose only court-ordered medical treatment. Social service intervention and subsequent medical treatment best serve the state’s interest in protecting children and their families. Such an approach is less burdensome than an emotionally and financially devastating criminal prosecution following a child’s death. Thus, criminal prosecution after the death of a child is neither the least restrictive nor the most narrowly tailored means of serving the State’s interest in preventing child abuse and preserving family life.

C. Permissive Accommodation

In many instances, legislatures have enacted religious accommodation statutes to protect the constitutional right of free exercise of religion. When such a statute is challenged as an impermissible establishment of religion, the Supreme Court generally relies on the three-prong test set forth in Lemon v. Kurtzman. Under the first prong of the Lemon test, the Court examines whether the statute has a secular purpose. Justice Sandra Day O’Connor has analyzed and affirmed the secular purpose of statutes that accommodate religious freedom, stating that the purpose of these statutes is to guarantee fundamental first amendment rights, and therefore that they do not contravene the establishment clause.

The second prong of the Lemon test asks whether the primary effect of the statute is to establish religion, or, as Justice O’Connor suggests, to endorse religion. Accommodations discussed in this Article do not endorse religion, but serve to distinguish the intent traditionally associated with child abuse from the intent of parents who simply choose one form of treatment over another. This accommodation does not work to establish any religion, but rather recognizes that “government’s actions impinge on different persons in dramatically

130. See, e.g., Fla. Stat. § 415.502 (1989) (stating that intent of statute is to prevent further harm to the child or any other children living in the home and to preserve the family life of the parents and children).
134. Id. at 76.
different ways, so that truly even-handed treatment at times compels exempting those whose religious beliefs are exceptionally burdened by a challenged state action."\textsuperscript{135} The primary effect of the accommodation, therefore, is to assure even-handed treatment for all parents who choose health care, either spiritual or medical, for their children, while reserving criminal penalties for those who willfully neglect and mistreat their children.\textsuperscript{136}

Some statutes, however, may not withstand direct constitutional attack where they express state preference for one group over other similar groups. The United States Supreme Court has noted that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."\textsuperscript{137} Most of the state statutes grant an accommodation for parents who provide treatment by "a duly accredited practitioner" in lieu of medical treatment.\textsuperscript{138} While Christian Science accredits practitioners to care for persons who are ill, other groups may rely on more informal, individual means of spiritual care.\textsuperscript{139} Strictly interpreted, statutes requiring the use of a "duly accredited practitioner" deny accommodation to members of groups that do not "accredit" someone called a "practitioner."

Constitutional neutrality toward religion prohibits state preference for religions that practice spiritual healing through "accredited practitioners," such as Christian Science, over those that do not.\textsuperscript{140}

\begin{align*}
\text{135.} & \quad \text{L. Tribe, American Constitutional Law 821 (1978).} \\
\text{136.} & \quad \text{Statutes that equally accommodate all religions relying on spiritual healing should be constitutionally valid, just as the equal accommodation of other particular types of religious practice has been approved in a variety of settings. See Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707 (1981) (holding accommodation of believer who could not work in munitions factory constitutional); Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding accommodation of Amish practice constitutional); Sherbert v. Verner, 374 U.S. 398 (1963) (holding accommodation of Sabbath observance constitutional).} \\
\text{137.} & \quad \text{Larson v. Valente, 456 U.S. 228, 244 (1982).} \\
\text{139.} & \quad \text{For example, the Bible teaches that when someone is ill they should "call for the elders of the church, and let them pray over him, anointing him with oil in the name of the Lord." James 5:14 (New American Standard 1963).} \\
\text{140.} & \quad \text{See Everson v. Board of Educ., 330 U.S. 1, 15 (1947) (holding that states may not "pass laws which aid one religion" or "prefer one religion over another").}
\end{align*}
Section 270, California Penal Code, provides an accommodation based on the stature of a parent's religion as "recognized" or part of a "denomination." In addition, the religion must provide spiritual care through the services of a "duly accredited practitioner." The statute arguably excludes from its coverage those whose religious beliefs are not "recognized," "denominational," or administered by a "duly accredited practitioner." This description apparently applies only to Christian Science. Therefore, the statutes specifically naming Christian Science, or implicitly referring to it through the phrase "duly accredited practitioner," arbitrarily prefer one religion over others similarly situated.

The third prong of the Lemon test forbids statutes that "excessively entangle" the government with religion. In State v. Miskimens, the court held that the accommodation statute provided a defense, but considered it to be an unconstitutional establishment of religion.

[I]t has been apparent throughout this trial that the second sentence of R.C. 2919.22(A) hopelessly involves the state in the determination of questions which should not be the subject of governmental inquisition and potential public ridicule — questions such as what is a "recognized religious body," by whom must it be "recognized," for how long must it have been "recognized," what are its tenets, did the accused act in accordance with those tenets, what are "spiritual means," and what is the effect of combining some prayer with some treatment or medicine. The determination of such issues runs clearly afool of at least one recognized test for determining an impermissible establishment problem, i.e., the "excessive entanglement" test . . . .

The Supreme Court has implicitly rejected such a broad application of the excessive entanglement test. The Court stated in Lemon that the
purpose of the excessive entanglement query is "to prevent, as far as possible, the intrusion of either [church or state] into the precincts of the other."147 Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is blurred, indistinct, and [a] variable barrier depending on all the circumstances of a particular relationship."148 In Lemon, the Court held unconstitutional statutes granting state aid to church-related schools through programs "whose very nature is apt to entangle the state in details of administration."149 However, in Wisconsin v. Yoder,150 the Court extensively detailed the tenets and religious practice of the Amish and expressly found that the accommodation of their beliefs did not violate the establishment clause.151 Therefore, fact-based inquiry by the courts into the tenets of a religion does not implicate prohibited entanglement through administrative schemes or intrusion into church doctrine.

Furthermore, Florida's accommodation statute does not require a determination of whether a religion is recognized, only whether the defendant was "legitimately" practicing religious beliefs. Thus, Florida's accommodation statute does not violate the establishment clause.

D. Due Process

In Mourning v. Family Publications Service,152 the Supreme Court stated that the objective of due process is "to ensure that no individual is convicted unless a fair warning has been first given to the world in language that the common world will understand what the law intends to do if a certain line is passed."153 Florida's accommodation statute is constitutionally deficient because it authorizes reliance on spiritual healing without fairly warning that the authorization may be withdrawn and criminal charges brought for child abuse if a child's illness threatens permanent damage or death. The statute fails to give citizens clear guidelines for legal conduct. A state criminal prohibition deprives a person of the fair warning—"the first essential of due process"—if people "of common intelligence must necessarily guess at its meaning and differ as to its application."154 When a statute imposes criminal penalties or burdens constitutionally protected rights, a heightened requirement of fair warning applies.155

147. Lemon, 403 U.S. at 614.
148. Id.
149. Id. (quoting Walz v. Tax Commission, 397 U.S. 664, 695 (1970)).
151. Id. passim.
153. Id. at 375.
By authorizing conduct in one statute, but declaring that same conduct criminal under another statute, the State trapped the Hermansons, who had no fair warning that the State would consider their conduct criminal. Under the current statutory scheme, the State continues to send mixed signals. Yet because these statutes concern the free exercise of religion, greater clarity than is otherwise required is necessary to ensure fair warning.

IV. SUGGESTIONS FOR REVISIONING FLORIDA'S ACCOMMODATION STATUTE

Florida should amend section 415.503, Florida Statutes, in order to give fair warning to those who rely on its accommodation of religion in caring for their children. In 1975, the Florida Legislature sent a clear signal to Christian Scientists and members of other religious sects who provide spiritual care in lieu of medical treatment that their reliance on spiritual treatment would not subject them to criminal liability. By prosecuting parents for making the very choice that the accommodation statute authorized, the state violates its duty to fairly warn parents about the conduct that would subject them to criminal liability.

A. Limitation for Life-Threatening Illness

As interpreted by the courts, the protection of the accommodation statutes is currently limited to non-life-threatening illnesses. Modification of the statute to reflect the current state of the law would satisfy the due process fair warning requirement. To this end, Florida's statute could be amended to include the phrase: "this accommodation is not available when the illness threatens permanent physical damage or becomes life-threatening."

However, this approach fails to protect parents if the severity of an illness cannot be readily detected. As revealed in testimony during the Hermanson trial, a doctor at an emergency room diagnosed flu in a young man who two days later died of ketoacidosis. Many illnesses
progress swiftly or appear to be milder, non-lethal forms of diseases, especially to the untrained eye. In *People ex rel D.L.E.*,\textsuperscript{162} the Colorado Supreme Court determined that the condition of an epileptic child was not life-threatening, and therefore that the mother did not neglect the child when she took him off medication.\textsuperscript{163} Only after a second trip through the Colorado court system did the supreme court decide that the child's condition was life-threatening.\textsuperscript{164}

Because the above revision would authorize parents to rely on spiritual means of healing only so long as an illness was not life-threatening, in some cases parents might think that their conduct was authorized when in fact an illness had become serious. Parents who believe that spiritual methods are superior to medical treatment might persist in relying on prayer beyond the time when a life-threatening condition could be halted. Christian Science parents essentially would be required to believe that a disease is life-threatening when their religious faith tells them otherwise.

Although this modification would maintain the legal effect given to the statute in the *Hermanson* case, and by courts across the country, it would not eliminate fair warning problems. Parents trained in spiritual healing might still have difficulty deciding when an illness becomes life-threatening. The practical effect would be to leave parents relying on spiritual healing in the same position as other parents: prosecution would result only when a child died or suffered permanent injury due to a failure to provide medical care. Nevertheless, the above revision maintaining the accommodation for less serious conditions would have one positive result: parents relying on spiritual healing for routine health maintenance would not be labeled "child abusers."

B. Statutory Modification to Grant Immunity

In the aftermath of the *Hermanson* case, two states have amended their child abuse laws to strengthen their religious accommodation for parents relying on spiritual healing.\textsuperscript{165} In Minnesota, the Legislature considered the *Hermanson* case before amending two sections of the criminal code. As amended, the definition of "neglect" includes instances in which a child is not provided with "health care."\textsuperscript{166} How-

\textsuperscript{162} 614 P.2d 873 (Colo. 1980).
\textsuperscript{163} Id. at 874-75.
\textsuperscript{164} 645 P.2d 271, 276 (Colo. 1982).
\textsuperscript{165} See OHIO REV. CODE ANN. § 2151.03 (West 1989); MINN. STAT. ANN. § 603.378 (West Supp. 1989).
\textsuperscript{166} MINN. STAT. ANN. § 603.378 (West Supp. 1989).
ever, the statute further provides that "[i]f a parent, guardian, or caretaker responsible for the child’s care in good faith selects and depends upon spiritual means or prayer for treatment or care of disease or remedial care of the child, this treatment or care is "health care" for the purposes of this clause."  

Ohio now provides express immunity from criminal liability for a parent or guardian when "solely in the practice of his religious beliefs, he fails to provide adequate medical or surgical care or treatment for the child." The amendment also allows the State to intervene to give medical care "to a child when his health requires that he be provided with medical or surgical care or treatment."  

Florida should follow the lead of these states by revising section 415.503(9)(f) to unmistakably grant immunity from criminal prosecution for parents who act in accordance with the accommodation.

1. Incorporation of the Grant of Immunity

By incorporating the grant of immunity found in section 415.511, Florida Statutes, into the religious exemption, the Legislature could strengthen its mandate that these religious practices do not constitute child abuse. Such an amendment should provide express directions concerning what evidence would support a defense of immunity. For example, in the Hermansons' case the parties debated the meaning of the phrase "for that reason alone." In Walker v. Superior Court, the California Supreme Court held that when a condition became grave or life-threatening, another "reason" was introduced so as to defeat the exemption. Although the judge presiding over the Hermanson case rejected this interpretation, other Florida courts may adhere to this construction. For this reason, the Legislature should define the phrase "for that reason alone" as having no purpose for withholding medical treatment other than a religious purpose, absent any actual, statutorily defined abuse. Such a legislative definition would assure consistent judicial interpretations.

The Legislature should affirmatively grant immunity to parents such as the Hermansons by amending the religious accommodation statute as follows: following the provisions allowing court interven-

167. Id.
169. Id.
171. Id. at ___, 763 P.2d at 863-66, 253 Cal. Rptr. at 12-15. See generally supra notes 66-71 and accompanying text.
tion to order medical or spiritual care for a child, an express grant of immunity should be provided. Unless a prosecutor demonstrates that a parent or other person has withheld medical care for a reason other than the practice of their religious beliefs, the prosecution should be barred.

2. *Substitute “Sincerely” for “Legitimately”*

When the State Attorney asked the *Hermanson* jurors to determine whether the defendants had been practicing their religious beliefs “legitimately,” he encouraged them to make the kind of inquiry into religious orthodoxy prohibited by *United States v. Ballard.* As reflected by the jurors’ questions midway through their deliberations, the case turned on whether Christian Science “allows” the use of medical treatment. Essentially, the jury determined that the Hermansons had not complied with what the jury had decided was orthodox Christian Science practice. Yet the undisputed evidence showed that Christian Science teaches reliance on spiritual healing in lieu of medical care. The proper inquiry under the existing statute should simply be whether defendants “sincerely” or in “good faith” relied on spiritual healing.

Even though evidence not introduced in the *Hermanson* trial suggests that Christian Science does not condemn members for turning to medical treatment, the teachings of *Thomas* and *Frazee* limit judicial inquiry to whether the defendants were sincerely following what they believed to be a tenet of their religion. Otherwise, the finder of fact determines ex post facto what is orthodox in a defendant’s religion.

Therefore, the Florida religious exemption should be amended to read as follows: “a parent or other person responsible for the child’s welfare *sincerely* practicing his religious beliefs, who by reason thereof does not provide specified medical treatment for a child, may not be considered abusive or neglectful . . . .”

3. *Draft of Proposed Revisions*

The Florida Legislature should amend section 415.503(9)(f) in the following manner:

> . . . a parent or other person responsible for the child’s welfare *sincerely* practicing his or her religious beliefs, who by

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172. 322 U.S. 78 (1944).
reason thereof does not provide specified medical treatment for a child, may not be considered abusive or neglectful for that reason alone if such religious reason is the only reason for not seeking medical attention, but such an exception does not:

1. Eliminate the requirement that such a case be reported to the department;
2. Prevent the department from investigating such a case; or
3. Preclude a court from ordering, when the health of the child requires it, the provision of medical services by a physician, as defined herein, or treatment by a duly accredited practitioner who relies solely on spiritual means for healing in accordance with the tenets and practices of a well-recognized church or religious organization.

Absent evidence that a parent or other person responsible for the child has withheld medical care for a reason other than the practice of their religious beliefs, this section confers immunity from criminal prosecution.

V. CONCLUSION

The fullest realization of true religious liberty requires that government . . . effect no favoritism among sects . . . and that it work deterrence of no religious belief.

Under the current interpretations by the Florida and California courts, parents treating their children with spiritual care in reliance on the religious accommodation statutes may be found guilty for not abandoning those religious beliefs at an undetermined point in the progression of an illness. Such a point can frequently be identified only in hindsight, even for the parent not acting in accordance with religious beliefs. Families who rely on spiritual healing need a more certain standard to guide their daily decisions. The religious accommodation statutes of Florida, California, and a majority of other states should be revised to actually provide the immunity from prosecution that in so many recent cases has turned out to be an illusion.

The statutory revisions emphasized above should give the courts guidance in properly enforcing the grant of immunity. The Florida

174. Additional reference to court-ordered spiritual treatment, while bolstering the legitimacy of such treatment through official authorization, runs afoul of the establishment clause by authorizing the court to order treatment by a “duly accredited practitioner” of a well-recognized church or organization. See generally supra notes 109-16 and accompanying text.

Legislature has an urgent responsibility to clarify the criminal liability of those who rely on these statutory accommodations. The Hermansons have suffered years of anguish and a disruption of their family life because of their prosecution. Revision of the accommodation statute to clarify its protection from criminal liability can ensure that their experience is not repeated.